IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEANNA R. LEDUC AND TERRI TRIPP, on behalf of the ACCT Holdings, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated,

Plaintiffs,

v.

MIGUEL PAREDES, PRUDENT FIDUCIARY SERVICES, LLC, CHRISTOPHER J. DEBBAS, JAMES R. GRIFFITHS, RUSSELL HUGHES, JOSEPH LEMBO, GREGORY S. CAMPBELL, and G.D. CAMPBELL ASSOCIATES, L.P.,

Defendants.

Case No. 2:24-cv-05970-WB

PLAINTIFFS' OPPOSITION TO SELLER AND DIRECTOR DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT COUNTS III-V

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INTRODUCTION

Plaintiffs Deanna R. LeDuc and Terri Tripp are participants in the ACCT Holdings, Inc. Employee Stock Ownership Plan ("ESOP" or "Plan") and former employees of the ESOP's sponsor, ACCT Holdings, Inc. ("ACCT" or "Company"), a privately held company that provides businesses with call centers and back-office support services, including debt-collection services. Plaintiffs allege in their Second Amended Complaint ("SAC") (ECF No. 56) that the ESOP's named Trustee, Defendant Miguel Paredes, together with his company, Defendant Prudent Fiduciary Services, LLC (together, "Trustee" or "Trustee Defendants"), caused the ESOP to acquire 100% of ACCT's issued and outstanding common stock in 2021 from the Company's former owners for $320 million, far above the stock's fair market value. In so doing, the Trustee Defendants violated ERISA's categorical prohibition on transactions between ERISA plans and plan insiders (known as "parties in interest"), 29 U.S.C. § 1106(a) (Count I), and its fiduciary standards, 29 U.S.C. § 1104(a) (Count II).[1]

The SAC also asserts three claims against a variety of ACCT officials and former shareholders for their roles in the ESOP transaction. Count III alleges that the selling shareholders to the ESOP who reaped the benefits of this overpriced stock deal—Defendants Christopher Debbas, James Griffiths, Russell Hughes, Joseph Lembo, Gregory Campbell, and G.D. Campbell Associates, L.P. ("Seller Defendants")—are liable for "knowingly participating" in the prohibited stock transaction caused by the Trustee Defendants. The basis for the Seller Defendants' knowing-participation liability is straightforward: they directly participated in the

[1] Plaintiffs have filed a separate brief opposing the Trustee Defendants' motion to dismiss Counts I and II. Plaintiffs here oppose the remaining Defendants' motion to dismiss Counts III-V.

ESOP transaction by selling their ACCT stock to the ESOP and receiving the ESOP's assets as consideration, and knew or should have known of the circumstances rendering it unlawful under 29 U.S.C. § 1106, namely, their own status as officers, directors, and/or 10% or more shareholders of ACCT (which makes them "parties in interest") and that their counterparty was the ESOP (represented by the Trustee). Count IV alleges that five of the six Seller Defendants (Debbas, Griffiths, Hughes, Lembo, and Campbell)—as members of ACCT's Board of Directors who appointed the Trustee ("Director Defendants")—also breached their fiduciary duty to monitor the Trustee by overlooking the latter's misconduct, which included, *inter alia*, paying a controlling-interest price for ACCT stock and failing to demand a discount for lack of control, despite the Director Defendants maintaining control of the Company. For much these same reasons, Count V alleges that the Director Defendants are liable as co-fiduciaries for the breaches committed by the Trustee Defendants.

The Seller and Director Defendants now seek dismissal on all counts, but their motion is irreconcilable with Supreme Court precedent and mischaracterizes the SAC. As to Count III, the Seller Defendants suggest that to state a claim for knowingly participating in a transaction prohibited by 29 U.S.C. § 1106(a)(1)(A) and (D), the complaint must plausibly allege *not only* that the transaction participant knew of the circumstances making the transaction illegal under § 1106(a)(1)(A) and (D), but *also* that it did not qualify for an exemption under 29 U.S.C. § 1108. But the Supreme Court recently held that those exemptions are *affirmative defenses* that plaintiffs need not negate to state a prohibited-transaction claim, which requires alleging *only* the elements of the prohibited transaction itself (generally, one between a plan and a party in interest). *Cunningham v. Cornell Univ.*, 604 U.S. —, 145 S. Ct. 1020, 1028 (2025). It thus follows that, to state a claim for knowingly participating in that transaction, the complaint need only allege the Seller Defendants actually or constructively knew of the facts satisfying those same elements, which the SAC alleges here.

The Director Defendants' arguments for dismissing Counts IV and V fare no better. As to Count IV for failing to prudently monitor the Trustee Defendants, the Director Defendants seek to shift all responsibility to the Trustee Defendants and shirk their own fiduciary status, which the caselaw firmly establishes through their appointment and removal authority. The Trustee Defendants also attempt to brush off the SAC's fiduciary-breach allegations as conclusory, when in fact the SAC details numerous problematic aspects of the transaction of which the Director Defendants were aware and did nothing about. Finally, the Director Defendants seek to dismiss Count V's claim for co-fiduciary liability for the same erroneous reasons on which they seek dismissal of the other counts. The SAC plausibly alleges they "enabled" the Trustee's fiduciary breaches by flouting their duty to monitor, 29 U.S.C. § 1105(a)(2), and that they further participated in and did not make reasonable efforts to remedy the Trustee's breaches in violation of their duties as co-fiduciaries, 29 U.S.C. § 1105(a)(1), (3). Their motion should be denied.

BACKGROUND

ACCT is a privately held company that (through its subsidiaries) provides businesses with call centers and back-office support services, including debt-collection services. SAC ¶ 37. It was founded by Defendants Christopher Debbas and James Griffiths following the acquisition of ACCT's subsidiary (an operating company called Advanced Call Center Technologies, LLC), by the private equity firm CD Ventures, in which Debbas and Griffiths were partners. *Id.* ¶¶ 20, 23, 38.[2] ACCT is the sponsor and named Plan Administrator of the ESOP, which it adopted with

[2] CD Ventures was the predecessor to Julip Run Capital, in which Debbas and Griffith are also partners. SAC ¶ 20.

a retroactive effective date of January 1, 2021. *Id.* ¶¶ 42, 54, 57. The ESOP is a defined-contribution pension plan designed to invest primarily in ACCT stock. *Id.* ¶¶ 45-46.

On December 22, 2021, the ESOP acquired 100% of ACCT's stock for $320 million ("ESOP Transaction" or "Transaction") from the following individuals: (1) Debbas, who was Chairman of ACCT's Board of Directors ("Board"); (2) Griffiths, ACCT's CFO and also a Board member; (3) Russell Hughes, an Executive Vice President of ACCT, an ACCT Board member, and an owner of over 10% of ACCT's stock prior to the Transaction; (4) Joseph Lembo, the President and CEO of ACCT, a Board member, and an owner of over 10% of ACCT's stock prior to the transaction; (5) Gregory Campbell, an ACCT Board member; and (6) G.D. Campbell Associates, L.P., which was owned by Gregory Campbell (collectively, "Seller Defendants"), and which owned over 10% of ACCT's stock prior to the Transaction. *Id.* ¶¶ 20-36, 65. The Transaction was financed in part through promissory notes issued by the ESOP to the Seller Defendants in the amount of $201,500,000 (which ACCT immediately assumed from the ESOP), with the remainder paid in cash via a loan from ACCT. *Id.* ¶ 5.

As noted, five of the six Seller Defendants—Debbas, Griffiths, Hughes, Lembo, and Campbell—were members of ACCT's Board at the time of the ESOP Transaction. *Id.* ¶ 68. The Director Defendants were "centrally involved" in conceiving of, facilitating, and executing the Transaction, including conducting a selection process for ownership transition from the selling shareholders to an ESOP rather than to another buyer." *Id.* ¶ 71. Among other things, the Director Defendants "directed[ed] the preparation of . . . financial projections by CFO Griffiths and his staff for use in valuations in the Transaction," hired Transaction advisors for ACCT and the Seller Defendants, and approved ACCT's loan to the ESOP to finance the Transaction. *Id.*

The Director Defendants, as ACCT Board members, also appointed Defendant Miguel Paredes, the founder and owner of Defendant Prudent Fiduciary Services, to represent the ESOP as its Trustee in the prospective stock-purchase and loan transactions. *Id.* ¶ 62. The Trustee Defendants proceeded to value the ACCT stock "on a control basis" without applying a discount for lack of control despite the fact that the ESOP "did not obtain control of the Company" following the Transaction. *Id.* ¶ 72. Rather, the "Director Defendants retained control of the ACCT Board after the ESOP Transaction." *Id.* ¶ 70. The Trustee Defendants also (1) relied on projections of ACCT's future financial performance (prepared at the direction of Director Defendants) that were "unreasonably optimistic and aggressive" without adequately challenging that information, *id.* ¶ 73; (2) applied a discount for ACCT's lack of marketability of only 5% because of the ESOP's purported control rights that it did not in fact acquire and because they assumed the ESOP itself had a "put option" that it did not in fact have, *id.* ¶ 75; and (3) approved a Transaction that authorized the issuance of synthetic equity (in the form of warrants) exercisable by the Seller Defendants that threatened to dilute the ESOP's ownership interest without negotiating a discount to the purchase price to reflect that dilution. *Id.* ¶¶ 76-79, 82.

As a result of these errors, the ESOP "overpaid for ACCT." *Id.* ¶ 82. Following the Transaction, the Director Defendants rewarded the Trustee Defendants "with engagement as the Plan's ongoing trustee by Director Defendants." *Id.* ¶ 84.

Plaintiffs Deanna LeDuc and Terri Tripp are former employees of ACCT's subsidiary and operating company Advanced Call Center Technologies, LLC, and both are participants in the ESOP. SAC ¶¶ 14-15. They allege in Count I of the SAC that the Trustee Defendants violated ERISA's prohibited transaction rules in 29 U.S.C. § 1106(a) by approving the stock-purchase and loan transactions between the ESOP and "parties in interest" (*i.e.*, the Seller Defendants) and causing assets of the Plan to be transferred to the Seller Defendants. *Id.* ¶¶ 95-103. Plaintiffs further allege in Count II that the Trustee Defendants violated their fiduciary duties in 29 U.S.C. § 1104(a) by failing to conduct an adequate due diligence leading up to the Transaction, relying on a flawed valuation of ACCT stock, and failing to negotiate for the Plan to pay no more than fair market value for the stock. *Id.* ¶¶ 104-113. Plaintiffs allege in Count III that the Seller Defendants knowingly participated in the Trustee Defendants' § 1106(a)(1)(A) and (D) prohibited transactions because they knew or should have known that the Trustee Defendants caused an ERISA plan (the ESOP) to purchase stock from, and transfer plan assets to, parties-in-interest to the ESOP (the Seller Defendants themselves). *Id.* ¶¶ 114-124. Count IV alleges that the Director Defendants breached their fiduciary duties in 29 U.S.C. § 1104(a) by failing to monitor the Trustee Defendants. *Id.* ¶¶ 125-134. Finally, Count V contends that the Director Defendants are liable as co-fiduciaries to the Trustee Defendants under 29 U.S.C. § 1105(a) by participating knowingly in the Trustee Defendants' breach, enabling that breach through their own failure to monitor the Trustee Defendants, and failing to remedy the Trustee Defendants' breach. *Id.* ¶¶ 135-144.

STANDARD OF REVIEW

To survive dismissal under Rule 12(b)(6), a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This is not a "probability requirement." *Iqbal*, 556 U.S. at 678. Rather, a complaint need only "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The court must assume the complaint's "factual allegations to be true, construe those truths in the light most favorable to the plaintiff, and then draw all reasonable inferences from them."

Connelly v. Lane Const. Corp., 809 F.3d 780, 791 (3d Cir. 2016); *Sweda v. Univ. of Pa.*, 923 F.3d 320, 325–26, 331–32 (3d Cir. 2019). Courts employ a "holistic approach" in evaluating whether a complaint states a plausible claim for relief; "[t]he complaint should not be 'parsed piece by piece to determine whether each allegation, in isolation, is plausible.'" *Sweda*, 923 F.3d at 331 (*quoting Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594, 598 (8th Cir. 2009)). This is especially true in the ERISA context where plan participants enjoy "limited access to crucial information" regarding "facts which tend systemically to be in the sole possession of defendants." *Braden*, 588 F.3d at 598; *cf. Sweda*, 923 F.3d at 326–27 ("ERISA's purpose informs our assessment of Sweda's pleadings. ERISA's protective function is the focal point of the statute[.]") (citation omitted).

ARGUMENT

I. Count III Plausibly Alleges that the Seller Defendants Knowingly Participated in the § 1106(a)(1)(A) and (D) Prohibited Transactions Caused by the Trustee Defendants

In *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, the Supreme Court held that ERISA's cause of action in 29 U.S.C. § 1132(a)(3)—which authorizes "appropriate equitable relief" for violations of ERISA and plan terms—"admits of no limit . . . on the universe of possible defendants." 530 U.S. 238, 246 (2000). In particular, the Court held that ERISA plan participants may bring a claim against anyone (fiduciaries and non-fiduciaries alike) who "knowingly participates" in a fiduciary's violation of ERISA's prohibited transaction rules. *Id.* at 245–49. For liability to attach, the transaction participant must have had "actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Harris Trust*, 530 U.S. at 251; *accord Spokane v. Nationwide Life Ins. Co.*, 617 F. Supp. 3d 290, 304 (E.D. Pa. 2022) (on denial of defendant's summary judgment motion, explaining a non-fiduciary must have "had constructive knowledge of the circumstances rendering the transaction unlawful before it can be held liable under Section 1132(a)(3)"). Here, Count III of the SAC, which arises under 29 U.S.C. § 1132(a)(3), clearly alleges that the Seller Defendants participated as counterparties in the ESOP's stock-purchase and were transferred Plan assets, and knew or should have known of the circumstances rendering those transactions unlawful by § 1106(a)(1)(A) and (D)'s categorical bars. The Seller Defendants' arguments for dismissal are irreconcilable with recent Supreme Court precedent and prior caselaw defining the pleading requirements for a knowing participation claim.

A. The SAC Plausibly Alleges that the Seller Defendants Knew or Should Have Known the Facts Establishing the Elements of the § 1106(a)(1)(A) and (D) Prohibited Transactions (Count III)

Count III alleges that the Seller Defendants are liable for knowingly participating in the prohibited transactions caused by the Trustee Defendants that violated 29 U.S.C. § 1106(a)(1)(A) and (D). *See* SAC ¶¶ 114-124. "Section 1106 'supplements the fiduciary's general duty of loyalty to the plan's beneficiaries ... by categorically barring certain transactions deemed likely to injure the pension plan.'" *Cunningham v. Cornell Univ*., 604 U.S. —, 145 S. Ct. 1020, 1025 (2025) (*quoting Harris Trust*, 530 U.S. at 241-242). Among the statute's categorical bars are transactions involving a sale or exchange of any property between a plan and a party in interest, or the transfer of any assets of the plan to a party in interest. *See* 29 U.S.C. § 1106(a)(1)(A), (D). A "party in interest" is defined to include various "plan insiders," *Cunningham*, 145 S. Ct. at 1025, including "an employee, officer, director . . . or 10 percent or more shareholder" of the employer whose employees are covered by the plan, and fiduciaries of the plan. 29 U.S.C. § 1002(14)(A), (C) & (H). ERISA also supplies corresponding exemptions to ERISA's prohibited transactions, *see generally* 29 U.S.C. § 1108, with one of those exemptions allowing a plan to purchase employer stock for "adequate consideration." 29 U.S.C. § 1108(e). But the Supreme Court recently clarified that the exemptions in § 1108 are "affirmative defenses" that "must be pleaded and proved by the *defendant* who seeks to benefit from them." *Cunningham*, 145 S. Ct. at 1028 (emphasis added). Thus, to state a prohibited transaction claim under § 1106(a), a plaintiff need only "plausibly allege that a plan fiduciary engaged in a transaction proscribed therein, no more, no less." *Id.; see also id.* at 1027 ("Section 1106(a)(1)(C)'s bar is categorical: Any transaction that satisfies its three elements is presumptively unlawful.").[3]

As explained in Plaintiffs' Opposition to the Trustee Defendants' Motion to Dismiss, there can be no doubt that Count I of the SAC states a plausible claim that the Trustee Defendants caused the ESOP to enter prohibited transactions with parties in interest, in violation of 29 U.S.C. § 1106(a)(1). The SAC plausibly pleads that the Seller Defendants qualify as "parties in interest" to the ESOP as officers, directors, and/or 10 percent or more shareholders of ACCT, and/or as fiduciaries to the ESOP. *See* 29 U.S.C. § 1002(14)(A), (H) (defining "party in interest").[4] And it also plausibly pleads that the Trustee Defendants caused the ESOP to enter into the stock purchase transactions with the Seller Defendants whereby assets of the Plan were transferred to them, in violation of 29 U.S.C. § 1106(a)(1)(A) and (D). *See* SAC ¶¶ 65-66.

[3] To be clear—and as the Court in *Cunningham* pointed out—"a plaintiff will not prevail by simply pleading, and later proving, the § 1106(a) elements. If a defendant establishes that a § 1108 exemption applies, the § 1106(a)(1)(C) claim will ultimately fail." 145 S. Ct. at 1028. The point is simply that, "[a]t the pleading stage, however, it suffices for a plaintiff plausibly to allege the . . elements" of the claimed § 1106(a) violation. *Id.*

[4] Each of the Seller Defendants qualified as a party in interest at the time of the ESOP Transaction for at least one, and in many cases multiple reasons. *See* SAC ¶¶ 20-22 (alleging that Debbas was a member of ACCT's Board of Directors and a fiduciary of the ESOP); *id.* ¶¶ 23-25 (alleging that Griffiths was ACCT's CFO and Treasurer, a member of its Board of Directors, and a fiduciary of the ESOP); *id.* ¶¶ 26-28 (alleging that Hughes was ACCT's Executive Vice President, a member of its Board of Directors, a 10% or more shareholder of ACCT, and a fiduciary of the ESOP); *id.* ¶¶ 29-31 (alleging that Lembo was ACCT's CEO, a member of its Board of Directors, a 10% or more shareholder in ACCT, and a fiduciary of the ESOP); *id.* ¶¶ 32-34 (alleging that Campbell was a member of ACCT's Board of Directors, a 10% or more shareholder in ACCT, and a fiduciary of the ESOP); *id.* ¶¶ 36 (alleging that G.D. Campbell Associates, L.P., was a 10% or more shareholder of ACCT). *See* 29 U.S.C. § 1002(14)(H).

Indeed, even the Trustee Defendants do not dispute that Count I of the SAC states a prohibited-transaction claim. *See* Trustee Defs.' Mem. in Supp. of Mot. to Dismiss (ECF No. 61-1) at 29.

And it is equally indisputable that Count III of the SAC plausibly alleges that the Seller Defendants knowingly participated in those prohibited transactions. Again, after *Cunningham*, a plaintiff bringing a prohibited transaction claim need only allege "that a plan fiduciary engaged in a transaction proscribed [by 29 U.S.C. § 1106], no more, no less." 145 S. Ct. at 1028. In follows, then, that to state a claim for knowingly participating in such a transaction, a complaint need only allege that the defendant had "actual or constructive knowledge" of the facts establishing a transaction proscribed by § 1106—generally speaking, one between an ERISA plan and a "party in interest." *See*, *e.g.*, *Haley v. Teachers Ins. & Annuity Ass'n of Am.*, 377 F. Supp. 3d 250, 264 (S.D.N.Y. 2019) (explaining that plaintiffs need only "plausibly allege that non-fiduciary transferee defendants knew they were transacting with an ERISA fiduciary, and knew the factual circumstances underlying the transaction that are relevant to the application of § [1106(a)]."); *Arnold v. Paredes*, 714 F. Supp. 3d 962, 984–85 (M.D. Tenn. 2024) ("Plaintiffs need only allege that [selling shareholder] 'knowingly participated' in the fiduciary's breach of ERISA § 406," *i.e.*, the seller "knew the 2020 Transaction was between the Plan and a 'party in interest' concerning the 'lending of money or other extension of credit,' the 'sale or exchange ... of any property,' the 'transfer to, or use by or for the benefit of a party in interest.'"); *Godfrey v. GreatBanc Tr. Co.*, No. 18 C 7918, 2019 WL 4735422, at *8 (N.D. Ill. Sept. 26, 2019) (knowledge that company executed stock sale that was § 1106 prohibited transaction constitutes "knowledge of the circumstances that rendered the transaction unlawful"); *Neil v. Zell*, 753 F. Supp. 2d 724, 732 (N.D. Ill. 2010) (interpreting *Harris Trust* to mean that fiduciary and nonfiduciary defendants need only "actual or constructive knowledge of the deal's details. That rule is required because § 406 defines *per se* rules.") (citing *Harris Trust*, 530 U.S. at 241–42).

Here, the SAC plausibly alleges that the Seller Defendants—who are indisputably parties in interest, *see* SAC ¶¶ 20-36—participated in transactions prohibited by § 1106(a) in selling their stock to the ESOP and receiving transfers of its assets, *see*, *e.g.*, SAC ¶¶ 3, 5, 8, 65. The SAC also plausibly alleges that the Seller Defendants had actual or constructive knowledge of the circumstances rendering those transactions prohibited by § 1106(a): their own status as officers, directors, 10% or more shareholders of ACCT, and/or fiduciaries (rendering them parties in interest), and that their counterparty in the sale and transfer transactions was the ESOP (represented by the Trustee). *E.g.*, SAC ¶ 119. Actual and constructive knowledge of the Transaction was necessarily supplied by the Stock Purchase Agreement dated December 22, 2021, which every Seller Defendant signed, as well as by other sources of information. SAC ¶ 120. It is reasonable to infer on the pleadings that the Seller Defendants must have known all these basic facts given their roles at the Company and their roles in the ESOP Transaction. That is enough to state a claim.

B. The Seller Defendants' Arguments for Dismissing Count III Are Contrary to the Supreme Court's Decision in *Cunningham*

The Seller Defendants' arguments for dismissal are irreconcilable with *Cunningham.* They nowhere take issue with the SAC's allegations that they knew or should have known of their status as officers, directors, or shareholders of ACCT, or the fact that their counterparty was the ESOP—a silence that dooms in their motion. Instead, they claim that "[n]one of these allegations go to the alleged impropriety of the transaction or a breach of fiduciary duty[.]" Seller and Director Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem.") (ECF No. 60-1) at 12. But that is directly contradicted by *Cunningham*—a case Defendants neglect to cite—which made clear that those very allegations (*i.e.*, of a transaction between a plan and a party in interest) capture *precisely* the impropriety of the transactions proscribed by § 1106(a). *Cunningham*, 145 S. Ct. at 1027 ("Section 1106(a)(1)(C)'s bar is categorical: Any transaction that satisfies its three elements is presumptively unlawful."). Their argument is also contrary to the pre-*Cunningham* decisions cited *supra* (*Haley*, *Arnold*, *Neil*, and *Godfrey*), which *Cunningham* now confirms were right.

Also contradicted by *Cunningham* is the Seller Defendants' apparent argument that plaintiffs bringing prohibited transaction claims—beyond pleading the elements of a § 1106(a) transaction—must also plead that the transaction is *not exempt* under § 1108 (and, by extension, that a knowing participant must have knowledge of the circumstances that render the transaction non-exempt). That was the holding of the principal case on which the Seller Defendants rely, *Ahrendsen v. Prudent Fiduciary Servs., LLC*, No. CV 21-2157, 2022 WL 294394 (E.D. Pa. Feb. 1, 2022). *See* Defs.' Mem. at 11 (explaining that the SAC's allegations "are very similar to the insufficient allegations that were rejected in *Ahrendsen*"). In *Ahrendsen*—decided three years before *Cunningham*—a court in this District explained that because "an ESOP transaction for adequate consideration ***is not prohibited per se under § 1106(a) even if between a plan and parties in interest***," that means the selling shareholders' "knowledge of the transaction itself is therefore not enough to plead that they knew the transaction was prohibited, that is it was not for adequate consideration under § 1108(e)." *Ahrendsen*, 2022 WL 294394 at *8 (emphasis added).

But that portion of *Ahrendensen* cannot be reconciled with *Cunningham*. As discussed, *Cunningham* held that "§ 1106(a), by its terms, sets out *per se* prohibitions" and a "categorica[l] bar," and explicitly rejected the notion that a plaintiff must negate the exemptions in § 1108 (which includes the "adequate consideration" exemption in § 1108(e)) in order to state a prohibited-transaction claim. 145 S. Ct. at 1030. As the Court made clear, "[u]nderstood as affirmative defenses, the § 1108 exemptions must be pleaded and proved by the defendant who seeks to benefit from them." *Id.* at 1028. Plaintiffs need only allege the elements of a § 1106(a) transaction, "no more, no less." *Id.* at 1027-28. Thus, to state a claim for knowing participation in such a transaction, the complaint need only plausibly allege that the transaction participant had knowledge of those elements (not of the inapplicability of an exemption). *Cf. Haley*, 377 F. Supp. 3d at 260. As explained above, the SAC does exactly that.[5]

The other authorities on which the Seller Defendants rely are also either at odds with *Cunningham*, distinguishable, or directly contrary to their position. The Seller Defendants cite *Laborers' Pension Fund v. Arnold*, *see* Defs.' Mem. at 12, n.3, where the court rejected the plaintiffs' argument that that "to state a claim under § [1106], they need only assert that the plan fiduciaries knew or should have known that they were entering into a transaction with a party in interest," and instead required allegations "that the plan fiduciaries knew or should have known that the payment tendered to Defendants was unreasonable," No. 00 C 4113, 2001 WL 197634,

[5] Further, even under *Ahrendsen*, the claims against the Seller Defendants should survive. The court there dismissed claims against James R. Wells and Richard Wells, elderly directors who, unlike James's son Jim Wells, were not alleged to have been "centrally involved" in the transaction and to have "exercised control over [company] operations prior to and at the time of the transaction." 2022 WL 294394, at *2, *5, *8–9. The Seller Defendants here are akin to the non-dismissed director (Jim Wells) in *Ahrendsen*. Indeed, five of the six Seller Defendants were officers and/or directors of ACCT, SAC ¶¶ 20-36, and were "centrally involved" in conceiving of, facilitating, and executing the Transaction, including conducting a selection process for ownership transition from the selling shareholders to an ESOP rather than to another buyer," *id.* ¶ 71. Among other things, these five Seller Defendants "directed[ed] the preparation of . . . financial projections by CFO Griffiths and his staff for use in valuations in the Transaction," hired Transaction advisors for ACCT and the Seller Defendants, and approved ACCT's loan to the ESOP to finance the Transaction. *Id*. And the sixth Seller Defendant, G.D. Campbell Associates, L.P., was owned by Defendant Campbell, such that Campbell's knowledge may be attributed to his company. *See Chao v. USA Mining, Inc.*, No. 1:04–CV–1, 1:04–CV–138, 2007 WL 208530, at *15 (E.D. Tenn. Jan. 24, 2007).

at *8 (N.D. Ill. Feb. 27, 2001). Of course, *Cunningham* held the exact opposite. In *Spear v. Fenkell*, *see* Defs.' Mem. at 11, 13, the court dismissed a knowing participation claim because the claimant has "not alleged the transactions" at issue and identified conduct that did "not amount to participation." *Spear v. Fenkell*, No. 13-CV-02391, 2015 WL 3643571, at *9 (E.D. Pa. June 12, 2015). Neither omission is present here, as the SAC alleges both the pertinent transactions (the ESOP stock purchase and transfer transactions) and the Sellers Defendants' status as the ESOP's counterparties in both. Finally, *Haley*, *see* Defs.' Mem. at 11, n.3, directly undermines Seller Defendants' argument, as the court there explained that "to survive a motion to dismiss, plaintiffs need not plausibly allege that the fiduciary and non-fiduciaries involved knew that the transaction at issue was a prohibited transaction under § [1106](a) that did not fall within an exemption under § [1108](b)." *Haley*, 377 F. Supp. 3d at 263. Instead, they need only "plausibly allege that non-fiduciary transferee defendants knew they were transacting with an ERISA fiduciary, and knew the factual circumstances underlying the transaction that are relevant to the application of § 406(a)." *Id.* Because the SAC does just that, the Seller Defendants' motion to dismiss Count III should be denied.

C. The Complaint Puts Seller Defendants on Notice of the Allegations Against Them and Does Not Engage in Impermissible Group Pleading

The Seller Defendants' other arguments for dismissal of Count III are equally spurious. They claim that the SAC bases knowing-participation liability only on the Seller Defendants' "roles," *see* Defs.' Mem. at 11, and similarly engages in impermissible "group pleading," *id.* at 13. To the contrary, the SAC specifically identifies how each individual Seller Defendant is a party in interest and how each individually participated in the prohibited transactions at issue by acting as counterparties to the ESOP. *See* SAC ¶¶ 20-36, 65-66. Count III is properly asserted against each of them.

"Rule 8(a) 'requires that pleadings provide enough information to put a defendant on sufficient notice to prepare their defense and also ensure that the Court is sufficiently informed to determine the issue.'" *MCS Indus. v. Michael's Stores, Inc.*, No. 21-2563, 2022 WL 1291518, at *1 (E.D. Pa. Apr. 29, 2022) (quoting *Fabian v. St Mary's Med. Ctr.*, No. Civ. A. 16-4741, 2017 WL 3494219, at *3 (E.D. Pa. Aug. 11, 2017) (quotations omitted)); Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain: … a short and plain statement of the claim showing that the pleader is entitled to relief"). "It is not group pleading *per se* … that violates the standard of Rule 8. Rather, it is group pleading that fails to provide defendants with fair notice of what they are being accused." *Commonwealth of Pa. v. Think Fin., Inc.*, NO. 14-cv-7139, 2016 WL 183289, at *11 (E.D. Pa. Jan. 14, 2016) (internal citation omitted); *see Corbin v. Bucks Cnty.*, NO. 23-2784, 2023 WL 8042560, at *2 (E.D. Pa. Nov. 21, 2023) ("a claim leveled against multiple defendants is evaluated at the motion-to-dismiss stage as any other claim: surviving when the complaint pleads sufficient facts to show that the plaintiff is entitled to relief from a particular defendant, and failing when the complaint does not").

The SAC gives each of the Seller Defendants more than "fair notice of what they are being accused," *Commonwealth,* 2016 WL 183289, at *11, *i.e.*, knowing participation in the Trustee Defendants' prohibited transaction. Again, the SAC alleges that each of the Seller Defendants *individually* was either a director, officer, or 10% or more shareholder of ACCT (thus qualifying as a party in interest), SAC ¶¶ 20-36, and that each one of the Seller Defendants sold their stock to the ESOP in the Transaction, *id.*¶¶ 65-66. It is not clear what any of the Seller Defendants could possibly be confused about. Indeed, the Seller Defendants' motion belies their purported ignorance, as it fully engages on the issues relevant to the knowing-participation claim. *See Garrett*, 938 F.3d at 95 ("Without addressing the validity of the [group] Defendants' arguments, we believe their brief demonstrates that it was possible to understand and engage with [Plaintiff's] claims on their merits.").[6]

The Court should therefore reject Seller Defendants' argument that the SAC engages in impermissible "group pleading" as they have been provided ample "notice of the accusations against each" of them in accordance with Rule 8(a). *MCS Indus.*, 2022 WL 1291518, at *3–4.

II. The SAC Plausibly Alleges that the Director Defendants Breached Their Fiduciary Duties by Failing to Adequately Monitor the Trustee (Count IV)

ERISA's fiduciary duties are the "highest known to the law." *Sweda v. Univ. of Pennsylvania*, 923 F.3d 320, 333 (3d Cir. 2019) (internal citations and quotations omitted). Among other things, they require plan fiduciaries to act for the exclusive benefit of plan participants and beneficiaries and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A)-(B). Count IV of the SAC plausibly alleges that the Director Defendants (who comprise five of the six Seller Defendants) (1) were fiduciaries to the ESOP by virtue of their appointment of the Trustee and their authority to remove the Trustee, and (2) breached their duties to monitor the Trustee by standing idly by as the Trustee committed the

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[6] While the Director Defendants do not appear to argue that the SAC engages in impermissible group pleading as to the fiduciary-breach claim in Count IV concerning their failure to monitor the Trustee (and the associated co-fiduciary claim in Count V), it would fail in any event. As members of the Board of Directors, the Director Defendants "share overlapping and inextricably intertwined roles … and therefore each and every allegation applies to all … Defendants." *MCS Indus.*, 2022 WL 1291518, at *4; *see also Zanfardino v. Kay*, No. 22-cv-7258, 2023 WL 8232896, at *4 (D.N.J. Nov. 28, 2023) ("Plaintiff has placed Defendants on notice of the claims against each of them, as the allegations suggest that the directors played identical or substantially similar roles in breaching their fiduciary duties."); *Shapiro v. Aetna, Inc.*, No. 22-cv-1958, 2023 WL 4348601, at *10 (D.N.J. June 5, 2023) ("By specifically alleging how Defendants operated in concert, the Complaint meets the pleading requirements of Rule 8.").

ESOP to a patently overpriced Transaction and failed to conduct adequate due diligence. In response, the Director Defendants seek to elide their fiduciary status despite it being well settled in the caselaw, and try to brush off the SAC's numerous well-pled allegations of monitoring deficiencies as "conclusory." Their arguments should be rejected.[7]

A. The Director Defendants Were Fiduciaries By Virtue of Appointing the Trustee and Breached Their Duty to Monitor the Trustee

As the Supreme Court has explained, "ERISA ... defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 262 (1993) (emphasis added). That functional definition imposes fiduciary status "to the extent that" anyone "has any discretionary authority or discretionary responsibility in the administration of such plan" or "exercises any discretionary authority or discretionary control respecting management of such plan[.]" 29 U.S.C. § 1002(21)(A). "The definition of a fiduciary under ERISA is to be broadly construed." *Edmonson v. Lincoln Nat. Life Ins. Co*., 725 F.3d 406, 413 (3d Cir. 2013).

Against these standards, the Director Defendants are plainly fiduciaries. The SAC alleges that the Director Defendants—through their positions as members of the ACCT Board of Directors—exercised discretionary authority over the ESOP by appointing Paredes as Trustee. SAC ¶¶ 22, 25, 28, 31, 34, 62. It also alleges that, as Board members, they had the continuing authority to remove the Trustee. *Id.* ¶¶ 22, 25, 28, 31, 34, 139. As this Court has explained, "the responsibility of appointing and retaining the named fiduciaries of [ERISA plans]" is "itself a

[7] The Director Defendants argue at the outset that the duty-to-monitor claim in Count IV should fail to the extent the SAC's claims against the Trustee Defendants (Counts I and II) are dismissed. *See* Defs.' Mem. at 16. But the SAC's claims against the Trustee Defendants decidedly should not be dismissed for the reasons discussed in Plaintiffs' separately filed opposition to the Trustee Defendants' motion to dismiss.

fiduciary function." *Mehling v. New York Life Ins. Co*., 163 F. Supp. 2d 502, 509 (E.D. Pa. 2001); *see also Johnson v. Couturier*, 572 F.3d 1067, 1076 (9th Cir. 2009) ("[W]here members of an employer's board of directors have responsibility for the appointment and removal of ERISA trustees, those directors are themselves subject to ERISA fiduciary duties . . . with respect to trustee selection and retention."); 29 C.F.R. § 2509.75–8, D–4 ("the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise 'discretionary authority or discretionary control respecting management of such plan' and are, therefore, fiduciaries with respect to the plan.").

It is equally well established that with the power of appointment and removal comes the corresponding fiduciary duty to monitor those appointees. *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 164–65 (E.D. Pa. 2009) ("One such duty [under ERISA § 404(a)(1)(B)], is the duty to monitor other plan fiduciaries."); *Graden v. Conexant Sys., Inc.*, 574 F. Supp. 2d 456, 466 (D.N.J. 2008) ("ERISA imposes upon those individuals empowered to appoint and remove plan fiduciaries a fiduciary duty to monitor those fiduciaries."). This well-accepted duty requires monitoring fiduciaries to have an adequate system in place to periodically review their appointees' performance. *See* 29 C.F.R. § 2509.75–8, FR–17 (Department of Labor Interpretive Bulletin) (explaining that monitoring fiduciaries must at "reasonable intervals" review their appointees to ensure "compliance with the terms of the plan and statutory standards"); *Graden*, 574 F. Supp. 2d at 466 (looking to DOL's "interpretive bulletin relating to fiduciary duty under ERISA for instruction on the contours of the duty to monitor," an appointer must "[a]t reasonable intervals" review appointees' performance "in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards") (emphasis omitted) (quoting 29 C.F.R. § 2509.75–8, FR–17).

Here, it can reasonably be inferred from the SAC's allegations that the Director Defendants did not have any system to review the Trustee's conduct in the course of the Transaction, and thereby breached their duty to monitor. In particular, the SAC alleges that the Trustee Defendants paid a controlling-interest price for ACCT stock notwithstanding that the ESOP, following the Transaction, "did not obtain control of the Company," SAC ¶ 72—which was instead controlled by the Director Defendants (through their continued domination of the Board of Directors), *id.* ¶ 70—and that "the Director Defendants knew the control features of the Transaction deal," *id.* ¶ 132. The SAC also alleges that the Trustee Defendants relied on projections of ACCT's future financial performance that were "unreasonably optimistic and aggressive" without adequately challenging that information, *id.* ¶ 73, and that those projections were prepared by the Director Defendants, *id.* ¶¶ 71, 120. And the SAC alleges that the Trustee Defendants approved a Transaction that authorized the issuance of synthetic equity (in the form of warrants) exercisable by the selling shareholders—which describes each of the Director Defendants—that threatened to dilute the ESOP's ownership interest without negotiating a discount to the purchase price with the selling shareholder to reflect that dilution. *Id.* ¶¶ 76-79. A reasonable inference from these allegations is that the Director Defendants did not have a system to monitor the Trustee Defendants (a failure that the SAC specifically alleges, *see id.* ¶ 132).

B. The Director Defendants Cannot Shed Their Fiduciary Responsibility or Pretend Away the SAC's Well-Pled Allegations of Their Failure to Monitor

In response, the Director Defendants do not (and cannot) dispute ERISA's functional definition of fiduciary or that the power of appointment and removal confers fiduciary status. They instead first claim that, "[i]n this case, the 'particular function at issue—the authority to act on behalf of the ESOP in the Transaction—was performed solely by the Trustee, not any of the Director Defendants," and that "the Director Defendants therefore were not ERISA fiduciaries with respect to the ESOP Transaction." Defs.' Mem. at 17. But even a cursory review of the SAC reveals that, in fact, there are *two* fiduciary functions at issue in this case: (1) the Trustee Defendants' conduct in representing the ESOP in the Transaction, *and* (2) the Director Defendants' monitoring of the Trustee Defendants. As explained above, the latter function is well established in the caselaw and directly asserted in the SAC. The Director Defendants cannot simply pretend it away.

The Director Defendants next contend that the SAC's theory against them "would flip ERISA on its head by making the Director Defendants responsible for decisions taken by the ERISA fiduciary for the ESOP, the Trustee." Defs.' Mem. at 17. This is hyperbole. As explained, the duty to monitor does not mean that the monitoring fiduciary is responsible for each and every decision of their appointee, but rather that they have a system in place to ensure the appointee is doing its job, an omission that the SAC here adequately alleges. *See* SAC ¶ 132; *see also Silva v. Evonik Corp.*, No. 20-cv-2202, 2020 WL 12574912, at *9 (D.N.J. Dec. 30, 2020) ("Plaintiffs have alleged that Defendants did not have any system in place for monitoring the Committee's performance. This allegation, taken as true, plausibly suggests a breach of the duty to monitor.") (internal citation omitted). If anything, it is the Director Defendants' argument that flips the duty -to-monitor on its head, as it would absolve monitoring fiduciaries from all liability simply because the ultimate "decisions" lie with the appointee (here, the Trustee Defendants). But that is most always the case; if that were enough to defeat a duty-to-monitor claim, the doctrine would no longer exist.

Nor is that proposition supported by the caselaw relied upon by the Director Defendants. *See* Defs.' Mem. at 17-18. In *Howell v. Motorola, Inc.*, the Seventh Circuit explained that the duty to monitor "exists so that a plan administrator or sponsor cannot escape liability by passing the buck to another person and then turning a blind eye." 633 F.3d 552, 573 (7th Cir. 2011). It just merely held—in the context of summary judgment—that there was "no evidence that anything like that occurred here" because the plan's "procedures required annual renewal of appointments to the Committee, periodic reports by the Committee to the Board, and outside auditing of the Plan by KPMG." *Id.* Of course, the SAC here alleges the total absence of review procedures. SAC ¶ 132. The Director Defendants also invoke *Vang v. Geil Enterprises Inc.*, quoting the court's dismissal of a fiduciary-breach claim for failing to "allege any facts suggesting that [defendants] had control or authority over ESOP assets." No. 1:23-CV-00447, 2023 WL 3168513, at *3 (E.D. Cal. Apr. 28, 2023). Aside from the fact that *Vang* did not involve a duty-to-monitor claim, control over plan assets is not even the basis for fiduciary status asserted in the SAC as to the Director Defendants, so *Vang* is doubly irrelevant. Also irrelevant is the holding in *Neil v. Zell*, quoted by the Director Defendants, that the board-member defendants in that case were not fiduciaries because the trustee "made an independent decision" to enter the deal. 677 F. Supp. 2d 1010, 1023 (N.D. Ill. 2009). But the court was there considering a *direct* fiduciary breach claim against the board members for the transaction in question, not a monitoring claim, which was separately asserted and separately considered. *Id.* ("The court considers a separate claim regarding the Directors' exercise of their fiduciary responsibilities in appointing and monitoring GreatBanc below.").[8]

[8] While the court's unpublished decision in *Su v. Alerus*, N.A., No. 1:23-CV-00537, 2024 WL 4681323 (D. Idaho Nov. 4, 2024), actually dealt with a duty-monitor claim, it too is distinguishable. The court there appeared to understand the complaint as predicating its duty-to-monitor claim on the sole allegation that the ESOP overpaid for employer stock. *Id.* at *4 (plaintiff "asks the Court to work backwards, inferring deficient process from what she asserts is a deficient price"). Far more is alleged here, including specific facts about the Transaction underlying the SAC's fiduciary-breach claim against the Trustee Defendants (like control and warrants) of which the Director Defendants were or should have been aware.

The Director Defendants also contend that the SAC's allegations supporting the duty-to-monitor claim are "conclusory." *See* Defs.' Mem. at 19. But as noted, the SAC specifically alleges that the Trustee Defendants paid a controlling-interest price for ACCT stock despite the Director Defendants' continued Board domination following the Transaction, and that the Director Defendants were well aware of the Transaction's control features. *See* SAC ¶¶ 70, 72, 132. The SAC also specifically alleges that the Trustee Defendants approved a Transaction that authorized the issuance of dilutive warrants to the selling shareholders (which includes the Director Defendants) without negotiating a reduction to the purchase price with the selling shareholders (which, again, include the Director Defendants). *Id.* ¶¶ 76-79.

And while the Director Defendants gripe that the SAC does not explain why the ACCT projections prepared by the Director Defendants (and supplied to the Trustee Defendants) were unreasonably optimistic, the Trustee Defendants' valuation report—which the SAC relies upon[9]—shows the problem. As explained in more detail in Plaintiffs' Opposition to the Trustee Defendants' Motion to Dismiss, ACCT averaged $13.7 million in yearly earnings from 2016-2020, but then experienced a precipitous jump to $52.5 million in 2021, the year before the Transaction. *See* Ex. A to Declaration of Jeffrey Hahn, ACCT Holdings, Analysis of Transaction Fairness (hereinafter, "Stout Report") at 30, 48. Yet the projections relied upon by the Trustee Defendants were premised on the assumption that ACCT would exceed 2021's anomalous

[9] "In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. A document forms the basis of a claim if the document is 'integral to or explicitly relied upon in the complaint.'" *Lum v. Bank of Am.,* 361 F.3d 217, 222 (3d Cir. 2004) (*quoting In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1426 (3d Cir.1997)). Because the SAC predicates its imprudence claim on the Trustee Defendants' reliance on a flawed valuation of ACCT stock, and repeatedly references that valuation, *see, e.g.,* SAC ¶¶ 73, 75, 109, the valuation is both "integral to" and "explicitly relied upon" in the SAC, such that the Court may properly consider it.

earnings level (above $52 million) into the foreseeable future, despite the lion's share of ACCT's revenue concentrated in only two customers. *See* Stout Report at 38-39, 48. The Directors Defendants' motion to dismiss Count IV should be denied.

III. The SAC Plausibly Alleges that the Director Defendants are Liable as Co-Fiduciaries to the Trustee Defendants (Count V)

In addition to the fiduciary standards in 29 U.S.C. § 1104, ERISA also prohibits any fiduciary from knowingly participating in, enabling, or failing to remedy a breach committed by a co-fiduciary. Specifically, fiduciaries are liable for a breach committed by another fiduciary "(1) if he participates knowingly in . . . an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a)(1), (2), and (3).

Count V plausibly alleges that the Director Defendants violated all three of these proscriptions. *See* SAC ¶¶ 135-144. First, as discussed, the SAC plausibly alleges that the Director Defendants knowingly participated in the Trustee Defendants' breach given their participation in the ESOP Transaction and knowledge of the Trustee Defendants' central missteps, including those related to control and warrants. *See* SAC ¶¶ 70, 72, 132 (Directors Defendants aware of Transaction's control features); *id.* ¶¶ 76-79 (alleging that the Trustee Defendants approved a Transaction that authorized the issuance of dilutive warrants to the Director Defendants). And, for the reasons discussed in Part II, *supra*, the SAC also plausibly alleges that, due to the Director Defendants' own breach of their duty to monitor the Trustee Defendants, they enabled the Trustee Defendants' breach. 29 U.S.C. § 1105(a)(2); *see Graden*, 574 F. Supp. 2d at 468 ("the director Defendants' alleged failure to exercise their duty to monitor prudently can give rise to an inference that this fiduciary breach enabled the other fiduciaries to" breach their duty of prudence). Finally, the SAC plausibly alleges that the Director Defendants, despite their knowledge of the Trustee Defendants' breach, failed to take remedial action by, for example, preventing the ESOP's overpayment or reimbursing the ESOP. 29 U.S.C. § 1105(a)(3); *see* SAC ¶ 143.

The Director Defendants first seek dismissal of Count V's claim under 29 U.S.C. § 1105(a)(2)—for enabling the Trustee Defendants' breach by failing to monitor them—for the same reasons they seek dismissal of the duty-to-monitor claim in Count IV. *See* Defs.' Mem. at 20, n.2. This argument thus fails for the same reasons their duty-to-monitor arguments fail. *See* Part II, *supra*.

The Director Defendants next seek dismissal of Count V's other two bases for co-fiduciary liability (under 29 U.S.C. § 1105(a)(1) and (3)) because the SAC supposedly fails to allege facts that could show that any one of the Director Defendants had ***actual knowledge*** of a breach." Defs.' Mem. at 21 (Defendants' emphasis). But the SAC contains numerous allegations from which the Director Defendants' knowledge can be inferred. On a broad level, it alleges that the "Director Defendants were centrally involved in conceiving of, facilitating, and executing the Transaction." SAC ¶ 71. And as explained in Part II(B), *supra*, the Director Defendants had good reason to be aware of the specific breaches committed by the Trustee Defendants. For example, the SAC alleges that the Director Defendants were well aware of the Transaction's control features, *see* SAC ¶ 132, and as counterparties, it is reasonable to infer that they were aware of the Trustee Defendants' failure to negotiate a discount for lack of control. Likewise, the SAC alleges that the Transaction authorized the issuance of warrants to the selling shareholders (which included the Director Defendants), *id.* ¶¶ 77, 82; here again, as counterparties, it is reasonable to infer that the Director Defendants were aware that the Trustee Defendants failed to negotiate a purchase-price reduction to account for the warrants' dilutive effect. Such circumstantial evidence is sufficient to prove "actual knowledge" on the merits, let alone at the pleading stage. *See Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 189 (2020) (explaining that "actual knowledge can be proved through inference from circumstantial evidence") (internal quotations and citation omitted).

CONCLUSION

For the foregoing reasons, the Seller and Director Defendants' Motion to Dismiss Second Amended Complaint Counts III–V should be denied.

DATED: June 10, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Accordingly, the foregoing is available for viewing and downloading from the ECF System.

/s/ Jeffrey Hahn
Jeffrey Hahn