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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 MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff Jackie Lysengen ("Plaintiff") moves for summary judgment on her three Count I claims against Defendant Argent Trust Company ("Argent") for causing the Morton Buildings, Inc. Leveraged Employee Stock Ownership Plan (the "Plan") to engage in transactions prohibited by Section 406(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1106(a). Plaintiff seeks a summary judgment that she has proved each element of the following claims:

1) Argent's authorization of the Plan's purchase of Morton Buildings, Inc. ("Morton") stock from parties in interest in the May 8, 2017 ESOP Transaction was prohibited by ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A);
2) Argent's authorization of the Plan's loans from Morton and Henry A. Getz in the ESOP Transaction was prohibited by ERISA § 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B); and
3) Argent's authorization of the transfer of assets of the Plan to party in interest selling shareholders as payment for Morton stock in the ESOP Transaction was prohibited by ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

There are no genuine disputes of material fact on any elements of these claims. Argent admits it was the Plan's Trustee; it contractually assumed fiduciary responsibilities in determining the prudence of the ESOP Transaction, whether the price the Plan paid for the stock was "adequate consideration" as defined in ERISA, and whether the Transaction was fair from a financial viewpoint to the Plan and its participants; and that it approved the Transaction. Argent admits the Plan paid the selling shareholders for the stock and that Morton and the "former shareholder" (Henry A. Getz) provided the Plan loans to do so. Argent admits that persons with whom the Plan transacted had certain statuses, which as a matter of law made them parties in

interest to the Plan. Other defendant admissions and indisputable documents further prove the material facts, including that Henry A. Getz, Virginia Miller, and Getz Family Limited Partnership ("Getz FLP") were parties in interest as 10% or more shareholders; Edward C. Miller ("Miller") was a party in interest as a Morton director and officer; and Morton was a party in interest as an employer whose employees were covered by the Plan, and as a fiduciary of the Plan in its roles as Plan Administrator, Named Fiduciary, and appointer of fiduciaries. The undisputed material facts prove all the elements of the three § 406(a) claims on which Plaintiff seeks summary judgment.

Plaintiff also moves for summary judgment on available remedies. Specifically, Plaintiff seeks entry of a judgment that she is entitled to pursue remedies for the entire plan as a matter of law, as expressly authorized by the plain language of the statute and numerous decisions. And Plaintiff moves for summary judgment on the statute of limitations/repose and laches affirmative defense, and the lack of intent to benefit a party in interest in violation of § 406(a)(1)(D) affirmative defense, which are asserted in Defendants' answers to the First Amended Complaint ("Complaint" or "FAC") (Dkt. 57).

Plaintiff moves for partial summary judgment to narrow the issues presented at trial. The Count I § 406(a) claims are Plaintiff's primary claims, and trial will thus focus primarily on the ERISA § 408 (29 U.S.C. § 1108) affirmative defenses, on which Argent has the burden of proof. Should the Court grant this motion, Plaintiff's burden of proof at trial will be limited to the Count I § 406(b) prohibited transaction claims; the Count II ERISA § 404(a) (29 U.S.C. § 1104(a)) breach of fiduciary duty claims; the Count III claim alleging Argent is liable for reimbursement of indemnification payments provided in this lawsuit by Morton, which the Plan owns, under ERISA §§ 410(a) and 404(a) (29 U.S.C. §§ 1110(a), 1104(a)); and the "derivative"

claims under ERISA § 502(a)(3) (29 U.S.C. § 1132(a)(3)) against the Defendant Shareholders for knowingly participating in the prohibited stock transaction. Partial summary judgment is an appropriate procedure for the Court to narrow the scope of trial. For these reasons and those set forth below, the Court should grant Plaintiff's motion for partial summary judgment.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Morton adopted the Morton Buildings, Inc. Leveraged Employee Stock Ownership Plan document effective January 1, 2017 (the "Plan Document"). Declaration of Patrick Muench ("Muench Decl.") ¶ 5, Ex. 1 (Plan Document at p.1 preamble & § 1.2); Argent FAC Answer (Dkt. 58) ¶¶ 5, 30.

2. The Plan Document provides: "Except to the extent the Company otherwise designates pursuant to the provisions of Section 10.4 or Section 10.5, the Company shall be the Plan Administrator and the named fiduciary as defined in Section 402(a)(1) of ERISA and shall have authority to control and manage the operation and administration of the Plan." Muench Decl. ¶ 5, Ex. 1 (Plan Document § 10.1).

3. Morton is and was from the inception of the Plan the sponsor of the Plan, and its employees are eligible to participate in the Plan. Argent FAC Answer (Dkt. 58) ¶¶ 35, 36; Muench Decl. ¶ 6, Ex. 2 (2017 Form 5500 Annual Return/Report of Employee Benefit Plan for the Plan submitted to the U.S. Department of Labor at Part II, Line 2a); Muench Decl. ¶ 5, Ex. 1 (Plan Document at p.1 preamble & §§ 1.2, 3.1, & First Amendment § 3.1).

4. Morton was the Plan Administrator of the Plan in 2017. Muench Decl. ¶ 6, Ex. 2 (2017 Form 5500 Annual Return/Report of Employee Benefit Plan for the Plan submitted to the U.S. Department of Labor at Part II, Line 3a); Muench Decl. ¶ 5, Ex. 1 (Plan Document § 10.1).

5. Morton did not delegate its duties as Plan Administrator to a benefit plan committee. Argent FAC Answer (Dkt. 58) ⁋ 42; Miller FAC Answer (Dkt. 59) ⁋ 42; Getz FLP FAC Answer (Dkt. 126) ⁋ 42; Estate of Virginia Miller ("Miller Estate") FAC Answer (Dkt. 127) ⁋ 42; Estate of Henry A. Getz ("Getz Estate") FAC Answer (Dkt. 128) ⁋ 42.

6. The Plan purchased Morton common stock in the May 8, 2017 ESOP Transaction. Argent FAC Answer (Dkt. 58) ⁋⁋ 5, 46; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement); Muench Decl. ¶ 8, Ex. 4 (Deposition Transcript of Stephen Martin at 122:17–123:5).

7. The Plan paid its assets consisting of $147,263,648 for 1,956,992 shares of Morton stock at $75.25 per share, and the Plan paid $523,229 for 48,670 shares of Morton stock at $10.75 per share. Argent FAC Answer (Dkt. 58) ⁋⁋ 5, 46; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008732–ML00008733); Muench Decl. ⁋ 9, Ex. 5 (Stock Issuance Agreement – ML00001485–ML00001507).

8. The Purchase Agreement, the May 8, 2017 contract under which the Plan purchased Morton stock from certain selling shareholders in the ESOP Transaction, is signed by Argent as Trustee of the Plan's trust. Muench Decl. ⁋ 7; Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008792).

9. Morton sold Morton shares to the Plan in the ESOP Transaction. Muench Decl. ⁋ 9, Ex. 5 (Stock Issuance Agreement – ML00001485–ML00001507); Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at § 2.2(b)).

10. The Plan purchased the stock with loans from Morton and shareholder Henry A. Getz. The Plan's purchase of Morton shares was financed in part by a term loan agreement that the Plan's Trust entered into with Henry A. Getz for $14,986,187 at an interest rate of 5.00%,

payable in semiannual payments with final payment due in 2046. The Plan's purchase of Morton shares was also financed by loans entered into with Morton for $132,277,461.32 and $523,229.20 at interest rates of 2.75% payable in annual payments with final payment due in 2046. Getz Estate FAC Answer (Dkt. 128) ⁋⁋ 5, 48; Muench Decl. ⁋ 10, Ex. 6 (Deposition Exhibit 61 – ESOP Note); Muench Decl. ¶ 11, Ex. 7 (Deposition Transcript of Jan Rouse at 52:5–54:3); Argent FAC Answer (Dkt. 58) ⁋⁋ 5, 48; Muench Decl. ⁋ 12, Ex. 8 (ESOP Notes and ESOP Loan and Pledge Agreements attached to ARGENT_LYSENGEN_00044792).

11. Henry A. Getz sold Morton shares in the ESOP Transaction. Getz Estate FAC Answer (Dkt. 128) ⁋⁋ 8, 22; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

12. Henry A. Getz was a 10% or more shareholder of Morton at the time of the ESOP Transaction. Getz Estate FAC Answer (Dkt. 128) ¶ 43; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

13. In the ESOP Transaction, the Plan purchased Morton stock from Edward C. Miller, who was a Director and officer of Morton. Argent FAC Answer (Dkt. 58) ⁋ 20; Miller FAC Answer (Dkt. 59) ⁋⁋ 8, 20, 43; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

14. Virginia Miller sold shares in the ESOP Transaction. Miller Estate FAC Answer (Dkt. 127) ⁋⁋ 8, 23; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

15. Virginia Miller was a 10% or more shareholder of Morton at the time of the ESOP Transaction. Miller Estate Answer (Dkt. 127) ⁋ 43; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

16. Getz FLP sold shares in the ESOP Transaction. Getz FLP FAC Answer (Dkt. 126) ⁋ 21; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

17. Getz FLP was a 10% or more shareholder of Morton at the time of the ESOP Transaction. Getz FLP FAC Answer (Dkt. 126) ⁋ 21; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008831–ML00008836).

18. Argent and Morton entered into an engagement agreement dated April 25, 2017 and signed by Edward Miller on behalf of Morton on May 4, 2017 ("Transaction Engagement Letter"), under which Morton appointed Argent as "discretionary trustee" for the Plan in the ESOP Transaction and Argent "assume[d] the fiduciary responsibility for determining, in consultation with its advisors, . . . (b) with respect to [the Plan], the prudence of entering into the Proposed Transaction and whether the price proposed to be paid for the stock in the Proposed Transaction is for 'adequate consideration' (as defined in the Employee Retirement Income Security Act of 1974, 'ERISA'), and whether the Proposed Transaction is fair from a financial viewpoint to [the Plan] and its participants" and provided that Argent had the authority to "agree to the terms of the Proposed Transaction and purchase the stock." Muench Decl. ⁋ 13, Ex. 9 (Deposition Exhibit 84 – Transaction Engagement Letter at 1-2 & signature pages).

19. Argent admits that it served as Trustee in the ESOP Transaction and that under the terms of its engagement it agreed to assume the fiduciary responsibility for determining, in consultation with its advisors, the prudence of entering into the ESOP Transaction, whether the price proposed to be paid for the stock in the ESOP Transaction is for 'adequate consideration' (as defined in ERISA), and whether the ESOP Transaction is fair from a financial viewpoint to

the ESOP and its participants, including whether it is fair relative to other parties in the ESOP Transaction. Argent FAC Answer (Dkt. 58) ⁋⁋ 6, 16, 44, 45.

20. Argent and Morton entered into an engagement agreement dated April 25, 2017 and signed by Argent as trustee of the ESOP on April 27, 2017 ("Ongoing Engagement Letter"), in which Argent agreed to serve as "discretionary trustee" of the Plan and "In connection with the appointment of Argent as discretionary trustee, Argent agrees to perform the fiduciary and other duties allocated to the trustee under the terms of the Plan Documents and this letter agreement." Muench Decl. ⁋ 14, Ex. 10 (Deposition Exhibit 83 – Ongoing Engagement Letter at 1).

21. Argent and Morton entered into a trust agreement titled the Morton Buildings, Inc. Leveraged Employee Stock Ownership Trust (the "Trust Agreement") dated May 8, 2017 and effective as of January 1, 2017—which forms a part of the Plan with the Plan Document—under which Morton appointed Argent as Trustee for the Plan, consistent with the Plan Document, which likewise identifies Argent as Trustee. Muench Decl. ⁋ 15, Ex. 11 (Deposition Exhibit 37 - Trust Agreement at 1); Muench Decl. ¶ 16, Ex. 12 (Deposition Transcript of Brian Hector at 35:3–18); Declaration of Patrick Muench ("Muench Decl.") ⁋ 5, Ex. 1 (Plan Document at p.1 preamble & §§ 1.1, 1.3(aa), (bb)).

22. Argent's powers under the Trust Agreement included: "to contract or otherwise enter into transactions between the Trustee and the Company or any Company shareholder or any other entity or person with respect to the purchase or sale of Company Stock." Muench Decl. ⁋ 15, Ex. 11 (Deposition Exhibit 37 - Trust Agreement at § 2.3(e)).

23. Argent's powers under the Trust Agreement included: "to borrow such funds from time to time as the Trustee considers desirable or necessary and in the best interest of the

Trust, including to finance the purchase of Company Stock, and to enter into such agreements as the Trustee determines necessary or appropriate to accomplish such actions." Muench Decl. ⁋ 15, Ex. 11 (Deposition Exhibit 37 - Trust Agreement at § 2.3(r)).

24. Under the Trust Agreement, Argent was required to discharge its duties thereunder solely in the interest of Participants and other persons entitled to benefits under the Plan, and in accordance with the terms of the "Fiduciary Duties" rules at ERISA § 404(a)(1)(A), (B), and (D), 29 U.S.C. § 1104(a)(1)(A), (B), (D), which are stated in the Trust Agreement. Muench Decl. ⁋ 15, Ex. 11 (Deposition Exhibit 37 - Trust Agreement at § 2.5).

25. Argent approved the ESOP Transaction, as it admits, specifically signing the stock purchase and loan contracts in the Transaction, including: it signed the Purchase Agreement dated as of May 8, 2017 as trustee of the Plan; it signed the Stock Issuance Agreement dated May 8, 2017 as trustee of the Plan; it signed the ESOP Loan and Pledge Agreement dated May 8, 2017 between Morton and the Trust as trustee of the Plan; it signed the ESOP Loan and Pledge Agreement dated May 8, 2017 between Morton and Henry Getz and the Trust as trustee of the Plan; it signed the Redemption Agreement dated May 8, 2017 between Morton, Certain Shareholders of Morton, Edward Miller, Jan Rouse, and the Trust, as trustee of the Plan; and it signed Notes in which the Trust promised to pay Morton $132,277,461.32 and $523,229.22 and promised to pay Henry Getz $4,986,186.68. Argent FAC Answer (Dkt. 58) ⁋ 74; Muench Decl. ⁋ 7, Ex. 3 (Deposition Exhibit 60 – Purchase Agreement at ML00008731–32, ML00008792); Muench Decl. ⁋ 9, Ex. 5 (Stock Issuance Agreement at ML00001485, 1494); Muench ¶ 12, Ex. 8 (ESOP Loan and Pledge Agreement at ARGENT_LYSENGEN_00045184–185, ARGENT_LYSENGEN_00045195); Muench Decl. ¶ 17, Ex. 13 (ESOP Loan and Pledge Agreement at ARGENT_LYSENGEN_00024051–24052, ARGENT_LYSENGEN_00024063);

Muench Decl. ¶ 18, Ex. 14 (Redemption Agreement at ARGENT_LYSENGEN_00022738–22739, ARGENT_LYSENGEN_00022797); Muench Decl. ¶ 12, Ex. 8 (ESOP Note at ARGENT_LYSENGEN_00045145, ARGENT_LYSENGEN_00045148, ARGENT_LYSENGEN_00045161); Muench Decl. ¶ 10, Ex. 6 (ESOP Note at ML00009131, ML00009135).

26. Plaintiff filed her original complaint in this lawsuit on April 30, 2020. Complaint (initial complaint) (Dkt. 1).

III. ARGUMENT

A. Summary Judgment Standard.

A plaintiff may move for summary judgment on a single "claim or defense," or even a "part of each claim or defense." Fed. R. Civ. P. 56(a). A court must grant the motion if the plaintiff "shows that there is no genuine dispute as to any material fact and [she] is entitled to judgment as a matter of law." *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–323 (1986). To oppose this motion, a defendant may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts based upon materials in the record showing there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–587 (1986) (further explaining, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts"); Fed. R. Civ. P. 56(c). A defendant's showing must be "significantly probative" in order to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–250 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

The usefulness of a partial summary judgment to narrow the issues for trial is well established, as the Seventh Circuit explains:

> The Federal Rules of Civil Procedure explicitly allow for "[p]artial [s]ummary [j]udgment" and require parties to "identif[y] each claim or defense—*or the part of each claim or defense*—on which summary judgment is sought." FED. R. CIV. P. 56(a) (emphasis added). At the summary-judgment stage, the court can properly narrow the individual *factual* issues for trial by identifying the material disputes of fact that continue to exist.

BBL, Inc. v. City of Angola, 809 F.3d 317, 325 (7th Cir. 2015) (emphasis in original); *see also Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund*, 778 F.3d 593, 606 (7th Cir. 2015) ("A request for partial summary judgment can serve a useful brush-clearing function even if it does not obviate the need for a trial, and it may also facilitate the resolution of the remainder of the case through settlement.") (citation omitted); *Teamsters & Emp'rs Welfare Tr. of Ill. v. Gwillim Trucking, Inc.*, No. 14-03386, 2017 WL 630744, at *3–4 (C.D. Ill. Feb. 14, 2017) (citing *BBL* to grant partial summary judgment). Courts commonly grant partial summary judgment in private company ESOP cases like this one. *See Walsh v. Reliance Tr. Co.*, No. CV-19-03178, 2023 WL 1966921, at *16–18 (D. Ariz. Feb. 13, 2023) (granting in part Secretary's motion for partial summary judgment in ESOP case); *Brundle v. Wilmington Trust, N.A.*, No. 1:15-cv-1494, 2016 WL 6542718, at *1, *12, *16 (E.D. Va. Nov. 3, 2016) (granting in part plaintiff's motion for partial summary judgment in ESOP case); *Neil v. Zell*, 753 F. Supp. 2d 724, 726, 734 (N.D. Ill. 2010) (granting plaintiffs' motion for partial summary judgment in ESOP case).

B. ERISA's Statutory Scheme and Standards.

Plaintiff moves for summary judgment on violations of ERISA § 406(a). Congress enacted § 406 "to bar categorically a transaction that was likely to injure the pension plan." *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993) (explaining that in enacting 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") (citing S.Rep. No. 93–383, pp. 95–96, U.S.Code Cong. & Admin.News 1974, p. 4639 (1973)); *see also Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241–242 (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 v. GreatBanc Trust Co.*, 835 F.3d 670, 674 (7th Cir. 2016) ("ERISA identifies a number of transactions that are flatly prohibited between a plan and a party in interest, or a plan and a fiduciary."); *Donovan v. Cunningham*, 716 F.2d 1455, 1464–1465 (5th Cir. 1983) ("The object of Section 406 was to make illegal per se the types of transactions that experience had shown to entail a high potential for abuse."). Courts strictly enforce ERISA's prohibited transaction rules to protect plan participants. *See Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984) ("the *per se* rules of section 406 make much simpler the enforcement of ERISA's more general fiduciary obligations"); *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 439 (6th Cir. 2002) ("in creating § 406(a), Congress intended to create a category of per se violations"); *McMaken v. GreatBanc Tr. Co.*, No. 17-cv-04983, 2019 WL 1468157, at *4 (N.D. Ill. Apr. 3, 2019) ("ERISA § 406 … creates *per se* liability for 'transactions in which the potential for misuse of plan assets is particularly great'"); *Neil*, 753 F. Supp. 2d at 731 ("§ 406 defines *per se* rules").

The Seventh Circuit construes ERISA broadly, recognizing Congress's intent to protect plan participants. *See Leigh*, 727 F.2d at 126 (reading § 406 "broadly in light of Congress' concern with the welfare of plan beneficiaries"; "The entire statutory scheme of ERISA

demonstrates Congress' overriding concern with the protection of plan beneficiaries, and we would be reluctant to construe narrowly any protective provisions of the Act."); *cf. Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 n.8 (1985) (in enacting ERISA, "the crucible of congressional concern was misuse and mismanagement of plan assets by plan" fiduciaries).

Section 406(a) provides, in relevant part, that:

> 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—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest; [or]
>
> (D) 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).

ERISA defines a party in interest, in relevant part, as:

> The term "party in interest" means, as to an employee benefit plan—
>
> . . .
>
> **(C)** an employer any of whose employees are covered by such plan;
>
> . . .
>
> **(H)** an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan.

ERISA § 3(14), 29 U.S.C. § 1002(14).

A person may have fiduciary status under ERISA as a "named fiduciary" and/or as a "functional fiduciary." ERISA § 402(a) provides that fiduciaries may be named in a written instrument governing a plan or by a sponsoring employer or employee organization pursuant to a procedure specified in a plan. 29 U.S.C. § 1102(a). Likewise, ERISA provides at Section 3(21)(A) the definition of a functional fiduciary: "a person is a fiduciary with respect to a plan to

the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

ERISA § 403(a) requires plan assets to be held by trustees who have "have exclusive authority and discretion to manage and control the assets of the plan," subject to certain exceptions. 29 U.S.C. § 1103(a). "A plan trustee, therefore, will, by definition [at ERISA § 3(21)(A)], always be a 'fiduciary' under ERISA as result of its authority or control over plan assets." U.S. Dep't of Labor, Field Assistance Bulletin 2004-03, 2004 WL 2979777 (EBSA) (Dec. 17, 2004); *see also* 29 C.F.R. § 2509.75–8 (D–3).

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

To prevail on her Section 406(a)(1)(A), (B), and (D) claims, Plaintiff must prove that: (1) the Plan used its monetary assets to purchase stock and was lent money or extended credit to do so in the ESOP Transaction; (2) Argent was a fiduciary with authority to cause the Plan to engage in the ESOP Transaction; (3) persons with whom the Plan transacted were parties in interest; and (4) Argent caused the Plan to engage in the Transaction. *See* 29 U.S.C. § 1106(a)(1)(A), (B), (D). The facts proving these elements have been admitted by Argent and proved by other defendants' admissions and indisputable documents; there is no genuine issue of material fact requiring trial. Plaintiff therefore has proven violations of ERISA's prohibited transaction rule. *See Leigh*, 727 F.2d at 123 ("the *per se* rules of section 406 make much simpler

the enforcement of ERISA's more general fiduciary obligations"). The Court should grant summary judgment on Plaintiff's prima facie case under ERISA § 406(a)(1)(A), (B), and (D).[1]

1. Argent was a fiduciary to the Plan with authority over its transactions.

Argent has admitted facts showing that it was a Plan fiduciary, both because it had and exercised discretionary authority, and because it was named the Plan's Trustee and contractually agreed to assume fiduciary responsibilities in that role. Plaintiff's Undisputed Material Facts ("UMF") ⁋⁋ 19, 25. As explained in Section III.B, *supra*, a person may hold ERISA fiduciary status as a functional fiduciary and/or as a named fiduciary to a plan. *See* ERISA §§ 3(21)(A), 402(a); *see also Bruister*, 823 F.3d at 259. Argent was both a functional fiduciary and a named fiduciary to the Plan, and its fiduciary authority specifically covered approval of the ESOP Transaction at issue.

Argent had authority and discretion with respect to the Plan's investment in Morton stock and taking of loans from Morton and Henry A. Getz, pursuant to the Transaction Engagement Letter and the Trust Document. UMF ⁋⁋ 18, 19, 21–24. Argent admitted it had the responsibility for determining whether to enter into the ESOP Transaction on behalf of the Plan and that it in fact approved the Transaction. UMF ⁋⁋ 19, 25.

In addition, at the time of the ESOP Transaction on May 8, 2017, Argent was Trustee for the Plan. UMF ⁋⁋ 18–25. For this reason as well, Argent held a fiduciary position at the time of

[1] Plaintiff does not move for summary judgment on the ERISA § 408, 29 U.S.C. § 1108, affirmative defenses to prohibited transaction claims, on which Argent has the burden of proof. This Circuit and others uniformly hold that ERISA's exemptions to the prohibited transaction rules are affirmative defenses for which the defendant has the burden of proof. *See Allen*, 835 F.3d at 676–677; *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 685 (7th Cir. 2014); *see also Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 770 (4th Cir. 2019); *Perez v. Bruister*, 823 F.3d 250, 262 (5th Cir. 2016); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 601–602 (8th Cir. 2009); *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 619 (2d Cir. 2006); *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996). The "adequate consideration" affirmative defense under ERISA § 408(e) will be the main focus of trial.

the ESOP Transaction. *See id.* As the U.S. Department of Labor has explained, a trustee of a plan "will, by definition, always be a 'fiduciary' under ERISA as result of its authority or control over plan assets." U.S. Dep't of Labor, Field Assistance Bulletin 2004-03, 2004 WL 2979777 (EBSA) (Dec. 17, 2004); *see also* 29 C.F.R. § 2509.75–8 (D–3) ("a trustee of a plan must, b[y] the very nature of his position, have 'discretionary authority or discretionary responsibility in the administration' of the plan within the meaning of section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries."); 29 U.S.C. § 1103(a); *Makar v. Health Care Corp.*, 872 F.2d 80, 83 (4th Cir. 1989) ("ERISA also imposes broad fiduciary responsibilities on plan trustees and extensively regulates their conduct."). Argent was identified as the Trustee, with fiduciary functions, in the engagement letters, the Trust Agreement, and the Plan Document. UMF ⁋⁋ 18–24. The Trust Agreement forms part of the Plan and is an instrument governing the Plan. UMF ⁋ 21; *see also Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333, 1338–1339 (7th Cir. 1995) (trust agreement is a document/instrument governing the plan). Having been named as the fiduciary Trustee, Argent is a "named fiduciary" under ERISA § 402(a) and necessarily a functional fiduciary under ERISA § 3(21)(A).

2. The selling shareholders and lenders included parties in interest.

There is no dispute that persons who sold Morton stock to the Plan in the ESOP Transaction included parties in interest on account of their statuses as 10 percent (10%) or more shareholders, directors, or officers, to wit, Henry A. Getz, Virginia Miller, Getz FLP, and Edward C. Miller. UMF ⁋⁋ 11–17. Henry A. Getz was the "former shareholder" who lent money to the Plan in the Transaction. UMF ⁋ 10. The Defendant Shareholders, or their decedents in the case of the Estates, thus fall within the ERISA § 3(14)(H) definition of a party in interest.

Morton sold stock to the Plan and lent it money in the Transaction. UMF ⁋⁋ 9, 10. There is no dispute that Morton was an employer whose employees were covered by the Plan and was the Plan Sponsor that established the Plan. UMF ⁋⁋ 1, 3. Nor is there a genuine dispute that Morton was a Plan fiduciary, as it appointed Argent as Trustee (appointment is a fiduciary function), and it was the Plan's Named Fiduciary and Administrator. UMF ⁋⁋ 2, 4, 5, 18, 20, 21; *see also Leigh*, 727 F.2d at 133 ("It is clear that Engle and Libco are fiduciaries to the extent that they performed fiduciary functions in selecting and retaining plan administrators."); 29 C.F.R. § 2509.75–8 (D–4) (persons "responsible for the selection and retention of plan fiduciaries" are fiduciaries); 29 C.F.R. § 2509.75–8 (D–3) (plan administrators are fiduciaries). Morton thus falls within the ERISA § 3(14)(A) and (C) definitions of party in interest. *See also Chao*, 285 F.3d at 424 ("A party in interest is broadly defined to include any fiduciary, a person providing services to the plan, an employer whose employees are covered by the plan, and certain shareholders and relatives.").

3. Argent caused the transactions between the Plan and the parties in interest.

Argent has admitted that it served as the Plan's Trustee in the ESOP Transaction; that it approved the ESOP Transaction; and that it contractually assumed fiduciary responsibilities in determining the prudence of entering into the Transaction, whether the price the Plan paid for the stock was for "adequate consideration" as defined in ERISA, and whether the Transaction was fair from a financial viewpoint to the Plan and its participants. UMF ⁋ 19, 25. The Purchase Agreement and other ESOP Transaction contracts are signed by Argent as Trustee of the Plan's trust. UMF ⁋⁋ 8, 25. Argent approved the Plan's purchase of 1,956,992 shares of Morton stock with the Plan's assets of $147,263,648, and 48,670 shares of Morton stock with the Plan's assets of $523,229. UMF ⁋⁋ 6, 7, 8, 25. In approving the ESOP Transaction, Argent further approved the Plan's loans from Morton and Henry A. Getz. UMF ⁋⁋ 10, 23, 25.

Plaintiff therefore meets the elements of her Section 406(a) claims.

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

1. Claims under ERISA § 502(a)(2) proceed "only in a representative capacity on behalf of the plan, not in [the plaintiff's] own behalf." *Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 481–482 (7th Cir. 2010). Section 502(a)(2) authorizes plan participants to sue for the relief provided in ERISA § 409. 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, says that breaching fiduciaries "shall be personally liable ***to make good to such plan any losses to the plan*** resulting from each such breach, and to ***restore to such plan any profits*** of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. § 1109(a) (emphasis added).

The plain language of the statute thus authorizes a plan participant to sue a fiduciary to make good to the plan "any" losses suffered by the plan. *Id.*; *see also 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."); *Kenseth*, 610 F.3d at 481–82; *Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) ("we hold today … that participants in defined contribution plans may use § 502(a)(2), and thus § 409(a), to obtain relief if losses to an account are attributable to a pension plan fiduciary's breach of duty owed to the plan"); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 261 (2008) (Thomas, J., concurring) ("On their face, §§ 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach."); Br. of U.S. Sec'y of Labor at 7, *Cedeno v. Argent Tr. Co.*, No. 21-2891 (2d Cir. June 10, 2022) (A person suing under § 1132(a)(2) "does so on the plan's behalf and may recover all losses to the plan (among other forms of redress) stemming from the fiduciary breach.").

The statutory text also expressly authorizes participants to seek equitable relief that necessarily affects the plan as a whole. Section 409(a) says breaching fiduciaries "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). Other equitable relief could include, for example, an injunction or rescission of the unlawful transaction. *Cf. Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613 (7th Cir. 2021) (invalidating arbitration clause that precluded remedies impacting other plan participants); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090 (10th Cir. 2023) (same). A court can no more deprive Plaintiff of the remedies authored by Congress than Plaintiff can prospectively waive them.

In sum, claims under § 502(a)(2) are necessarily brought in a representative capacity on behalf of the plan for relief to the plan under § 409. And § 409 speaks in mandatory and categorical terms: the fiduciary "*shall*" restore "*any*" losses and disgorge "*any*" profits, alongside equitable relief like fiduciary removal. To conclude otherwise would be to rewrite the statutory text Congress enacted.

The law is equally clear that class certification is not required to obtain relief for the plan under § 409. *See Coan v. Kaufman*, 457 F.3d 250, 259–260 (2d Cir. 2006) (explaining that Congress considered and rejected making class actions mandatory under §§ 502(a)(2) and 409). Not surprisingly, then, individual participants have recovered a plan's entire losses under ERISA § 409 without class certification:

- In *Brundle*, a single plaintiff obtained a $29.7 million judgment on behalf of an Employee Stock Ownership Plan (ESOP) against the ESOP trustee following trial, and the Fourth Circuit affirmed the judgment. 919 F.3d at 769. *Brundle* was originally filed as

a class action but proceeded as an individual representative action after the district court denied the motion for class certification. *Id.* at 772 n.4.[2]

• In *Roth v. Sawyer-Cleator Lumber Co.*, the Eighth Circuit held that two ESOP participants were entitled to recover the ESOP's losses after the company's bankruptcy rendered the ESOP's company stock worthless because "the decline in value of the Company stock held by the Plan qualifies as a loss to the Plan under ERISA § 409(a)." 61 F.3d 599, 601, 605 (8th Cir. 1995).

• In *Johnson v. Couturier*, several ESOP participants filed suit against the ESOP's fiduciaries under ERISA, seeking, *inter alia*, to recover "all ESOP losses" and "disgorgement of Defendants' wrongful profit." 572 F.3d 1067, 1074 (9th Cir. 2009). The Ninth Circuit upheld the district court's preliminary injunction barring the ESOP sponsor from advancing the defendants' defense costs to protect the benefits of all ESOP participants. *Id*. at 1082.

• In *Horn v. McQueen*, several ESOP participants asserted ERISA fiduciary claims against ESOP trustees alleging that the defendants had caused losses of over $14 million to the ESOP. 215 F. Supp. 2d 867, 869 (W.D. Ky. 2002). Following a trial in which the court found the defendants liable for breach of fiduciary duty in their roles as trustees of

[2] *Cf. Ortiz v. American Airlines, Inc.*, 5 F.4th 622, 627 & n.7 (5th Cir. 2021) (where district court denied class certification but "permitted Plaintiffs to proceed as representatives of the Plan pursuant to 29 U.S.C. § 1132," Fifth Circuit explained: "A § 1132(a)(2) plaintiff acts in a representative capacity on behalf of the plan as a whole, because § 1109 is designed to protect the entire plan.") (cleaned up); *In re AEP ERISA Litig.*, No. C2–03–67, 2009 WL 3854943, at *1 (S.D. Ohio Nov. 17, 2009) ("Because [Plaintiff] has been proceeding in a representative capacity from the time he filed a class action lawsuit against Defendant … , and because there is no requirement that a plaintiff acting in a representative capacity meet the procedural requirements of Federal Rule of Civil Procedure 23 in order to bring an ERISA § 502(a)(2) claim, the Court finds that [Plaintiff] is entitled to maintain his claim as an individual acting in a representative capacity, despite the denial of class certification.").

the ESOP, the court awarded "the plaintiffs, on behalf of the plan" over $8 million "for the loss to the plan." *Horn v. McQueen*, 353 F. Supp. 2d 785, 790, 806 (W.D. Ky. 2004). Courts, in short, have awarded individual plaintiffs the plan-wide remedy authorized by ERISA § 409(a) because the statute authorizes plan participants to bring a representative action on behalf of the plan for "any losses to the plan," as Plaintiff does here. *See* Complaint at caption, preamble, ⁋⁋ 3, 9, 10, 68, 80–82, 86, 87, 90, 93, 94, Prayer for Relief ⁋ D.

For these reasons, the Court should render judgment that Plaintiff may recover any losses incurred by the Plan, any profits earned by Defendants, as well as equitable relief that may have a plan-wide effect.

2. Separate from the relief authorized by the statute (which the Court may not permissibly truncate) are questions about procedures to protect non-litigants, *i.e.*, the participants in the plan that are not involved in the lawsuit. Because a single plaintiff represents the plan, some courts have held that procedures should be adopted to ensure the plaintiff adequately represents the interests of the plan and other plan participants. *See Coan*, 457 F.3d at 259–60. It is settled that such procedures need not rise to formal class certification under Fed. R. Civ. P. 23 (Congress rejected a proposal that would have required class actions for § 502(a)(2) claims), and no minimum procedural safeguards for pursuing a § 502(a)(2) claim have been established. *Id.* But some courts held a participant cannot "bring suit on behalf of an employee benefit plan without observing *any* procedural safeguards for other interested parties." *Id.* at 260.

The Seventh Circuit has not adopted such requirements, and many district courts have likewise declined to do so. As one court explained, even "legitimate policy concerns" that may motivate a desire to impose such safeguards "are insufficient to overcome the fact that neither ERISA itself, nor the Federal Rules of Civil Procedure, require ERISA participants to bring

section 502(a)(2) claims" subject to procedural rules not found in the statute. *Waldron v. Dugan*, No. 07 C 286, 2007 WL 4365358, at *6 (N.D. Ill. Dec. 13, 2007). Rather, because ERISA is a "comprehensive and reticulated statute," "courts should be very reluctant to tinker with its plain language." *Id.* Thus, § 502(a)(2) and the Federal Rules of Civil Procedure do not require plaintiff-participants to proceed on a class basis or derivatively; there is no requirement of "using special procedures." *Id.*; *see also Jesse v. Nagel Lumber Co. Inc.*, No. 8-CV-400, 2009 WL 2176649, at *3 (W.D. Wis. July 21, 2009) (same).

Other courts, while acknowledging that neither class certification nor derivative actions are required for § 502(a)(2) claims, have adopted or endorsed some of the procedural protections of Fed. R. Civ. P. 23.1. *See Koerner v. Copenhaver*, No. 12-1091, 2014 WL 5544051, at *3 (C.D. Ill. Nov. 3, 2014); *Fish v. GreatBanc Tr. Co.*, 667 F. Supp. 2d 949, 951-52 (N.D. Ill. 2009). To be clear, however, *no* decision holds that Rule 23 class certification is required, and such a holding would run afoul of the plain language of the statute and the Seventh Circuit's admonishment to enforce the statute precisely as written.[3]

In sum, no authority requires the Court to impose extra, non-statutorily-prescribed safeguards here. And because Plaintiff plainly seeks relief benefitting the plan as a whole—not just relief that would benefit herself—no such procedures are necessary or warranted. *Cf. Coan*,

[3] The civil enforcement provisions of ERISA are "carefully integrated" to "remedy ERISA violations." *Buckley Dement, Inc. v. Travelers Plan Adm'rs of Ill., Inc.*, 39 F.3d 784, 787 (7th Cir. 1994). The statute's "detailed enforcement scheme" "counsels against" tampering with ERISA's enforcement provisions. *Id.* at 789. Thus, the role of a court is to apply ERISA as precisely as it can "rather than to make adjustments according to a sense of equities in a particular case." *Id.* (citations and quotations omitted). A court cannot "rewrite ERISA." *Bauwens v. Revcon Tech. Grp., Inc.*, 935 F.3d 534, 538 (7th Cir. 2019). And, although several courts have been willing to create ERISA common law doctrines, the Seventh Circuit "has consistently refused" to do so. *Id. See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90–91 (1983) (ERISA is a "comprehensive statute" that "sets various uniform standards, including rules concerning ... fiduciary responsibility, for both pension and welfare plans.").

457 F.3d at 261 (expressing concern that the plaintiff might seek relief that "would disproportionately, or even exclusively, benefit her").

Nonetheless, although the Court may not foreclose the *remedies* the statute expressly authorizes, it could appropriately fashion some *procedures* designed to protect other participants in the Plan. Among other things, the Court can order notice to the participants in the Plan. Such a notice would explain the claims and defenses, the key rulings to date, and trial date. Second, Plaintiff's counsel can establish a website that provides regular updates as well as key documents.[4] Third, if there is a settlement or judgment for Plaintiff, the Court can provide Plan participants the opportunity to comment on a plan of allocation and any attorneys' fees.[5] *Cf. Koerner*, 2014 WL 5544051, *3 ("the similarities between shareholder derivative lawsuits and ERISA lawsuits brought on behalf of the plan convince the Court that various requirements imposed by Rule 23.1, including court approval of any settlement and notice to plan participants, are appropriate here to provide the necessary reassurance that the plaintiffs are proceeding in a representative capacity rather than an individual capacity.").

Safeguards such as these have been deemed adequate in other cases to protect the interests of the plan as a whole, and they would likewise be adequate here should the Court deem them necessary. Plaintiff, however, submits that the details of any such procedural protections should be addressed after the Court rules on summary judgment.

[4] Plaintiff's counsel has a webpage on the Bailey Glasser website doing so: https://www.baileyglasser.com/services-erisa-employee-benefits-and-trust-litigation#Active-Cases. This may be modified, or supplemented with a separate website.

[5] The trial court in *Brundle, supra*, in which Plaintiff's counsel here represented the plaintiff, adopted such notice procedures to allow participants to be heard on the distribution of the judgment amount and attorneys' fees.

E. The Court Should Render Judgment for Plaintiff on Two Affirmative Defenses.

For the reasons set forth below, the Court should grant Plaintiff summary judgment on the following affirmative defenses asserted in Defendants' Answers.[6]

1. Affirmative Defense of Statute of Limitations/Repose, Laches.

ERISA § 413, 29 U.S.C. § 1113, provides two statutes of limitations for breaches of fiduciary duty and prohibited transactions: a six-year statute dating from the breach or violation, and a three-year statute dating from the plaintiff acquiring actual knowledge of the breach or violation. 29 U.S.C. § 1113(1), (2). The complained of transaction occurred on May 8, 2017. UMF ⁋⁋ 6, 8, 25. Plaintiff filed her original complaint on April 30, 2020, within three years of the transaction at issue. UMF ⁋ 26. Therefore, the undisputed material facts demonstrate that Plaintiff's claims are timely under the shortest conceivably applicable limitations period—even if one were to assume that Plaintiff had actual knowledge of the breach or violation. The Court should grant Plaintiff summary judgment on Argent's Second, and Getz FLP's Ninth, Affirmative Defenses.

2. Affirmative Defense of Lack of Intent.

The Defendant Shareholders raise their Second Affirmative Defense—claiming "Courts have held that a prohibited use of plan assets for the benefit of a party in interest as described in ERISA § 406(a)(1)(D) requires a subjective intent to benefit a party in interest"—against the § 406(a)(1)(D) Count I claim. Miller, Miller Estate, Getz Estate & Getz FLP Answers at Second Affirmative Defense. But, as Defendants appear to recognize, in the few courts that recognize a subjective intent requirement, it has been applied only to the subset of "use . . . for the benefit of

[6] Defendants Argent (Dkt. 58) and Getz FLP (Dkt. 126) asserted the statute of limitations/repose and laches affirmative defense in their answers. Defendants Getz FLP (Dkt. 126), Miller (Dkt. 59), Getz Estate (Dkt. 128), and Miller Estate (Dkt. 127) asserted the lack of intent to benefit a party in interest in violation of § 406(a)(1)(D) affirmative defense in their answers.

a party in interest" claims under § 406(a)(1)(D). *See, e.g.*, *Reich v. Compton*, 57 F.3d 270, 278–280 (3d Cir. 1995). Plaintiff is asserting and has proved every element of a "transfer to" § 406(a)(1)(D) claim, which is a different "species" of the cause of action.[7] The Court should therefore grant Plaintiff summary judgment on this defense.

IV. CONCLUSION

The Court should conclusively resolve that Plaintiff has met her ERISA § 406(a) burdens of proof on three Count I claims in order to simplify and streamline the trial. Plaintiff also believes that resolution of these claims will assist the parties in evaluating a possible settlement of the litigation. For the reasons set forth herein, the Court should therefore enter judgment for Plaintiff on her ERISA §§ 406(a)(1)(A), 406(a)(1)(B), and 406(a)(1)(D) claims; grant her summary judgment on the statute of limitations/repose/laches and lack of intent affirmative defenses; and render judgment that plan-wide relief is available on her claims.

Dated: March 17, 2023

Respectfully submitted,

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[7] Further, the courts taking the minority position err by applying a scienter requirement even in "use … for the benefit" claims because it is not in the statutory text and courts should not invent elements for ERISA's carefully-crafted claims. *See Chao*, 285 F.3d at 441 n.12 (subjective intent rejected as against weight of authority and as Congress intended per se violations); *Neil*, 753 F. Supp. 2d at 731 (rejecting "subjective intent" or "scienter requirement on § 406" as "§ 406 defines *per se* rules"); *Becker v. Wells Fargo & Co.*, No. 20-2016, 2021 WL 1909632, at *7 (D. Minn. May 12, 2021) ("[Plaintiff] need not plead subjective intent to plausibly state her claims").

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CERTIFICATION

Plaintiff, by and through her counsel of record Bailey & Glasser, LLP, and for her Certificate of Compliance pursuant to Local Rule 7.1, states as follows:

1. The undersigned hereby affirms that Plaintiff's Motion for Partial Summary Judgment complies with the type volume limitation of Local Rule 7.1(B)(4)(b)(1).

2. Plaintiff's Argument Section in her Motion for Partial Summary Judgment contains 5,269 words and 26,870 characters (with no spaces).

/s/ Patrick Muench
Patrick Muench

CERTIFICATE OF SERVICE

I certify that on March 17, 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 Muench