

**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
GETZ FAMILY LIMITED PARTNERSHIP'S RESPONSE TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Plaintiff Jackie Lysengen replies to Getz Family Limited Partnership's Response to Plaintiff's Motion for Partial Summary Judgment (Dkt. 172) (the "Response").

In its Response, Getz Family Limited Partnership ("Getz FLP") does not dispute facts proving the Count I ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A), (D), prohibited transaction claims that underlie the Count IV "knowing participation" claim against it. Further, the Response makes no argument against summary judgment that Plaintiff proved the elements of her Count I claims against Argent Trust Company ("Argent"), but joins in and adopts Argent's argument. But Argent does not dispute that Plaintiff proved the § 406(a)(1) elements of her Count I claims (Dkt. 171). The Court should grant Plaintiff's motion for a partial summary judgment that she proved the § 406(a)(1) elements of her Count I claims.

Getz FLP concedes its Second and Ninth Affirmative Defenses are not applicable to this case. Therefore, the Court should grant Plaintiff summary judgment against those defenses.

Getz FLP opposes summary judgment that Plaintiff may pursue remedies to the Morton Buildings, Inc. Leveraged Employee Stock Ownership Plan (the "Plan") as a whole. Getz FLP's 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).

ARGUMENT

1. Getz FLP does not dispute facts proving the ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A), (D), prohibited stock transaction claims that underlie the Count IV “knowing participation” claim against it and the other Defendant Shareholders. Getz FLP does not dispute facts proving Argent was a fiduciary trustee that caused the Plan to engage in the ESOP Transaction. (Dkt. 172, Response to Undisputed Material Facts (“Response UMF”) 8, 18, 19, 20, 21; *see also id.* 22, 24, 25). Getz FLP does not dispute facts proving it was a party in interest to the Plan. (Response UMF 17). Getz FLP does not dispute facts proving it sold stock to the Plan in exchange for monetary assets of the Plan. (Response UMF 6, 7, 16). Getz FLP does not dispute facts proving Edward Miller, Henry A. Getz, and Virginia Miller were parties in interest who sold stock to the Plan in exchange for monetary assets of the Plan. (Response UMF 6–7, 11–15). Getz FLP does not dispute facts proving Morton Buildings, Inc. was a party in interest that sold stock to the Plan in exchange for monetary assets of the Plan. (Response UMF 2–7, 9, 18, 20, 21). Plaintiff proved the elements of her § 406(a)(1)(A) and (D) Count I claims. The Court should grant Plaintiff’s motion for a summary judgment that she did so.

The Response makes no argument against summary judgment that Plaintiff proved the elements of her Count I claims against Argent of violations of ERISA § 406(a)(1)(A), (B) and (D). To the extent Getz FLP adopts (Response at 1–2, 13–14) Argent’s response, Plaintiff refers to her concurrently-filed reply to Argent’s brief on that issue. However, Argent does not dispute that Plaintiff proved the § 406(a)(1) elements of her Count I claims. Rather, Argent contends the elements “are typically not controverted” and that “[a]ll ESOP transactions could be characterized as prohibited transactions.” (Dkt. 171 at 2, 28). The Court should grant Plaintiff’s motion for summary judgment that she proved the § 406(a)(1) elements of her Count I claims.

2. The Response concedes Getz FLP's Second Affirmative Defense of "Lack of Intent under ERISA § 406(a)(1)(D)" is "inapplicable" because Getz FLP observes that Plaintiff is not seeking to prove a "use ... for the benefit of" claim under § 406(a)(1)(D) (which Plaintiff does not dispute). (Response at 2, 14–15). The Court should grant Plaintiff summary judgment against that defense.

3. With regard to Getz FLP's Ninth Affirmative Defense of "Statute of Limitations," Getz FLP "concedes that the statute of limitations defense is not applicable to this case." (Response at 14). To the extent Getz FLP may elsewhere hedge by saying "*at this stage*, the facts do not support a statute of limitations defense" (Response at 2, emphasis added), mere speculation about possible facts is not sufficient to defeat summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). The Court should grant Plaintiff summary judgment on the defense.

4. In opposition to Plaintiff's motion for summary judgment that she may seek relief to the Plan as a whole, Getz FLP again relies on *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982), which doesn't say what Getz FLP thinks it says. (Response at 14). Plaintiff has already responded to Getz FLP's argument on this issue, and refers to Plaintiff's Response to Defendant Getz Family Limited Partnership's Motion for Summary Judgment (Dkt. 175 at 39–42). Further, as a Defendant Shareholder, Getz FLP is identically situated with Defendants Edward Miller, Estate of Henry A. Getz, and Estate of Virginia Miller, who made a more fulsome response than did Getz FLP in its two-paragraph argument. Plaintiff therefore refers to and incorporates herein her concurrently-filed reply to Miller and the Estates' response on that issue. And because "Getz FLP adopts and joins in Argent's arguments in opposition to this request for summary judgment"

(Response at 14), Plaintiff refers to her concurrently-filed reply to Argent's response brief.

Dated: June 5, 2023

Respectfully submitted,

BAILEY & GLASSER LLP

/s/ Patrick O. Muench

Patrick O. Muench
318 W. Adams St., Ste. 1512
Chicago, IL 60606
Telephone: (312) 500-8680
Facsimile: (304) 342-1110
pmuench@baileyglasser.com

Gregory Y. Porter
Ryan T. Jenny
Laura Babiak
1055 Thomas Jefferson St., NW, Ste. 540
Washington, DC 20007
Telephone: (202) 463-2101
Facsimile: (202) 463-2103
gporter@baileyglasser.com
rjenny@baileyglasser.com
lbabiak@baileyglasser.com

Attorneys for Plaintiff

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 limitations of Civil LR 7.1(D)(5), and the Court's text order of June 5, 2023 expanding the page count for this reply, because the page count for the portion of this reply titled Argument does not exceed five pages.

/s/ Patrick O. Muench