IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

JACKIE LYSENGEN, on behalf of the Morton Buildings, Inc. Leveraged Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated,

Plaintiff,

v.

ARGENT TRUST COMPANY, EDWARD C. MILLER, GETZ FAMILY LIMITED PARTNERSHIP, ESTATE OF HENRY A. GETZ, and ESTATE OF VIRGINIA MILLER,

Defendants.

Case No. 1:20-cv-01177-MMM-JEH

PLAINTIFF'S REPLY TO
EDWARD MILLER, ESTATE OF HENRY A. GETZ, AND
ESTATE OF VIRGINIA MILLER'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Jackie Lysengen replies to Defendants Edward Miller, Estate of Henry A. Getz, and Estate of Virginia Miller's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment (Dkt. 170) (the "Response"). The Response does not argue against summary judgment that Plaintiff proved the elements of her Count I claims of violations of ERISA § 406(a)(1)(A) and (B), 29 U.S.C. § 1106(a)(1)(A)-(B). It opposes summary judgments:

1) That with regard to the Count I claim of violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), Miller and the Estates' Second Affirmative Defense of lack of intent to benefit a party in interest must fail as a matter of law because there is no element of subjective intent to benefit a party in interest on a claim that assets of a plan were *transferred to* a party in interest;
2) That Argent Trust Company's authorization of the transfer of assets of the Morton Buildings, Inc. Leveraged Employee Stock Ownership Plan (the "Plan") to party in interest selling shareholders as payment for Morton Buildings, Inc. ("Morton") stock was prohibited by ERISA § 406(a)(1)(D); and
3) That Plaintiff may pursue remedies to the Plan as a whole.

Miller and the Estates' arguments have no merit, for the reasons set forth herein and in Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment (Dkt. 166). The Court should grant Plaintiff's Motion for Partial Summary Judgment (Dkt. 165) in its entirety.

REPLY TO ADDITIONAL MATERIAL FACTS

The Response lists no additional facts under Civil LR 7.1(D)(2)(b)(5), and relies on another party's Response to Undisputed Material Facts under Civil LR 7.1(D)(2)(b).

ARGUMENT

1. <u>The Court Should Render Judgment on the Second Affirmative Defense.</u>

Miller and the Estates' argument that Plaintiff must prove subjective intent to benefit a party in interest on her ERISA § 406(a)(1)(D) claim is wrong as a matter of law. Under § 406(a)(1)(D), "A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect … transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). Three potential violations are evident in this section: (1) transfer of plan assets to a party in interest, (2) use of plan assets by a party in interest, or (3) use of plan assets for the benefit of a party in interest. *Id.*

As Plaintiff explained previously, she has proven the first violation: transfer of plan assets to party in interest selling shareholders for their Morton stock. (Dkt. 166 at 1, 13, 16, 23-24). While Miller and the Estates argue Plaintiff has not proven "subjective intent to benefit a party in interest" (Response at 2) on her "transfer to" claim, no such element is in the statute, which states a "transfer to" a party in interest of plan assets is a § 406(a)(1)(D) violation, "***or***" use of plan assets "for the benefit of" a party in interest is a violation. To impose a subjective intent element on a "transfer to" claim would be contrary the plain language of the statute and to the *per se* nature of § 406(a)(1) prohibited transaction claims, which is recognized by the Seventh Circuit and is the majority rule.[1] And the Court should further reject Miller and the

[1] *See Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 434, 441 n.12 (6th Cir. 2002) (holding in ESOP case that Congress "inten[ded] to create per se violations in § 406(a)(1)" and "requiring subjective intent for a violation of § 406(a)(1)(D) is against the great weight of authority"); *Donovan v. Cunningham*, 716 F.2d 1455, 1464–65 (5th Cir. 1983) (observing in ESOP case where "the Secretary has charged the MCS fiduciaries with violating Section 406 by causing the ESOP to enter into a transaction with, and transfer its assets to, a 'party in interest'" that § 406 makes "illegal per se" transactions that "entail a high potential for abuse"); *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1983) ("the *per se* rules of section 406 make much simpler the enforcement of ERISA's more general fiduciary obligations"); *Neil v. Zell*, 753 F. Supp. 2d 724, 731 (N.D. Ill. 2010) (ESOP case rejecting "subjective intent" or "scienter requirement on § 406" as "§ 406 defines *per se* rules").

Estates' bid to narrow the "transfer to" claim because the "protective provisions of section 406(a)(1)(D) … should be read broadly in light of Congress' concern with the welfare of the plan beneficiaries." *Sandoval v. Simmons*, 622 F. Supp. 1174, 1213 (C.D. Ill. 1985) (citation omitted).

For these reasons, as the courts have held, Plaintiff has no subjective intent burden of proof on her "transfer to" claim. *See also Perez v. Eye Ctrs. of Tenn., LLC*, 2016 WL 6648854, *3–4, *6 (M.D. Tenn. Nov. 10, 2016) (defendants held liable on summary judgment for violation of § 406(a)(1)(D) for transferring plan assets to parties in interest, court rejecting argument that defendants must have "subjective intent to benefit a party in interest" to be held liable); *Becker v. Wells Fargo & Co.*, 2021 WL 1909632, *7 (D. Minn. May 12, 2021) (where plaintiff alleged fiduciaries "violated § 1106(a)(1)(D) by causing the transfer of Plan assets to" parties in interest, court held plaintiff "need not plead subjective intent to plausibly state her claims"); *Falberg v. Goldman Sachs Grp., Inc.*, 2020 WL 3893285, *12–13 (S.D.N.Y. July 9, 2020) (on claim that "Defendants caused the Plan to make indirect transfers of Plan assets to GSAM and other parties in interest," court held "any intent requirement is inconsistent with the 'categorical' nature of the § 1106 prohibited transactions"); *cf. Neil*, 753 F. Supp. 2d at 731 (rejecting "subjective intent" requirement on § 406(a)(1)(E) claim because "§ 406 defines *per se* rules").

Miller and the Estates rely on Third Circuit jurisprudence that is inapposite because it: (1) does not impose a subjective intent element on "transfer to" claims under § 406(a)(1)(D), (2) expressly diverges from the Seventh Circuit's *per se* rule against prohibited transactions and takes a minority approach on imposing a subjective intent element on certain non-transfer-to claims, and (3) distinguishes ESOP cases from cases where an intent element may be imposed.

Miller and the Estates' Third Circuit authorities did *not* require subjective intent on a § 406(a)(1)(D) "transfer to" claim. In *Reich v. Compton*, the court required "proof of a subjective

intent to benefit a party in interest" on a "for the benefit of" claim, finding it "strongly supported, if not required, by the statutory phrase 'for the benefit'" in § 406(a)(1)(D). 57 F.3d 270, 278–80 (3d Cir. 1995). In *Sweda v. University of Pennsylvania*, the court imposed a subjective intent element on a § 406(a)(1)**(C)** claim. 923 F.3d 320, 336-38, 340 (3d Cir. 2019). The "transfer to" claim in *Sweda* failed because "investment fees were not plausibly alleged to be a transfer of assets of the Plan under § 1106(a)(1)(D)," as the plaintiff "alleged that investment fees were drawn from mutual fund assets, not Plan assets." *Id.* at 340. The plaintiff "did not plausibly allege that revenue sharing involved a transfer of Plan property or assets under § 1106(a)(1)(A) or (D)," as the revenue sharing was drawn from mutual fund assets and "[m]utual fund assets are distinct from Plan assets" under ERISA. *Id.* at 339. In contrast, there is no genuine issue of fact that the selling shareholders received assets of the Plan in the ESOP Transaction here.

Sweda added an "element of intent to benefit a party in interest" to the elements of a § 406(a)(1)(C) claim to avoid the "absurd" result that a service provider could face liability for accepting payment in "ubiquitous service transactions." 923 F.3d at 336-38, 340. *Sweda* is distinguishable because Plaintiff's claim does not concern "ordinary service arrangements." *Id.* at 336. *Sweda* itself distinguishes private company ESOP cases like this one, citing the leading Seventh Circuit decision, *Allen v. GreatBanc Tr. Co.*, 835 F.3d 670 (7th Cir. 2016), from a claim about "ubiquitous service transactions." *Id.* ("One of the reasons we do not find *Allen* persuasive is that the transactions the Seventh Circuit scrutinized in *Allen* were a far cry from the ordinary service arrangements at issue here"). *Sweda* correctly notes § 406(a)(1) "was designed to prevent 'transactions deemed likely to injure the ... plan.'" *Id.* (citation omitted). The transactions here and in *Allen* are precisely the type Congress deemed likely to injure a plan when it crafted its bar on transactions including the sale of property to a plan by parties in interest. *See Comm'r v.*

Keystone Consol. Industr., Inc., 508 U.S. 152, 160 (1993).[2] There is no basis to defy the Supreme Court's § 406 categorical bar on transactions like the one here with a judicially-crafted element, particularly as Congress itself defined § 408 affirmative defenses to the prohibited transaction rule for ESOPs.[3] And the Third Circuit itself explained it was diverging from the Seventh Circuit's holding "that § 1106(a)(1) creates a per se rule against party in interest transactions." *Sweda*, 923 F.3d at 335–36 (citing *Allen*, 835 F.3d at 676). *Sweda* is not good law in this Circuit, and does not apply to private company ESOP cases by its own terms.

Miller and the Estates misconstrue *Reich* and *Sweda*, as do the two district court decisions they cite (Response at 5–6). As another Defendant Shareholder, Getz Family Limited Partnership ("Getz FLP"), concedes, their "defense is inapplicable" to a "transfer to" claim. (Dkt. 172 at 2, 14–15). Summary judgment to Plaintiff should be granted under ERISA's plain terms and the law of this Circuit.

2. The Court Should Render Judgment that Plaintiff Proved the Elements of Her Count I Prohibited Transaction Claim Under § 406(a)(1)(D).

The invented "subjective intent" element alleged in the Second Affirmative Defense being a red herring, Miller and the Estates do not argue Plaintiff failed to prove *any* element of

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[2] The Supreme Court explained that in enacting the prohibited transaction rules in response to "abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued … Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Keystone*, 508 U.S. at 160; *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–42 (2000) ("Responding to deficiencies in prior law regulating transactions by plan fiduciaries, Congress enacted ERISA § 406(a)(1), which supplements the fiduciary's general duty of loyalty to the plan's beneficiaries, § 404(a), by categorically barring certain transactions deemed 'likely to injure the pension plan'"); *Allen*, 835 F.3d at 674 ("ERISA identifies a number of transactions that are flatly prohibited between a plan and a party in interest"). And Congress found the need to add ***more*** protections for ESOPs in ERISA's exemptions and other terms (*e.g.*, 29 U.S.C. §§ 1002(18), 1107(d)(6), 1108(b)(3), 1108(e)), which was particularly necessary because a trustee's valuation of private stock lacks the reliability of a stock market's assessment of value. *Allen*, 835 F.3d at 679 ("Was the trustee unbiased? Was it independent? Did it have solid data behind its assessment? None of those questions is important in the case of public markets; all of them and more are for private holdings.").

[3] ERISA is a "comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (cleaned up). Courts should not invent intent elements for these carefully-crafted statutory claims.

her § 406(a)(1)(D) "transfer to" claim. The Court should therefore grant Plaintiff summary judgment on that claim. And while the Response attempts to muddy the waters with vague exposition on the proof required for a "knowing participation" claim (Response at 3–4), Plaintiff has not moved for summary judgment on that Count IV claim.

3. <u>The Court Should Render Judgment that Equitable Relief to the Plan as a Whole is Awardable from Defendant Shareholders.</u>

Miller and the Estates' primary argument is that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), "contains no mechanism for an individual to recover on behalf of an entire plan." (Response at 7). They could not be more wrong. Section 502(a)(3) is a "catchall" provision "providing 'appropriate equitable relief' for 'any' statutory violation." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). There has never been any question that relief to a plan is awardable under it. Just the opposite: prior to *Varity*, "[s]ome Courts of Appeals … held that [§ 502(a)(3)], when applied to a claim of breach of fiduciary obligation, does not authorize awards of relief to individuals, but instead only authorizes suits to obtain relief for the *plan*." *Id.* at 495 (emphasis in original). But *Varity* found "[t]he words of subsection (3)" to be so "broad" as to cover individual relief as well. *Id.* at 510. The Seventh Circuit didn't hold that "an individual may seek equitable relief from a breach of fiduciary duty under section 1132(a)(3)" until 1993. *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 992-93 (7th Cir. 1993). Prior to that time, it recognized relief to a plan only. *Id.*; *Varity*, 516 U.S. at 495.

Plaintiff has always sought relief to the Plan under § 502(a)(3) from Defendant Shareholders, including Miller and the Estates and Getz FLP. The First Amended Complaint (Dkt. 57) ("FAC") brings this lawsuit on behalf of the Plan for relief to it – including the "knowing participation" claim under § 502(a)(3) against Defendant Shareholders and the underlying claim of a prohibited stock transaction against Argent, in which Miller and the

Estates' decedents participated. (FAC at caption, preamble, ⁋⁋ 3, 9, 10, 80–82, 100, 105–107, Prayer ⁋⁋ B, D, E). This is not and never was a lawsuit seeking individualized relief to Plaintiff, as the fiduciary and party in interest violations did not affect Plaintiff directly but affected the Plan and its trust, the party to the stock transaction that overpaid for Morton stock. Defendants did not oppose relief to the Plan as a whole until briefing on the motion for reconsideration of the denial of class certification, where Plaintiff vigorously refuted their position, explaining that "§ 502(a)(3)'s catchall provision similarly provides for 'appropriate equitable relief'" to a plan. (Dkt. 154 at 4, Pl. Reply Mem. Motion for Reconsideration (filed July 18, 2022)). The instant motion reiterated that Plaintiff's derivative claim against the shareholders is under § 502(a)(3). (Dkt. 166 at 2–3). Any claim that Plaintiff ever sought plan-wide relief exclusively under §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2), or individualized relief, is revisionist history. That Plaintiff did not focus on § 502(a)(3) in her initial brief is because it was unforeseeable how Miller and the Estates misunderstand the function and history of that provision. There is no basis for different treatment, for purposes of plan-wide relief, of the claim for § 502(a)(3) restitution or disgorgement against the sellers, which is "derivative" of § 502(a)(2) claims against the trustee. *See Laidig v. GreatBanc Tr. Co.*, 2023 WL 1319624, *7 (N.D. Ill. Jan. 31, 2023); FAC ⁋ 105.[4]

Relief to the Plan from Miller and the Estates, who are non-fiduciaries, is appropriate. Plaintiff sues them under § 502(a)(3), which authorizes a plan participant to bring a civil action to obtain "appropriate equitable relief" to redress violations of ERISA Title I. 29 U.S.C. § 1132(a)(3); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241, 243 (2000). In *Harris Trust*, the Supreme Court held that § 502(a)(3)'s authorization extends to a suit

[4] This entire lawsuit is "derivative" in the sense of being on behalf of the Plan, as the primary §§ 406 and 404 claims are under § 502(a)(2) and seek relief to the Plan under § 409(a); the § 502(a)(3) claim is "derivative" of the § 406(a)(1)(A) and (D) claims; and § 502(a)(3) itself provides relief to a plan. In two ways, the Count IV claim is a derivative claim on behalf of the Plan, authorized by § 502.

against a nonfiduciary "party in interest" to a prohibited transaction barred by § 406(a). 530 U.S. at 241. Because "§ 502(a)(3) itself imposes certain duties" on non-fiduciaries, they may be held liable under that provision. *Id.* at 245. Importantly, *Harris Trust* emphasizes that "the focus [of § 502(a)(3)] is on redressing the '*act or practice* which violates any provision of [ERISA Title I].'" *Id.* at 246 (emphasis and second alteration in original). Here, the "act or practice" to be redressed is Defendant Shareholders' prohibited transaction *with the Plan and its trust* – not with Plaintiff. Section 502(a)(3) therefore necessitates relief to the Plan as a whole. Indeed, as the Supreme Court explained, the common law of trusts, which offers a starting point for analysis of ERISA, "plainly countenances the sort of relief" Plaintiff seeks, as trust "beneficiaries may … maintain an action for restitution of [trust] property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom." *Id.* at 250. Thus, the Court held "an action for restitution against a transferee of tainted plan assets satisfies the 'appropriateness' criterion in § 502(a)(3) [and] is also 'equitable' in nature." *Id.* at 253 (cleaned up). Because relief to the Plan and Trust sought herein is "appropriate equitable relief," summary judgment to Plaintiff should be granted.

Miller and the Estates' argument for relief only to Plaintiff further conflicts with the authorities holding that the relief in ESOP litigation is ***all*** the plan's losses, measured by the amount the plan overpaid for company stock. *See Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 781 (4th Cir. 2019); *Perez v. Bruister*, 823 F.3d 250, 258, 265-66 (5th Cir. 2016); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 420, 444 (6th Cir. 2002); *Neil v. Zell*, 767 F. Supp. 2d 933, 944-45 (N.D. Ill. 2011). The Plan is entitled in equity to recovery of its overpayments to Defendant Shareholders, as well as damages from Argent, to make it whole from breaches of ERISA party in interest and fiduciary duties. ERISA and *Harris Trust* do not permit the absurd result that

trustees may be liable for all the losses caused to a plan in a dirty deal, while selling shareholders get to take the money and run, having small liability only to the plaintiff's account.

Thornton v. Evans, 692 F.2d 1064 (7th Cir. 1982), does not require Plaintiff to proceed under Rules 23.1 or 23 to seek relief to the Plan. *Thornton* featured a judicially-created claim *for damages* against *non-fiduciaries* for conspiracy, which was and is outside the cognizable § 502 claims.[5] 692 F.2d at 1079-80. *Thornton* is distinguishable because Plaintiff is bringing §§ 502(a)(2) and 502(a)(3) claims for relief to the Plan, that is, claims enumerated in the statute, which she has statutory standing to pursue. Because the *Thornton* plaintiffs were not doing so, "ERISA d[id] not provide an explicit answer to the[] procedural questions," and the court itself had to "determine the procedural requirements of a suit under ERISA against non-fiduciary parties for conspiracy with fiduciaries." 692 F.2d at 1079. *Thornton*'s *ad hoc* procedural requirements are limited to now-extinct judicially-crafted claims.

The Seventh Circuit itself distinguished § 502 claims from the *Thornton* claim, for which ERISA did not "confer standing on the[] plaintiffs to proceed with suits" because under ERISA "plaintiffs could not maintain an individual action against non-fiduciary parties." *Thornton*, 692 F.2d at 1079 & n.35. Highlighting only § 502(a)(2) claims because *Anweiler*, *Varity*, and *Harris Trust* had not yet construed § 502(a)(3) claims, the Court explained it would not have to invent procedures in a § 502 case: "Although the statute provides for suits by *individual* beneficiaries to recover damages, the statutory provision granting the right of individual suit is directly related to other statutory provisions which we [have] interpreted . . . as imposing fiduciary duties only upon *ERISA-defined fiduciaries*." *Id.* at 1079 n.35 (emphasis in original) (citing 29 U.S.C.

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[5] Any judicial recognition of claims for damages against non-fiduciaries was abrogated by *Mertens*. Judicially-crafted causes of action outside § 502 fell post-*Thornton* under a series of Supreme Court decisions. *See Buckley Dement, Inc. v. Travelers Plan Adm'rs of Ill., Inc.*, 39 F.3d 784, 789-90 (7th Cir. 1994); *Teamsters Local Union No. 705 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 824-25 (7th Cir. 2014).

§§ 1109(a), 1132(a) (1976)). *Thornton* itself therefore holds participants bringing § 502 claims do not have to meet the special procedures imposed in that case to obtain representative standing. *See also Jesse v. Nagel Lumber Co. Inc.*, 2009 WL 2176649, *3 (W.D. Wis. July 21, 2009) ("some courts have required these claims to be brought derivatively or as a class action. However, … the Seventh Circuit [in *Thornton*] disagrees with this mandatory approach, reasoning that § 502(a) specifically authorizes individual suits") (citation omitted); *Waldron v. Dugan*, 2007 WL 4365358, *6 (N.D. Ill. Dec. 13, 2007) (in *Thornton* "the court distinguished this judicially-created right to relief from the statutory right under ERISA section 502(a)"); *TBM Consulting Grp., Inc. v. Lubbock Nat'l Bank*, 2018 WL 2448446, *5 (E.D.N.C. May 31, 2018) (the *Thornton* "holding concerned a claim against a non-fiduciary, with the court acknowledging Section 502(a)(2) authorizes individual suits by participants against plan fiduciaries"); *Blankenship v. Chamberlain*, 695 F. Supp. 2d 966, 972-73 (E.D. Mo. 2010) (construing *Thornton* as "recognizing that section 502(a)(2) authorizes suits by individual beneficiaries," so "does not require them to take steps to represent the interests of absent plan participants").

Should this Court favor special procedures akin to Rules 23.1 or 23, Plaintiff has already explained it may apply them, as other courts have. However, the concerns compelling special procedures in *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), aren't issues here:

> The court found that three principal problems might arise if it allowed the plaintiff to proceed without more assurance that the absent participants' rights were protected: (1) the possibility that she would reach a settlement benefitting her but not the plan as a whole; (2) how to distribute any recovery she might obtain, given that the plan was no longer in existence; and (3) the potential for prejudice to other participants, if claim or issue preclusion principles were found to bar subsequent claims.

Blankenship, 695 F. Supp. 2d at 973 (citing *Coan*, 457 F.3d at 261–62). Settlement isn't an issue here because Plaintiff seeks only "to pursue claims and to recover damages on behalf of the ESOP as a whole." *Id.*; *see also Huizinga v. Genzink Steel Supply & Welding Co.*, 2013 WL

4511291, *8 (W.D. Mich. Aug. 23, 2013). Unlike the *Coan* plaintiff, Plaintiff does not bring suit individually, but only on behalf of the Plan. 457 F.3d at 254. Throughout this litigation, Plaintiff advanced the Plan's general interests, and there is no concern as in *Coan* that she lacked intent to benefit non-party participants. *Id.* at 257. The second concern isn't an issue because the Plan exists and can distribute any recovery. The third concern isn't an issue because any preclusive effect may be determined in later suits, in accordance with the preclusion doctrines. *Blankenship*, 695 F. Supp. 2d at 973-74; *Huizinga*, 2013 WL 4511291, *8. *Coan*'s standards were met by Plaintiff, who: (1) moved for class certification (Dkt. 54-55); (2) vigorously re-argued for certification in a motion for reconsideration (Dkt. 149-50, 154); (3) made a webpage describing the case and making available key filings (Dkt. 166 at 22 n.4); and (4) suggested the Court may implement procedures like in *Koerner v. Copenhaver*, 2014 WL 5544051 (C.D. Ill. Nov. 3, 2014), to address due process concerns (Dkt. 166 at 21-22; Dkt. 154 at 1-2 n.2).

Finally, this lawsuit is not an aggregation of individual participants' suits but an ERISA representative action on behalf of a "single principal" plan and trust. Class procedures need not be met and no conflict precludes plan-wide relief. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1920, 1922 (2022); *Burnett v. Prudent Fiduciary Servs. LLC*, 2023 WL 387586, *7 (D. Del. Jan. 25, 2023) (that ERISA "allows a single plaintiff to obtain plan-wide relief makes this case totally different than" class actions), *adopted by* 2023 WL 2401707 (D. Del. Mar. 8, 2023); *Bruister*, 823 F.3d at 258; Dkt. 184 at 98–99.

For these reasons and those briefed previously, the Court should grant Plaintiff's motion.

Dated: June 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 5, 2023, a true and correct copy of the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ Patrick O. Muench

PAGE COUNT CERTIFICATION

The undersigned attorney certifies that the foregoing reply complies with the page limitation of the Court's text order of June 5, 2023 expanding the page count for this reply to ten pages, because the page count for the portion of this reply titled Argument does not exceed ten pages.

/s/ Patrick O. Muench