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,	**Case No. 1:20-cv-01177-MMM-JEH**
v.	
ARGENT TRUST COMPANY, EDWARD C. MILLER, GETZ FAMILY LIMITED PARTNERSHIP, ESTATE OF HENRY A. GETZ, and ESTATE OF VIRGINIA MILLER,	
Defendants.	

PLAINTIFF'S REPLY TO ARGENT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Jackie Lysengen replies to Argent's Opposition to Plaintiff's Motion for Partial Summary Judgment (Dkt. 171) (the "Response"). Argent offers no real argument against two aspects of Plaintiff's motion: (1) that Plaintiff met her burden of proving the elements of her Count I claims under ERISA § 406(a)(1)(A), (B), and (D), 29 U.S.C. § 1106(a)(1)(A), (B), (D), and (2) that Argent's Second Affirmative Defense invoking ERISA's statute of limitations and laches fails as a matter of fact and law. Rather than dispute these points on the merits, Argent simply urges the Court to ignore Plaintiff's motion as moot and grant its motion for summary judgment on its "adequate consideration" affirmative defense. But Plaintiff's motion, which is based upon undisputed facts, is what is intended by Rule 56, while Argent's motion ignores the many genuine issues of material fact precluding judgment on its defense, as detailed in Plaintiff's opposition. Even so, the issue at hand is Plaintiff's motion, which should be granted in its entirety under the undisputed facts and law.

That leaves only Plaintiff's argument that she may seek remedies for the Morton Buildings, Inc. Leveraged Employee Stock Ownership Plan (the "Plan" or "ESOP") including the Plan's full losses, and is not limited to individualized relief for losses to her own Plan account. As Plaintiff explained in her opening brief, the statute's plain text and a mountain of case law—including in ESOP cases directly analogous to this one—unquestionably establish Plaintiff's right to seek relief on behalf of the Plan as a whole. Argent's contrary arguments have no merit, for the reasons set forth herein and in Plaintiff's opening brief (Dkt. 166).

REPLY TO ADDITIONAL MATERIAL FACTS

The Response lists no additional facts under Civil LR 7.1(D)(2)(b)(5).

ARGUMENT

1. The Court Should Render Judgment that Plaintiff Proved the Elements of Her Count I Prohibited Transaction Claims under § 406(a)(1)(A), (B), & (D).

Argent does not dispute that Plaintiff proved the § 406(a)(1) elements of her Count I claims. To the contrary, Argent concedes the elements "are typically not controverted" and that "[a]ll ESOP transactions could be characterized as prohibited transactions." (Response at 2, 28).[1] Because there are no facts to try on the §§ 406(a)(1)(A), (B), and (D) elements that Plaintiff has the burden to prove, summary judgment is warranted. This will allow trial to focus appropriately on Argent's affirmative defenses. In another ESOP case brought by Plaintiff's counsel, in which a single plaintiff achieved a trial award of $29,773,250 to his ESOP without certification of a class, partial summary judgment was granted and greatly assisted in shortening and simplifying the trial. *See Brundle v. Wilmington Trust, N.A.*, 2016 WL 6542718, at *1, *12, *16 (E.D. Va. Nov. 3, 2016) (granting in part plaintiff's motion for partial summary judgment); *Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 769, 772 n.4 (4th Cir. 2019) (affirming $29,773,250 judgment for relief to ESOP without class certified). Rather than being a "diversion" as Argent claims (Response at 2), partial summary judgment is common in ESOP cases and the Seventh Circuit holds it "useful." *See* Pl.'s Br., Dkt. 166 at 10 (citing authorities). The Court should enter summary judgment on Plaintiff's Count I prima facie case.

2. The Court Should Render Judgment on the Second Affirmative Defense.

The Response makes no argument against summary judgment to Plaintiff on Argent's Second Affirmative Defense of "statute of limitations, statute of repose, and/or laches" (Answer,

[1] Argent's Response to Plaintiff's Statement of Facts (Response at 3–12) does not dispute the facts proving the § 406(a)(1) elements. "Saying that a document 'speaks for itself' is not a denial." *Henderson v. Bovis Lend Lease, Inc.*, 848 F. Supp. 2d 847, 849 (N.D. Ill. 2012). That Argent filed a cross-motion for summary judgment does not justify its designating all of Plaintiff's facts proving her prima facie case immaterial under Civil LR 7.1(D)(2)(b).

Dkt. 58 at 20). Instead, Argent urges the Court to ignore Plaintiff's motion as moot because it purportedly must grant Argent summary judgment. (Response at 28 n.8, 30). Argent does not dispute that "Plaintiff filed her original complaint on April 30, 2020" (Response at 12, responding to UMF 26), which is within ERISA's six-year limitations period. 29 U.S.C. § 1113. And Defendant Getz Family Limited Partnership asserted the same defense and now "concedes that the statute of limitations defense is not applicable to this case." (Dkt. 172 at 14). The Court should grant Plaintiff summary judgment on Argent's Second Affirmative Defense.

3. The Court Should Render Judgment that All the Plan's Losses and the Other Forms of Plan-Wide Relief Are Awardable.

Argent does not understand that this lawsuit is *not* an aggregation of individual participants' suits but is instead an ERISA representative action on behalf of a single principal, a retirement plan trust. Argent's invocation of some "usual rule that litigation is conducted by and on behalf of the individual named parties only" (Response at 16–17), to argue class certification is required here for a multitude of participant claims, conflicts with ERISA, which provides a cause of action for a participant to bring suit on behalf of her plan, for which the remedy is relief to the plan as a whole. To wit, ERISA § 502(a)(2) authorizes participants to sue for the plan-wide relief provided in § 409. 29 U.S.C. § 1132(a)(2) (providing "[a] civil action" "for appropriate relief under section 409"). A § 502(a)(2) claim is "brought in a representative capacity on behalf of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985).[2] Under § 409(a), a breaching fiduciary "*shall* be personally liable to make good to such plan *any losses to the plan* resulting from each … breach, and to restore to such plan *any*

[2] *See also Hawkins v. Cintas Corp.*, 32 F.4th 625, 633 (6th Cir. 2022) ("Plaintiffs' 'right,' even according to [defendant], is to bring a representative action pursuant to § 502(a)(2)."); *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 481–482 (7th Cir. 2010) (§ 502(a)(2) claims proceed "only in a representative capacity on behalf of the plan, not in [the plaintiff's] own behalf").

profits of [a] fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. § 1109(a) (emphasis added). It is "abundantly clear" that ERISA's congressional draftsmen "were primarily concerned with the possible *misuse of plan assets*, and with remedies that *would protect the entire plan*, rather than with the rights of an individual beneficiary." *Russell*, 473 U.S. at 142 (emphasis added).

LaRue reinforces this point. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 251, 254 (2008) ("Section 502(a)(2) provides for suits to enforce the liability-creating provisions of § 409, concerning breaches of fiduciary duties that harm plans"; "§§ 502(a)(2) and 409 protect the financial integrity of the plan"). The Court explained "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409." *Id.* at 256. Put another way: a participant's ability to recover "any losses" includes *both* losses to only a subset (or one) of the accounts, *and* losses to "plan assets payable to all participants"—i.e., on behalf of the plan as a whole. *Id.* That understanding follows the text: "The plain text of § 409(a), which uses the term 'plan' five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan." *Id.* at 261 (Thomas, J. concurring). "On their face, §§ 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach." *Id.* (emphasis in original). *LaRue* does not authorize ignoring the bulk of a plan's loss from an ERISA breach as § 409(a) "repeatedly identifies the 'plan' as the victim of any fiduciary breach and the recipient of any relief." *Id.* at 254.[3]

[3] *See also Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1111 (10th Cir. 2023) (citing *LaRue*, court holds: "§§ 1132(a)(2) and 1109 allow claimants to obtain certain forms of plan-wide relief. Indeed, the Supreme Court has made clear that § 1132(a) does not provide a remedy for individual injuries distinct from plan injuries."); *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1092-94 (9th Cir. 2018) (rejecting misinterpretation "that individuals may seek individual recovery in the context of defined contribution plans" because "*LaRue* cannot bear the weight USC places on it" and "it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan"); *Smith v.*

Argent further ignores the Supreme Court's recent *Viking River* decision, which held: "***Non-class representative actions*** in which a single agent litigates on behalf of a single principal ***are part of the basic architecture of much of substantive law***." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1922 (2022) (emphasis added). Such single principal actions include those, like here, on behalf of a trust. *Id.* Where a claim is brought on behalf of a "single principal," in contrast to a class claim on behalf of "a multitude of absent individuals" for their "individually held claims," there is no "need to consider adequacy of representation, numerosity, commonality, or typicality." *Id.* at 1920; *cf. 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, citing *Viking*), *adopted by* 2023 WL 2401707 (D. Del. Mar. 8, 2023). Under *Viking River*, the commonality, typicality, and adequacy elements this Court applied to deny class certification are irrelevant to this non-class representative action where a participant litigates on behalf of a single principal plan and trust. And that Plaintiff previously sought class treatment does not imply she has an individual claim or negate that she sues over injuries to the ESOP as whole and seeks plan-wide relief on its behalf. *Hawkins*, 32 F.4th at 634–35 (construing *Spano v. The Boeing Co.*, 633 F.3d 574, 581 (7th Cir. 2011) (a "plan injury" only "potentially would be appropriate for class treatment")). In sum, Plaintiff is statutorily authorized to seek relief to the Plan, and does not need a class action to do so.

The irrelevance of the class conflict inquiry to an action on behalf of a single principal ESOP is further demonstrated here because the Court previously identified no conflict between

Med. Benefit Adm'rs Grp., Inc., 639 F.3d 277, 282 (7th Cir. 2011) ("when he seeks relief under section 502(a)(2), a plan participant acts as a representative of the plan, and any relief he obtains 'inures to the benefit of the plan as a whole'"); *Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011) ("The remedy in an action for breach of fiduciary duty is for the fiduciary to 'make good' the loss to the plan.").

the ESOP participants *as ESOP participants*, but only a conflict arising from some class members' interests as participants in a separate KSOP. All ESOP participants, as ESOP participants, have the same interest in the ESOP and their individual accounts being made whole. *See Perez v. Bruister*, 823 F.3d 250, 258 (5th Cir. 2016) ("the 'loss [] to the plan' is the amount that the ESOP overpaid for [company] stock. Consequently, the losses suffered by the participants in the ESOP are coterminous with those of the plan, and [Plaintiff's] individual claim is proportional to the claims and losses of fellow participants."). Wearing their "ESOP participant hats," Plaintiff and the other participants are fully-aligned with the ESOP's interests, and it matters not if conflicts outside the ESOP, relating to benefits in a different "KSOP" plan, may be a factor under an inapplicable class analysis.[4] To the extent the Court discerned under Rule 23 a conflict with KSOP participants, some of whom are ESOP participants, that is not an issue for this representative suit on behalf of the "single principal" ESOP.[5] The ESOP's only interest is in maximizing the value of a recovery in this lawsuit.

Without citing *any* case law in support, Argent argues § 409(a) isn't really intended to remedy a plan's injury because § 502(a)(2) purportedly gives a court discretion to provide only the relief it finds "appropriate." (Response at 21–22). This argument has no basis in the text of §§ 502(a)(2) and 409(a) and, as explained above, is contrary to *LaRue*. Section 502(a)(2) is in fact a statutory standing provision and, while *LaRue* permits suits for losses inflicted on an individual account, "[t]he remedy in an action for breach of fiduciary duty is for the fiduciary to

[4] If there is any conflict, it is not on the Plaintiff's side but on Argent's, with Argent serving as fiduciary trustee for both KSOP and ESOP and favoring certain alleged KSOP participants at the ESOP's expense.

[5] *Abbott* is distinguishable because participants had an intra-class conflict by investing differently within a single principal, *i.e.*, "average class members compared to 'day trader' members." *Abbott v. Lockheed Martin Corp.*, 2010 WL 547172, *2 n.3, *4 (S.D. Ill. Feb. 10, 2010). Investments in a plan outside the litigation didn't cause the conflict and the actions that injured some participants while benefiting others caused no injury permitting "a direct action for Plan-wide recovery." *Id.*

'make good' the loss to the plan." *Peabody*, 636 F.3d at 373. The U.S. Department of Labor rejects Argent's argument. *See* Br. of U.S. Sec'y of Labor at 23–24, *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, No. 22-1098 (10th Cir. Sept. 7, 2022). Again, Argent's interpretation ignores the plain text of the statute, which specifies, with mandatory language, which remedies a fiduciary is subject to—the fiduciary "shall" restore "any" losses and disgorge "any" profits. 29 U.S.C. §§ 1109(a). No court has held § 502(a)(2) is a mechanism to circumscribe § 409(a)'s relief. The Supreme Court has held the similarly worded § 409(a) catchall relief of "equitable or remedial relief as the court may deem *appropriate*" is *additional* to the mandatory money "remedies benefiting, in the first instance, solely the plan," and does not "construct an entirely new *class* of relief" to anyone other than a plan. *Russell*, 473 U.S. at 140–42. Further, with the Plan having been injured by overpaying by millions of dollars for Morton stock, it is hard to imagine why the plan-wide relief Plaintiff seeks is not "appropriate" and ERISA's goal of redressing the statutory violation that caused the injury should be thwarted. *See Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 302 (7th Cir. 1985) ("The enforcement provisions of ERISA are intended to provide the Secretary, as well as participants and beneficiaries, with broad, flexible remedies to redress or prevent statutory violations.").

That participants may seek plan-wide relief without a certified class is well-established, as in the *Brundle* litigation, *supra*, in which Plaintiff's counsel here represented plaintiffs Brundle and Halldorson. Argent makes a poorly informed statement about *Brundle*:

> Plaintiff misrepresents the facts and procedure of that case, in which her same lawyers were counsel … It is … *at best* misleading to suggest that the court in *Brundle* permitted plan-wide relief after a denial of class certification. In reality, the issues implicated here were never raised and addressed in *Brundle*.

Response at 23 (emphasis in original). False. District Judge Leonie M. Brinkema addressed the issue of plan-wide relief without a class in open court. The reason she denied class certification

was that she held it unnecessary because an ESOP participant may seek plan-wide relief without it. *See* Transcript of Motions Hearing at 4–12, 19, 26, *Halldorson v. Wilmington Tr. Ret. & Inst. Servs. Co.*, No. 1:15-cv-01494 (E.D. Va. filed May 12, 2016), ECF No. 108; Order at 1 & n.2, *Halldorson v. Wilmington Tr. Ret. & Inst. Servs. Co.*, No. 1:15-cv-01494 (E.D. Va. Apr. 15, 2016), ECF No. 89. Other courts have held likewise. *See, e.g.*, *Tullis v. UMB Bank, N.A.*, 515 F.3d 673, 680 (6th Cir. 2008); *Ortiz v. American Airlines, Inc.*, 5 F.4th 622, 627 & n.7 (5th Cir. 2021); *In re AEP ERISA Litig.*, 2009 WL 3854943, *1 (S.D. Ohio Nov. 17, 2009). And, of course, Judge Brinkema entered a $29.7 million judgment for the ESOP, not plan participants.

Argent relies heavily on *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982), to argue a Rule 23 class action or Rule 23.1 derivative action is required; but that decision does not say what Argent thinks it says. Indeed, issued just eight years after ERISA's adoption, *Thornton* is easily misread, as it preceded seminal Supreme Court decisions construing the statute, such as *Russell*, *Mertens*, *Varity*, and *Harris Trust*.[6] *Thornton* does *not* mandate special procedures—under Rules 23 or 23.1 or any other procedures—for the representative claims in this case, nor any other claims cognizable today. The claim at issue in *Thornton* no longer even exists. *Thornton* featured a judicially-created claim *for damages* against *non-fiduciaries* for conspiracy, which was and is outside the cognizable § 502 claims, and has nothing to do with Plaintiff's claims here.[7] 692 F.2d at 1079-80. *Thornton* is distinguishable because Plaintiff is bringing a

[6] *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).

[7] 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). Only in 2000 did the Supreme Court recognize that ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), permits suits for equitable relief (but still not damages) against a nonfiduciary participant in a prohibited transaction. *Harris Trust*, 530 U.S. at 241, 243, 245, 253. And prior to 1996, "[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*." *Varity*, 516 U.S. at 495 (emphasis in original). But *Varity* found "[t]he words of subsection (3)" to be so

§ 502(a)(2) representative claim for relief to the Plan, that is, a claim 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." 692 F.2d at 1079. *Thornton*'s *ad hoc* procedural requirements are limited to now-extinct judicially-crafted claims outside § 502.

Thornton itself distinguished § 502(a)(2) claims for § 409(a) relief against a fiduciary from the judicially-crafted damages claim against non-fiduciaries therein, which was not authorized by the § 502 standing provisions. 692 F.2d at 1079 & n.35. Plaintiff here, by contrast, has § 502(a)(2) statutory standing to bring her representative action against a fiduciary; "participant[s]" are specifically enumerated as plaintiffs authorized to sue for relief under § 409. *Thornton* in fact expressly stated that a case like this one would not be subject to the same procedures that the court imposed in *Thornton*: "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. §§ 1109(a), 1132(a) (1976)). *Thornton* itself thus mandates that its procedures do not apply to the claims for § 409(a) relief from fiduciary Argent.

The case law supports this. A sister court explained:

> the *Thornton* court observed that suits against non-fiduciaries were not explicitly contemplated by ERISA, but were instead judicially-created supplements to the relief available under ERISA. *Id.* at 1079. Significantly, the court distinguished this judicially-created right to relief from the statutory right under ERISA section 502(a), which specifically authorizes *individual* suits by participants against plan fiduciaries. *Id.* at 1080 n. 35. Thus, *Thornton* did not hold, or even state, that an action such as

"broad" as to cover individual relief as well. *Id.* at 510. This Circuit didn't hold "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, it recognized relief to a plan only. *Id.*; *Varity*, 516 U.S. at 495.

> this one, by a plan participant against a plan *fiduciary* under section 502(a)(2), must be pleaded derivatively or as a class action.

Waldron v. Dugan, 2007 WL 4365358, *6 (N.D. Ill. Dec. 13, 2007) (emphasis in original). Other courts hold likewise. *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" such that 502(a)(2) "does not require them to take steps to represent the interests of absent plan participants"); *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, [*Thornton*] disagrees with this mandatory approach, reasoning that § 502(a) specifically authorizes individual suits against plan fiduciaries.") (citation omitted).

The concerns compelling special procedures articulated in *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), aren't even 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). As in *Blankenship*, the *Coan* settlement problem isn't an issue 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 *Coan* concern isn't an issue because the Plan exists and can distribute any recovery to participants. The third concern isn't an issue because any preclusive effect may be determined in later suits, in accordance with the preclusion doctrines themselves. *Blankenship*, 695 F. Supp. 2d at 973-74; *Huizinga*, 2013 WL 4511291, *8.

Plaintiff also *met Coan*'s standards. While the Second Circuit declined "to delineate minimum procedural safeguards that section 502(a)(2) requires in all cases," it did say that, to proceed on behalf of a plan or other participants, a plaintiff-participant must take some "steps to permit the court to safeguard the interests of others or the court's proceedings." *Coan*, 457 F.3d at 261-62. Plaintiff took such steps: (1) she moved for class certification (Dkt. 54-55); (2) vigorously re-argued for class 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), and as endorsed in *Fish v. GreatBanc Tr. Co.*, 667 F. Supp. 2d 949 (N.D. Ill. 2009), to address due process concerns (Dkt. 166 at 21-22; Dkt. 154 at 1-2 n.2). In contrast, the *Coan* district court noted: "it is undisputed that in the three years since this case was filed" plaintiff took no "antecedent steps required for a plaintiff to proceed in a representative capacity." *Coan v. Kaufman*, 333 F. Supp. 2d 14, 24 (D. Conn. 2004). Particularly, "she has never moved for class certification." *Id.* Plaintiff's actions likewise distinguish this lawsuit from *Ramos v. Banner Health*, 2019 WL 1777524 (D. Colo. Apr. 23, 2019).

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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