UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LISA ARNOLD, BRANDI TROUT, and SANDRA GOLDEN-WOODS, on behalf of the Churchill Holdings, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated,	)	**NO. 3:23-cv-00545**
Plaintiffs,	)	
v.	)	
MIGUEL PAREDES, PRUDENT FIDUCIARY SERVICES, LLC, LAWSON H. HARDWICK, III, MATTHEW C. CLARKE, and CECIL O. KEMP, JR.	)	
Defendants.	)	

MEMORANDUM OPINION

Pending before the Court are two motions to dismiss, filed by Lawson H. Hardwick, III ("Hardwick"), Matthew C. Clarke ("Clarke"), and Cecil O. Kemp, Jr. ("Kemp") (collectively, the "Churchill Defendants") and Miguel Paredes ("Paredes") and Prudent Fiduciary Services, LLC ("PFS") (collectively, the "Trustee Defendants").

The Churchill Defendants filed a Motion to Dismiss (Doc. No. 37), to which Plaintiffs responded (Doc. No. 45), and the Churchill Defendants replied (Doc. No. 47). The Trustee Defendants filed a Motion to Dismiss (Doc. No. 40), to which Plaintiffs responded (Doc. No. 46), and the Trustee Defendants replied (Doc. No. 48). Additionally, the Defendants have filed two notices of supplemental authority (Doc. Nos. 56 and 58), and Plaintiffs have responded to both

(Doc. Nos. 57 and 59). Plaintiffs have also filed a notice of supplemental authority. (Doc. No. 61).

The motions are ripe for review. For the reasons that follow, the Court will deny the Churchill Defendants' motion and will grant in part and deny in part the Trustee Defendants' motion.

BACKGROUND

The following allegations are taken from the Complaint (Doc. No. 1) and the Churchill Holdings, Inc. Employee Stock Ownership Plan (Doc. No. 37-1), which the Court may consider because it is referenced throughout the Complaint. See Greenberg v. Life Ins. Co. of Virginia, 177 F.3d 507, 514 (6th Cir. 1999). The allegations in the Complaint are accepted as true to resolve the pending motions.

Churchill Holdings, Inc. ("Churchill") is a privately owned company. (Doc. No. 1 ¶ 5). It operates an Employee Stock Ownership Plan (the "Plan"). (Id. ¶ 6). During the relevant period, Hardwick was the President, Chief Executive Officer of Churchill and a member of its Board of Directors. (Id. ¶ 31). Clarke was Churchill's Secretary, Chief Financial Officer, and Chief Operations Officer, as well as a member of its Board of Directors. (Id. ¶ 33). Kemp was the third and final member of Churchill's Board. (Id. ¶ 34). Michael Paredes and his employer, Prudent Fiduciary Services ("PFS"), were the trustees of the Plan. Plaintiffs are three former employees of Churchill. (Id. ¶ 23-25). They all participate in Churchill's Plan. (Id. ¶ 1).

The Plan was formed by Churchill on October 31, 2013. (Id. ¶ 6). At the same time, Hardwick sold 49% of his 100% stake in Churchill to the Plan in the form of Preferred Shares of Churchill stock. (Id.). Those Preferred Shares entitled the Plan and its participants to annual dividends of $2.4 million. (Id. ¶ 8).

At the core of Plaintiffs' claims is a December 19, 2020 transaction, in which the Plan purchased the remaining 51% of Hardwick's shares of Churchill stock at $145.90 per share, or $74,406,876 total (the "2020 Transaction"). (Id. ¶ 66). At year-end 2019, Churchill's stock was valued at $52.25 per share. (Id.). As Trustees of the Plan, Michael Paredes and PFS had "the sole and exclusive authority to negotiate the terms of the 2020 Transaction and to authorize the Transaction on the Plan's behalf." (Id. ¶ 13). The 2020 Transaction was financed through a note payable to Hardwick, which Churchill assumed from the Plan. (Id. ¶ 69). Churchill was then obligated to make payments on the note to Hardwick. (Id. ¶ 80). At the end of 2020, Churchill's Board of Directors approved a special $43.4 million dividend, $35 million of which was paid to Hardwick as an accelerated paydown of the note. (Id. ¶ 80). Plaintiffs allege that the Plan grossly overpaid for Hardwick's remaining shares in the 2020 Transaction.

Plaintiffs also allege that Hardwick, Clarke and Kemp, as Churchill's Board of Directors, controlled the distribution of the annual $2.4 million dividend. (Id. ¶¶ 49, 114-15). Rather than using the dividends to benefit the Plan, Plaintiffs allege that the Churchill Defendants used the dividends "for corporate purposes and not for the benefit of the Plan. In particular, the excess dividend payments were used to offset Churchill's obligations to make contributions to the [Plan] as an employee benefit." (Id. 60). Specifically, Plaintiffs allege that "[i]n 2017, $1,290,744 in dividends were improperly used to offset employer contributions into the Plan;" (id. ¶ 61), "[i]n 2018, $1.9 million in dividends were improperly used to offset employer contributions into the Plan;" (id. ¶ 62), and "[i]n 2019, $249,450 was used to pay interest expenses on [the 2013 loan from Hardwick to the Plan], while the remainder of the $2.4 million in dividends was used to offset corporate expenses." (Id. ¶ 63).

LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In reviewing a motion to dismiss, the Court must "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." Courtright v. City of Battle Creek, 839 F.3d 513, 518 (6th Cir. 2016). However, the Court will "disregard bare legal conclusions and naked assertions" and "afford[] the presumption of truth only to genuine factual allegations." Dakota Girls, LLC v. Philadelphia Indem. Ins. Co., 17 F.4th 645, 648 (6th Cir. 2021) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2007)) (internal quotations omitted). Nor can the Court "credit a threadbare recital of the elements of a cause of action ... supported by mere conclusory statements." Dakota Girls, 17 F.4th at 648 (citing Iqbal, 556 U.S. at 678)) (internal quotations omitted). The "factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." Cabinets to Go, LLC v. Qingdao Haiyan Real Est. Grp. Co., 605 F. Supp. 3d 1051, 1057 (M.D. Tenn. 2022) (quoting Fritz v. Charter Twp. of Comstock, 592 F.3d 718, 722 (6th Cir. 2010)), *reconsideration denied sub nom*. No. 3:21-CV-00711, 2023 WL 5013055 (M.D. Tenn. Aug. 7, 2023). "Ultimately, only a complaint that states a plausible claim for relief survives a motion to dismiss." Dakota Girls, 17 F.4th at 648 (quoting Iqbal, 556 U.S. at 679)) (internal quotations omitted). To avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all

material elements of each claim. Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003).

DISCUSSION

Defendants make two types of arguments for dismissal. First, they allege that Plaintiffs' claims are barred (1) because two of the Plaintiffs signed releases of their claims, (Doc. No. 38 at 19-20), and (2) because the Plan's governing documents contain a class action waiver that prevents them from bringing this action on behalf of a class and from requesting relief beyond their individual injuries. (Doc. No. 38 at 20-21; Doc. No. 41 at 6-8). Second, they make a slew of arguments that Plaintiffs have failed to state a claim, and the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6). (Doc. No. 38 at 8-19; Doc. No. 41 at 8-26). The Court will address the releases and class action waiver first, and then will address Defendants' Rule 12(b)(6) arguments.

1. Arnold and Golden-Woods Releases

Defendants argue that Plaintiffs Arnold and Golden-Woods released their claims against Hardwick, Clarke, and Kemp in their employment separation agreements, and thus lack Article III standing. (Doc. No. 38 at 19-20). Generally, "[a] release is valid if it was knowingly and voluntarily made under circumstances not indicating any overreaching or exploitation." Halvorson v. Boy Scouts of America, 215 F.3d 1326, at *3 (6th Cir. May 3, 2000). Plaintiffs argue that here, however, whether the releases apply hangs on whether their claims are individual in nature or are brought derivatively on behalf of the Plan. See Hawkins v. Cintas Corp., 32 F.4th 625, 636 (6th Cir. 2022). Plaintiffs argue that their claims are derivative and that, because of their derivative nature, the individual releases Arnold and Golden-Woods signed do not apply. (Doc. No. 46 at 12-13). Churchill Defendants counter that there is "no 6th Circuit authority that holds a release can be invalidated because it concerns ERISA claims." (Doc. No. 47 at 5).

Arnold's and Golden-Woods's releases are identical. Both are included in their severance agreements with Churchill Mortgage Corporation; Arnold's is dated September 5, 2018 and Golden-Woods's is dated July 27, 2018. (Doc. No. 46 at 13; Doc. No. 37-3 at 5, 9). The relevant language in the releases states:

> **Section 3. Waiver of Claims; Release.**
> In exchange for Employer's agreement to pay the amounts provided in Section 2, Employee hereby irrevocably and unconditionally releases, acquits and forever discharges Employer and each of Employer's owners, stockholders, partners, members, predecessors, successors, assigns, agents, directors, officers, employees, representatives, attorneys, divisions, subsidiaries, affiliates (and agents, directors, officers, employees, representatives and attorneys of such divisions, subsidiaries and affiliates), and all persons acting by, through, under or in concert with any of them (collectively, "Releasees"), or any of them, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorney's fees and costs actually incurred), of any nature whatsoever pertaining to his [sic] employment with or separation from Employer, or arising from any action taken by Employer, known or unknown (hereafter referred to as "Claim" or "Claims"), which Employee now has, owns or holds, or claims to have, own or hold, or which Employee at any time hereafter may have, own or hold, or claim to have, own or hold, against each of any of the Releasees, except for Employer's duties and obligations pursuant to this Agreement.
>
> Employee acknowledges and agrees that she is releasing and giving up any right or claims she may have under the Age Discrimination in Employment Act . . . Title VII of the Civil Rights Act of 1964 and the Tennessee Human Rights Act . . . the Equal Pay Act . . . the Americans with Disabilities Act . . . 42 U.S.C. 1981 and 1985; the Employee Retirement Income Security Acts of 1974; or any other federal, state or local laws or regulations prohibiting employment discrimination. This also includes a release by Employee of any claims for wrongful discharge.
>
> EMPLOYEE REPRESENTS THAT SHE HAS THOROUGHLY CONSIDERED ALL ASPECTS OF THIS AGREEMENT, THAT EMPLOYEE HAS CAREFULLY READ AND FULLY UNDERSTANDS ALL OF THE PROVISIONS OF THIS AGREEMENT, THAT EMPLOYEE HAS HAD THE ASSISTANCE OF COUNSEL IN NEGOTIATING AND ENTERING INTO THIS AGREEMENT, AND THAT EMPLOYEE IS VOLUNTARILY ENTERING INTO THIS AGREEMENT. EMPLOYEE ACKNOWLEDGES THAT EMPLOYER IS RELYING ON THIS AND ALL OTHER REPRESENTATIONS SHE HAS MADE HEREIN.
>
> It is understood that this Agreement does not constitute an admission by Employer of liability or any violation [of] applicable state or federal laws, including but not

limited to those prohibiting employment discrimination, wrongful termination, or breach of contract.

(Doc. No. 37-3 at 3, 7) (emphasis in original).

a. Plaintiffs' Claims are Derivative.

Plaintiffs bring their claims pursuant to ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3), alleging that Defendants violated ERISA §§ 404, 406(a), and 409. (See Doc. No. 1 ¶¶ 100, 106, 121). The Supreme Court has twice addressed whether ERISA claims alleging breach of fiduciary duties are individual or derivative. First, in a case brought by an employee who became disabled and received disability benefits though an ERISA-governed plan, the Court succinctly stated that § 502(a)(2) claims are "brought in a representative capacity on behalf of the plan as a whole." Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 136, 142 n.9 (1985). The Court relied in part on the text of ERISA § 409, which states that when a fiduciary violates his or her duties, "the potential personal liability of the fiduciary is 'to make good *to such plan* any losses *to the plan* . . . and to restore *to the plan* any profits of such fiduciary which have been made through use of assets *of the plan*." Id. at 140 (quoting ERISA § 409(a)) (emphasis in original). The Court rejected Russell's request for damages surrounding the plan's late payment of her disability benefits, holding that "the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims." Id. at 148.

In a later case, the Supreme Court explained that claims brought concerning defined contribution plans, where employees hold individual retirement accounts administered by their employer (such as 401(k) accounts), can be either individual in nature or derivative. Larue v.

DeWolff, Boberg & Associates, Inc., 552 U.S. 248, 256 (2008). The Court distinguished defined contribution plans from defined benefit plans like the plan at issue in Russell:

> For defined contribution plans, . . . fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to person tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of [ERISA] § 409.

Id. at 255-56. Larue did not hold that *all* ERISA fiduciary duty claims brought concerning defined contribution plans are individual in nature. See, e.g., Hawkins v. Cintas Corp., 32 F.4th 625, 631 (6th Cir. 2022); In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 595 n.9 (3d Cir. 2009). Rather, Larue held that it is *possible* to bring either individual or derivative claims concerning defined contribution plans. Id.

Here, the Plan is a defined contribution plan, so the Court must determine whether Plaintiffs have raised individual or derivative claims. To do so, the Court examines the description of the alleged wrongdoing and the nature of the requested relief. See, e.g., Harrison v. Envision Management Holding, Inc. Board of Directors, 59 F.4th 1090, 1101 (5th Cir. 2023).

The derivative nature of Plaintiffs' claims is evident from the Complaint's description of harm. The Complaint alleges that each year, "the Plan (and its participants) [were entitled] to annual dividends of approximately $4.90 per share," but "in most years a significant portion of the dividends were used to offset corporate obligations . . . instead of being used for the benefit of the Plan and its participants." (Doc. No. 1 ¶¶ 8-9). These allegations concerning Defendants' misuse of dividend payments affect the Plan as a whole and all of its participants, not just Plaintiffs' accounts. Additionally, the Complaint alleges that Hardwick sold his remaining shares in Churchill to the Plan for $145.90 per share, despite that Churchill's shares were only valued at $52.25 as of December 31, 2019, a year prior to the sale. (Id. ¶¶ 10-11). It further alleges that the

Plan overpaid Hardwick for his remaining shares to the detriment of the Plan and all of its participants. (Id. ¶ 14). Again, this alleged overpayment injured the Plan as a whole, not the Plaintiffs individually. "Th[e]se alleged breaches do not impact the Plaintiffs specifically; the harm (and the recovery) is to the Plan." Hawkins v. Cintas Corp., 32 F.4th 625, 634 (6th Cir. 2022).

The derivative nature of Plaintiffs' claims is further bolstered by their requested relief. They request, among other relief, (1) a declaration that the Trustee Defendants "caused the Plan to engage in prohibited transactions and thereby breached [their] duties under ERISA" (Doc. No. 1 at Prayer for Relief A.); (2) a declaration that the Churchill Defendants "breached their fiduciary duties under ERISA to the Plan and the class members" (id. at Prayer for Relief C.); (3) a "reformation of the 2020 Transaction contracts to provide the Plan pays no more than fair market value for Churchill stock as of the date of the transaction" (id. at Prayer for Relief G.); and (4) that the Court "[r]emove the Trustee as Plan fiduciary" (id. at Prayer for Relief L.). This relief, by its nature, is relief to the Plan as a whole and not solely to Plaintiffs. See Hawkins, 32 F.4th at 634. See also Smith v. Board of Directors of Triad Manufacturing, Inc., 13 F.4th 613, 621 (7th Cir. 2021) ("Removal of a fiduciary . . . go[es] beyond just [the plaintiff] and extend[s] to the entire plan").

Finally, claims brought pursuant to ERISA §§ 502(a)(2) and 502(a)(3) usually seek recovery for the plan itself, not an individual subject to the plan. Stanley v. George Washington University, 394 F. Supp. 3d 97, 103 (D.D.C. 2019). As one court has explained, "[s]uits under ERISA sections 502(a)(2) and (a)(3) are meaningfully distinct from those brought via section 502(a)(1)(B). Section 502(a)(2) and (a)(3) claims are generally brought in conjunction to enforce statutory ERISA rights, whereas section 502(a)(1)(B) claims are brought to enforce contractual

rights created by the terms of a benefit plan. . . . [W]hile section 502(a)(2) suits are brought in a representative capacity, so that recovery runs to the plan, section 502(a)(1)(B) remedies run directly to the injury participant or beneficiary." Id. Here, the fact that Plaintiffs have explicitly brought their claims under ERISA §§ 502(a)(2) and (a)(3) is another sign that they intended to bring their claims on behalf of the plan.

b. Arnold's and Golden-Woods's Releases Are Not Enforceable Against Their Derivative Claims.

As Arnold and Golden-Woods's claims are derivative, the Court must determine whether the releases in their severance agreements apply to derivative claims. The Court interprets the language in Arnold's and Golden-Woods's releases under federal common law. See McClellan v. Midwest Machining, Inc., 900 F.3d 297, 302 (6th Cir. 2018)("Federal law controls the validity of a release of a federal cause of action.") (quoting Street v. J.C. Bradford & Co., 886 F.2d 1472, 1481 (6th Cir. 1989)). Under federal common law, unambiguous agreements, including agreements to release or waive federal claims, are enforced according to their terms. See Soltis v. J.C. Penney Corp., 635 Fed. App'x 245, 248 (6th Cir. 2015).

Arnold's and Golden-Woods's releases are broadly worded. They apply to "any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorney's fees and costs actually incurred), of any nature whatsoever pertaining to his [sic] employment with or separation from Employer, or arising from any action taken by Employer, known or unknown." (Doc. No. 37-3 at 3, 7). They explicitly release any ERISA claims brought by Arnold or Golden-Woods. (Id. ("Employee acknowledges and agrees that she is releasing and giving up any right or claims she may have under . . . the Employee Retirement Income Security

Acts of 1974")). Moreover, they apply to claims "Employee now has, owns or holds, or claims to have, own or hold, or which Employee at any time hereafter may have, own or hold, or claim to have, own or hold." (Id.). In other words, the releases explicitly apply to past, present, or future claims.

Not so fast; the Court cannot end its analysis there. Even though the plain language of the releases encompasses Plaintiffs' claims, Plaintiffs argue the releases are not enforceable because Plaintiffs cannot waive claims owned by the Plan. (See Doc. No. 46 at 12-13). Plaintiffs rely on Hawkins v. Cintas Corp., which concerned an arbitration clause in an ERISA-governed plan, to support their argument. (See id.). In Hawkins, plaintiffs who had signed employment agreements to arbitrate employment-related claims sued their employer, Cintas, alleging that Cintas violated ERISA § 409 by failing to uphold its fiduciary duties to them in its administration of the company's retirement plan. Hawkins, 32 F.4th at 627-28. The plaintiffs, like Plaintiffs here, brought their lawsuit under ERISA § 502(a)(2). Id. The Sixth Circuit held that the arbitration provisions in the plaintiffs' employment agreements did not apply to their § 502(a)(2) claims. In doing so, the Court explained, as a matter of first impression, id. at 627:

> Although § 502(a)(2) claims are brought by individual plaintiffs, it is the plan that takes legal claim to the recovery, suggesting that the claim really "belongs" to the Plan. And because § 502(a)(2) claims "belong" to the Plan, an arbitration agreement that binds only individual participants cannot bring such claims into arbitration.

Id. at 632-33. The Sixth Circuit further held that "[t]he weight of authority and the nature of § 502(a)(2) claims suggest that these claims belong to the plan, not to individual plaintiffs." Id. at 627. In reaching this conclusion, the Court referenced the Supreme Court's decisions in Russell and Larue, both of which held that "any claims properly brought under § 502(a)(2) must be for injuries to the plan itself." Id. at 631.

Defendants argue that because Hawkins concerned an arbitration agreement and not a release of claims, it is inapposite to this case. (See Doc. No. 47 at 5). They offer no argument, however, explaining why Hawkins' reasoning—that § 502(a)(2) claims belong to the Plan and not individual plaintiffs suing on its behalf—should not equally apply to releases of claims. (See id.). Nor do they explain what differences exist between arbitration agreements and releases of claims that would justify a different result in this case. (See id.). Most striking, Defendants ignore that the Sixth Circuit credited the Hawkins plaintiffs' comparison to cases holding that an individual plaintiff cannot release claims belonging to an ERISA plan. Hawkins, 32 F.4th at 636.

Instead, Defendants rely on one unpublished Sixth Circuit case, which predated Hawkins by 12 years, that enforced a release of ERISA claims. (See Doc. No. 38 at 19-20). In Dotson v. Arkema, former employees alleged that their company's retirement benefits plan breached its fiduciary duties when it did not pay them severance after they agreed to resign. 397 Fed. App'x 191, 192 (6th Cir. Sep. 28, 2010). The severance agreements had been negotiated by the employees' union, which later released all claims relating to ERISA in an agreement with the company's buyer. Id. at 192. The Sixth Circuit held that the union's release applied to individual employees and was enforceable. Id. at 194. Like here, the Dotson plaintiffs' claims were derivative in nature.[1] Defendants are correct, then, that the Sixth Circuit has enforced individual releases against derivative claims on at least one occasion. But the Dotson opinion is not the ace-in-the-hole for Defendants. The Sixth Circuit explicitly declined to rule on the plaintiffs' argument that

[1] Dotson concerned a defined benefits plan. Id. at 192; see also Larue, 552 U.S. at 255 (a defined benefits plans "d[o] not have individual accounts," rather, they "p[ay] a fixed benefit"). As the Supreme Court explained in Russell and Larue, when an employee brings an ERISA claim concerning a defined benefits plan such as the severance benefits at issue in Dotson, the claim is brought on behalf of the plan as a whole, not the individual claimant. Russell, 473 U.S. at 140; Larue, 552 U.S. at 255.

"a union contract may not waive ERISA claims as a matter of law" because they had not raised the argument below. Id. at 193. Here, Plaintiffs have raised the argument that, pursuant to Hawkins, their individual releases cannot waive derivative claims. (See Doc. No. 46 at 11-14). Because the Sixth Circuit did not address this issue in Dotson, it is of limited relevance here.

Another Sixth Circuit case relied upon by Defendants, Taylor v. Visteon, suggested without deciding that employees can waive ERISA fiduciary duty claims. 149 Fed. App'x 422, 426-27 (6th Cir. Sep. 1, 2005). In that case, employees who were laid off sued their former employer, Visteon, alleging fiduciary duty violations under ERISA. Id. at 423. Specifically, the former employees alleged that Visteon had told them the benefits they received at termination were non-negotiable, but then Visteon negotiated additional benefits with other former employees. Id. In exchange for receiving the termination benefits, the employees all signed releases which "waive[d] and release[d] any and all rights or claims of any kind [they] may have . . . against Visteon Corporation." Id. at 423-24. The Sixth Circuit ultimately rejected Plaintiffs' argument that the releases did not apply to their lawsuit on grounds that are irrelevant here,[2] but it also addressed whether ERISA's prohibition of exculpatory agreements prohibits the enforcement of releases like the plaintiffs', finding that it likely does not. Id. at 426.[3] "[A] release of past breach-of-fiduciary-duty claims does not appear to implicate § 1110(a) because it does not relieve a fiduciary of any responsibility, obligation, or duty imposed by ERISA; instead, it merely settles a dispute that the fiduciary did not fulfill its responsibility or duty on a given occasion." Id. at 427 (quoting Leavitt

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[2] Plaintiffs argued that the releases were not applicable to their fiduciary duty claims because the releases only applied to claims arising before they signed the releases, and their fiduciary duty claim arose at the time of signing. Id. at 425. The Sixth Circuit rejected this argument. Id.

[3] The plaintiffs' argument that ERISA prohibited their releases was based on 29 U.S.C. § 1110(a): "Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."

v. Northwestern Bell Telephone Co., 921 F.2d 160, 161-62 (8th Cir. 1990)) (internal quotation marks omitted). This reasoning, grounded in a provision of ERISA that prevents fiduciaries from contracting around their statutory fiduciary duties, is entirely different from the argument Plaintiffs make here—that individuals cannot waive claims that belong to the Plan. Like Dotson, the Court did not address the issue Plaintiffs raise here, so it, too, does not determine the outcome here.

The Court has identified two other instances where the Sixth Circuit has enforced releases of ERISA claims, both pre-dating Hawkins. These cases both concerned discrimination claims. See Halvorson v. Boy Scouts of America, 2000 WL 571933, at *1 (6th Cir. May 3, 2000); Samms v. Quanex, 1996 WL 599821, at *1 (6th Cir. 1996). Claims alleging discrimination under ERISA are brought pursuant to ERISA § 502(a)(1)(B), which allows "participant[s] or beneficiar[ies]" to bring civil actions "to recover benefits due to [them] under the terms of [their] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). See, e.g., Lockett v. March USA, Inc., 354 Fed. App'x 984, 988 (6th Cir. 2009). These claims are individual in nature, see Stanley, 394 F. Supp. 3d at 103, and thus do not raise the relevant question here whether an individual release may waive derivative claims. Perhaps because these cases did not concern derivative claims, Defendants did not rely upon them.

Finally, Defendants rely on three out-of-circuit cases where district courts have upheld releases of derivative ERISA claims, again all pre-dating Hawkins. (See Doc. No. 38 at 20; Doc. No. 47 at 5). In Howell v. Motorola, Inc., the Seventh Circuit found a release to be valid that "waived the right to bring a lawsuit challenging the [ERISA] Plan as a whole." 633 F.3d 552, 560-61 (7th Cir. 2011). Because Howell's release was valid, the Seventh Circuit held that "he cannot

now claim that his [retirement] account would have been worth even more had the defendants not breached a fiduciary duty." Id. at 561.

In Halldorson v. Wilmington Tr. Ret. & Institutional Servs. Co., the plaintiff brought ERISA claims similar to those in this case, alleging that the plan overpaid when it purchased another company's stock, as that stock's value plummeted over the seven months following the transaction. 182 F. Supp. 3d 531, 534 (E.D. Va. 2016). Like this case, the plaintiff filed his claims under ERISA § 502(a)(2) for violations of § 409. Id. at 535. The court enforced the plaintiff's release against his ERISA claims, rejecting the plaintiff's arguments that his claim was actually one for vested benefits, a type of claim he had not waived by signing the release. Id. at 539-41. The plaintiff did not argue that his release could not apply to his derivative claim, nor did the court address this issue. Id.

Like the plaintiff in Halldorson, the plaintiff in Stanley v. George Washington Univ. argued that her ERISA claim was for vested benefits. 394 F. Supp. 3d 97, 101 (D.D.C. 2019). The court rejected this argument, finding that "section 502(a)(2) suits are brought in a representative capacity." Id. at 103. Finding that the plaintiff's release applied to her ERISA 502(a)(2) claim, the court enforced the release and dismissed her case. Id. at 111. Like the Halldorson and Howell courts, the court did not address whether Stanley had the power to waive claims brought derivatively on behalf of the plan. Id.

The Court does not find any of the cases relied upon by Defendants to be persuasive to answer the question whether Plaintiffs can release derivative claims. Instead, Hawkins is the most applicable case and is precedent that the Court must follow. Though Hawkins concerned an arbitration provision, its reasoning can be squarely applied to the release in this case. Moreover, the Sixth Circuit acknowledged several out-of-circuit cases in Hawkins that have held that a

plaintiff cannot release derivative claims. See Hawkins, 32 F.4th at 636 (citing In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 594 (3d Cir. 2009); Bowles v. Reade, 198 F.3d 752, 760 (9th Cir. 1999); Leber v. Citigroup 401(k) Plan Inv. Comm., 323 F.R.D. 145, 161 (S.D.N.Y. 2017)). The Court finds that Hawkins is controlling and the reasoning of these out-of-circuit cases is persuasive. Therefore, even though Arnold's and Golden-Woods's releases unambiguously apply to future ERISA claims, Arnold and Golden-Woods did not have the power to individually waive claims owned by the Plan in their separation agreements.[4]

2. The Plan's Class Action Waiver

Arnold's and Golden-Woods's releases aside, Defendants argue that the Plan contains a class action waiver that prohibits all three Plaintiffs (and any other Plan participant) from "recovering monetary amounts [beyond] their individual accounts." (Doc. No. 41 at 6; see also Doc. No. 40-3 § 11.09). The relevant Plan provision, which is included in Article XI, MISCELLANEOUS of the Plan and is titled "Consent to Jurisdiction; Service of Process; Legal Action; and Waiver of Class," states in relevant part:

[4] Plaintiffs also argue that the releases cannot apply to claims that arose after they were entered into. (See Doc. No. 46 at 13). Both Arnold and Golden-Woods signed the releases in 2018, so their claims concerning the 2020 Transaction did not exist when they signed the releases. The Court has already determined that the language in the releases unambiguously applies to future claims. The Court need not reach Plaintiffs' argument that future releases of federal claims are unenforceable because it has determined that the releases are unenforceable on other grounds. Moreover, it is not at all clear whether releases of future federal statutory claims are enforceable. Plaintiffs rely on Schumacher v. AK Steel Corp. Retirement Accumulation Pension Plan, 711 F.3d 675, 685 (6th Cir. 2013). Unlike this case, Schumacher concerned a general release that did not specifically mention ERISA claims. Id. at 684. The Sixth Circuit distinguished the case from two cases enforcing releases of future ERISA claims where ERISA was specifically mentioned in the releases. See id. at 684-85 ("Appellants also rely on cases where future ERISA claims were released. Those cases, however, involved an explicit reference to 'ERISA' in the agreement—a critical distinction from the present case.").

> Actions shall not be brought as class or collective actions. A participant, beneficiary, or other claimant expressly waives, forfeits, and forever relinquishes the right to participate in a class or collective action and to any recovery as part of a class or collective action. With respect to Actions that, pursuant to applicable law, must be brought in a representative capacity of another, which include without limitation Actions brought for losses to the Plan pursuant to ERISA Section 502(a)(2) and ERISA Section 409, the claimant may not represent a class or bring a class or collective action, and any relief obtained shall be limited to provide a remedy only to redress the claimant's individual losses. Any relief or remedy awarded must, to the extent possible, be pro-rated to provide relief or remedy solely to the individual claimant.

(Doc. No. 40-3 § 11.09).

Plaintiffs respond that to the extent the relevant provision of the Plan precludes them from seeking Plan-wide relief, it is void under the "effective vindication" doctrine because it bars a federal statutory remedy—the right to seek relief on behalf of the Plan as a whole. (Doc. No. 45 at 6-9). They further argue the provision is void because it is an unlawful exculpatory provision barred by ERISA § 410(a), 29 U.S.C. § 1110(a). (Id.). Defendants respond that the effective vindication doctrine only applies in the context of arbitration provisions, (Doc. No. 41 at 7 n.5), and the class waiver provision in not void under ERISA's exculpatory provision, § 410(a). (Doc. No. 45 at 10). The Court addresses each of these arguments below.

a. Effective Vindication Doctrine

Plaintiffs argue that because the Plan's class action waiver prevents them from seeking all but "monetary amounts [for their] individual accounts," (Doc. No. 40-3 § 11.09), it is barred by the effective vindication doctrine. (Doc. No. 41 at 6). The effective vindication doctrine was first articulated in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., when the Supreme Court determined that a Sherman Act antitrust claim could be arbitrated because "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute will continue to serve both its remedial and deterrent function." 473 U.S. 614,

637 (1985). The Supreme Court later explained that the doctrine "finds its origin in the desire to prevent prospective waiver of a party's right to pursue statutory remedies," including "provision[s] in arbitration agreement[s] forbidding the assertion of certain statutory rights." American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 236 (2013). Though the Supreme Court has acknowledged the existence of the effective vindication doctrine on several occasions, it has never actually applied the doctrine to invalidate an arbitration provision. Id. at 235-36. Multiple circuit courts, however, have done so. See Dorman v. Charles Schwab Corp., 780 Fed. App'x 510, 517 (9th Cir. 2019); Smith v. Board of Directors of Triad Manufacturing, Inc., 13 F.4th 613, 622 (7th Cir. 2021; Henry v. Wilmington Trust, N.A., 72 F.4th 499, 507 (3d Cir. 2023); Harrison v. Envision Management Holding, Inc. Board of Directors, 59 F.4th 1090, 1100-08 (10th Cir. 2023) *cert. denied* 144 S.Ct 280 (Oct. 10, 2023). See also Coleman v. Brozen, 2023 WL 4498506, at *17 (N.D. Tex. Jul. 12, 2023). As explained below, while each of these circuit court opinions pertains to arbitration provisions, the courts' reasoning hinges on the class action waiver language within those arbitration provisions. While the class action waiver in this case is not encased in an arbitration provision, these decisions are persuasive and relevant to the Court's analysis in this case.

In the first-decided of these circuit court decisions, Dorman, the plaintiff alleged that his former employer breached its fiduciary duties in administering his retirement plan under ERISA § 409. 780 Fed. App'x at 512. The retirement plan's governing documents required arbitration of claims concerning the plan. Id. The district court found that the arbitration provision did not apply because "[a] plan document drafted by fiduciaries—the very people whose actions have been called into question by the lawsuit—should not prevent plan participants and beneficiaries from vindicating their rights in court." 2018 WL 467357, at *5 (N.D. Cal. Jan. 18, 2018). The Ninth

Circuit reversed, holding that "an agreement to arbitrate ERISA claims is generally enforceable." 780 Fed. App'x at 513-14. In reaching this holding, the Ninth Circuit did not address the effective vindication doctrine. See generally id.

In Smith, the plaintiff, Smith, also sued alleging financial misconduct by his former employer of his retirement plan. 13 F.4th at 615. Smith brought his action on behalf of a putative class of similarly situated individuals. Id. Smith's retirement plan was subject to an arbitration provision. Id. In addition to requiring plan participants to arbitrate their claims, the provision also precluded relief that "has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." Id. Like the Ninth Circuit held in Dorman, the court acknowledged that ERISA claims are generally arbitrable. Id. at 620. The court went on to hold, however, that the arbitration provision did not apply to Smith's claims because "the plan's arbitration provision, which also contains a class action waiver, precludes a participant from seeking or receiving relief" on behalf of the plan. Id. at 621. In other words, the court found that that the invalid portion of the retirement plan's governing document was not the provision requiring arbitration of Smith's claims; instead, it was the class action waiver portion of that provision, which denied Smith the opportunity to seek damages on behalf of the retirement plan. Id.

In February 2023, the Tenth Circuit addressed a fact pattern similar to Dorman and Smith. Harrison, 59 F.4th at 1093-94. Like Smith, the Tenth Circuit declined to enforce an arbitration and class action waiver provision of a retirement plan that prohibited individuals from seeking plan-wide relief. Id. at 1096. After an extremely detailed analysis of the effective vindication doctrine, the class action waiver at issue, and ERISA, the Tenth Circuit held that "the effective vindication exception applies [because] it is not clear what remedies Harrison would be left with

if [the class action waiver] is enforced as written. And, in fact, [the class action waiver] effectively prevents any claimant from pursuing the types of claims that Harrison asserts in his complaint." Id. at 1107. The Tenth Circuit further explained:

> [T]he Supreme Court's rulings regarding the effective vindication exception . . . make clear that the exception is not implicated simply because an arbitration agreement changes, or even eliminates, the other applicable procedures that a claimant may use to seek relief. Instead, the effective vindication exception applies only where an arbitration agreement alters or effectively eliminates substantive forms of relief that are afforded to a claimant by statute. . . It is not the Plan Document's requirement that a claimant engage in the procedural mechanism of individual arbitration that is the problem [the exception seeks to remedy]. Rather, it is the Plan's prohibition on an individual claimant seeking any form of relief that would benefit anyone other than the claimant.

Id. at 1111. The Supreme Court denied the defendants' petition for certiorari. Argent Trust Co. v. Harrison, 144 S.Ct. 280 (2023).

In June 2023, the Third Circuit followed the reasoning of the Seventh and Tenth Circuits. Henry, 72 F.4th at 502. Like Smith and Harrison, the arbitration provision at issue in Henry contained a class action waiver that required claims to "be brought solely [in an] individual capacity and not in a representative capacity or on a class, collective, or group basis" and "prohibited a claimant from 'seek[ing] or receiv[ing] any remedy which has the purpose or effect of providing additional benefits or monetary or other relief' to anyone other than the claimant." Id. at 503. The Third Circuit held that "the class action waiver purports to waive [ERISA] authorized remedies, the class action waiver and the statute cannot be reconciled." Id. at 507.

The Smith, Harrison, and Henry opinions all invalidated class action waivers that prevented the plaintiff from seeking relief on behalf of the retirement plan. In this case, the class action waiver does the same thing—it prevents Plaintiffs from "represent[ing] a class or bring[ing] a class or collective action, and any relief obtained shall be limited to provide a remedy only to redress the claimant's individual losses. Any relief or remedy awarded must, to the extent possible, be pro-

rated to provide relief or remedy solely to the individual claimant." (Doc. No. 40-3 § 11.09). True, in this case, the class action waiver appears in the "MISCELLANEOUS" section of the Plan governing document, rather than within an arbitration provision. Id. In fact, the Plan does not contain an arbitration provision at all. Id. But as the three circuit court decisions all make clear, arbitration of ERISA claims is not, in itself, problematic. Harrison, 59 F.4th at 1111; Henry, 72 F.4th at 508; Smith, 13 F.4th at 620. The violative portions of the arbitration provisions in those cases are indistinguishable from the class action waiver in this case.

To be clear, the Court does not hold that a class action waiver alone violates the effective vindication doctrine. Indeed, the Supreme Court has declined to apply that doctrine to invalidate a class action waiver. American Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 236-37 (2013). ("[t]he class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938. . . . Or, to put it differently, the individual suit that was considered adequate to assure effective vindication of a federal right before adoption of class-action procedures did not suddenly become ineffective vindication upon their adoption.") (internal quotation marks and citations omitted). What distinguishes the class action waiver here (as well as those in Smith, Henry, and Harrison) from the waiver in Italian Colors is the prohibition on seeking plan-wide relief. ERISA explicitly allows plaintiffs to seek plan-wide relief. See 29 U.S.C. §§ 1109(a), 1132(a)(2); see also Russell, 473 U.S. at 142 n.9. Because the class action waiver in this case cannot be squared with that statutory remedy, it is barred by the effective vindication doctrine.

b. ERISA § 410(a) Exculpatory Provision

Assuming arguendo that the effective vindication doctrine does not bar the enforcement of the class action waiver, Plaintiffs argue that the waiver is also prohibited by the ERISA's exculpatory provision, ERISA §410(a), 29 U.S.C. § 1110(a). (Doc. No. 45 at 10). While courts have determined whether indemnification provisions and arbitration procedures are barred by this provision, the parties have not relied on—and the Court has not found any—cases concerning the application of this provision to a class action waiver.

In line with application of the effective vindication doctrine, courts hold that waivers that "diminish the statutory obligations of a fiduciary" are unlawful under ERISA's exculpatory provision. See Pfahler v. Nat'l Latex Product Co., 517 F.3d 816, 836-37 (6th Cir. 2007) (quoting Leavitt v. Nw. Bell Tel. Co., 921 F.2d 160, 161 (8th Cir. 1990)). See also Burnett v. Prudent Fiduciary Services LLC, 2023 WL 387586, at *6 (D. Del. Jan. 25, 2023) ("[A]n arbitration provision that eliminates the right to pursue a remedy provided by ERISA is invalid as against public policy."). Based on that reasoning, courts have found that indemnification provisions are not barred by § 410(a), because they "do not prevent a fiduciary from being held liable, but instead only provide that if the fiduciary is held liable, then someone else will compensate the fiduciary for that liability." Pfahler, 517 F.3d at 837. Nor are arbitration procedures. Dorman v. Charles Schwab Corp., 780 Fed. App'x 510, 513 (9th Cir. Aug. 20, 2019). In dicta, the Sixth Circuit has suggested that releases of ERISA claims also do not violate § 410(a). Taylor, 149 F. App'x at 427.[5] The Sixth Circuit explained that "[e]nforcing a waiver of this sort, for which plaintiffs

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[5] In Taylor, the Court's dicta only applied to claims that had already arisen at the time of the waiver, not to future claims. Taylor, 149 F. App'x at 427. An earlier Sixth Circuit case, Rosenbaum v. Davis Iron Works, held that waivers of future claims of fiduciary duty are unlawful under 410(a). 1989 WL 36897, at *5 (6th Cir. Apr. 19, 1989).

received valuable consideration, does not *relieve* [a trustee] of any fiduciary duties; it merely *resolves* claims arising from those duties." Id. (emphasis in original).

The Court finds that the portion of the class action waiver that bars relief on behalf of the plan is unlawful under ERISA § 410(a). Courts have held that provisions banning class actions—but not banning recovery of plan-wide relief—do not violate § 410(a) because these provisions do not prevent individual plaintiffs from pursuing statutory remedies; they simply prevent plaintiffs from aggregating their claims with similarly situated individuals. Burnett, 2023 WL 387586, at *7-*8 (citing Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 653 (2022); Epic Systems Corp. v. Lewis, 584 U.S. 497, 505 (2018); and Italian Colors, 570 U.S. at 236). Here, Plaintiffs' requested relief is not limited to compensation for their individual losses. They also request reformation or rescission of the 2020 Transaction and for the Court to remove the Defendants as trustees and fiduciaries of the Plan. (Doc. No. 1, Prayers for Relief G, H, L and M). By the very nature of this relief, a court cannot isolate the individual's and the Plan's injunctive relief. See Smith v. Board of Directors of Triad Manufacturing, Inc., 13 F.4th 613, 622-23 (7th Cir. 2021) ("Just like the removal of a fiduciary, the appointment of a new [trustee] cannot have anything *but* a plan-wide effect.") (emphasis in original). By forbidding claimants from seeking all but individual relief, the Plan bars several types of relief that ERISA guarantees. While every individual claimant could bring his or her own separate action seeking individual relief, none of these individuals would be able to seek injunctive relief. Therefore, the Court agrees with Plaintiffs that the portion of the class waiver provision that proscribes plan-wide relief violates ERISA § 410(a).

3. Rule 12(b)(6) Failure to State a Claim

Defendants raise several arguments that the Complaint fails state a claim. It is black letter law that a complaint must plausibly allege each element of its claims, and plaintiffs cannot rest upon conclusory statements to sail through the motion to dismiss phase of a case. Dakota Girls, 17 F.4th at 648. Defendants argue that the Complaint is littered with conclusory statements, requiring dismissal of each of Plaintiff's claims. (Doc. No. 38 at 2-3; Doc. No. 41 at 2). They further argue that Plaintiffs have failed to allege necessary elements of certain of their claims. (Doc. No. 38 at 8-19; Doc. No. 41 at 8-23). The Court addresses each of these so-called deficiencies in turn.

a. Whether Plaintiffs have alleged that PFS was a trustee

Defendants argue that Plaintiffs have not alleged that PFS was a trustee of the Plan, a necessary element of Plaintiffs' Counts I and II. (Doc. No. 41 at 25). In response, Plaintiffs argue that the Complaint's allegations and the engagement agreement between PFS and the Plan confirm that both Michael Paredes and PFS, his operating company, are trustees of the Plan. (Doc. No. 45 at 21). The Court agrees with Plaintiffs. The Complaint clearly alleges that "Miguel Paredes and his operating company Prudent Fiduciary Services, LLC . . . [is] the fiduciary trustee for the Churchill Holdings, Inc. Employee Stock Ownership Plan." (Doc. No. 1 ¶ 1). It further alleges that PFS "provid[es] trustee services to privately held companies wishing to sponsor Employee Stock Ownership Plans," (id. ¶ 26), and that "PFS provides a team of approximately fifteen full-time individuals to execute ESOP transactions including an in-house business appraiser, a routine due diligence process, office space, and insurance," of which "Paredes was . . . the sole member of PFS" responsible for making decisions regarding the Plan. (Id. ¶ 28). At this stage of the case,

Plaintiffs have met their pleading burden. See Ahrendsen v. Prudent Fiduciary Services, LLC, 2022 WL 294394, at *4 n.4 (E.D. Pa. Feb. 1, 2022).

Trustee Defendants argue that the Complaint incorporates the Plan's engagement agreement, and so the Court may look to the language of that agreement when deciding the motion to dismiss. (Doc. No. 41 at 25 (citing Doc. No. 1 ¶¶ 28-29)). Contrary to Trustee Defendants' arguments, the Complaint does not reference the engagement agreement; instead, it references the Plan's Summary Plan Description. (See Doc. No. 1 ¶¶ 28-29). Even if the Court were to consider the engagement agreement, however, the agreement only reinforces the Complaint's allegations that PFS "exercises . . . discretionary authority of discretionary control respecting management of [the Plan] or exercises . . . authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A).

b. Whether Plaintiffs have alleged that the Trustee Defendants acted with the motive to benefit themselves

Trustee Defendants argue that Plaintiffs have failed to allege that PFS and Paredes acted with the motive to benefit themselves, which they further argue is a requirement of Plaintiffs' second claim, that Trustee Defendants breached their duty of loyalty to the Plan. (Doc. No. 41 at 23-25). Plaintiffs respond that because they sue a "private company ESOP action," they are not required to plead self-dealing or motive to allege a breach of fiduciary duty, as all they need to allege is that the trustees did not act with only the interests of the Plan in mind and did not thoroughly investigate the 2020 Transaction. (Doc. No. 45 at 20-21).

The Sixth Circuit's recent decision in Forman v. TriHealth, Inc. decides this issue. There, the Sixth Circuit held that the duty of loyalty "claim fails because [the plaintiffs] do not make any allegations suggesting that the fiduciary's operative motive was to further its own interests, as

required to show a breach of the fiduciary duty of loyalty." 40 F.4th 443, 450 (6th Cir. 2022). The Sixth Circuit specifically rejected the plaintiffs' allegations that the trustee violated its duty of loyalty by choosing investments that would benefit third parties, suggesting that even conduct designed to benefit third parties who are not plan beneficiaries may not be enough to state a claim for violation of the duty of loyalty. Id. Cf. Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056, 1062 (M.D. Tenn. 2018) (holding that "in order to show that Defendants breached the fiduciary duty of loyalty, Plaintiffs must allege that Defendants acted for the purpose of benefitting . . . third parties or themselves") (internal quotation marks and emphasis omitted). Plaintiffs try to distinguish Forman from this case because Forman involved a public company's retirement plan rather than a private company's retirement plan, but they offer no explanation—and cite no case—supporting their argument that this case should be treated differently. (See Doc. No. 45 at 20-21).[6]

Plaintiffs also argue that Trustee Defendants "improperly attempt to slice-and-dice" their fiduciary duty breach claim, which purports to allege breaches of both the duty of loyalty and the duty of prudence under ERISA § 404(a). (Doc. No. 45 at 20-21). Courts acknowledge that ERISA § 404(a) creates fiduciary duties of prudence and loyalty. See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570-71 (1985). These duties closely mimic duties created under trust laws. Id. Courts analyze allegations concerning the two duties separately. See, e.g., Cassell, 285 F. Supp. 3d at 1062-63; Beldock v. Microsoft

[6] The cases Plaintiffs rely on are unhelpful. Perez v. Bruister, 919 F.3d 763 (4th Cir. 2019), and Brundle v. Wilmington Trust, 823 F.3d 250 (5th Cir. 2016) are not binding on this Court, and to the extent they conflict with Forman, the Court must follow Forman. Chao v. Johnston, 2007 WL 2847548 (E.D. Tenn. Jul. 9, 2007), which was decided by another district court within the Sixth Circuit, was decided before Forman and is also not binding on this Court. Finally, Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield of Michigan simply states that "ERISA's duties of loyalty and care are undeniably broader than the prohibition on self-dealing." 722 F.3d 861, 869 (6th Cir. 2013). This vague statement cannot trump Forman's clear directive.

Corp., 2023 WL 1798171, at *6-*7 (W.D. Wash. Feb. 7, 2023). There was nothing improper about Trustee Defendants' argument that Plaintiffs failed to allege a breach of the duty of loyalty. Because Plaintiffs have not alleged that the 2020 Transaction or the alleged misuse of dividend payments was an act of self-dealing on Paredes's or PFS's part, or that these transactions were completed to benefit Paredes or PFS, they have not sufficiently alleged the breach of duty of loyalty portion of their ERISA § 404(a) claim (Count II).

c. Whether Plaintiffs have alleged that Trustee Defendants used a deficient process to evaluate the 2020 Transaction

Trustee Defendants argue that Plaintiffs have failed to allege that they used a deficient process in evaluating the 2020 Transaction, so Count I (prohibited transaction under ERISA § 406) must be dismissed. (Doc. No. 41 at 8-23). Plaintiffs respond that they have provided circumstantial allegations that suggests an imprudent process. (Doc. No. 45 at 17-18).

The Complaint lays out several ways that Plaintiffs allege the Trustee Defendants' evaluation of the 2020 Transaction was deficient:

- "The Trustee valued Churchill stock on a control basis by using an industry capital structure instead of Churchill's actual capital structure in its income method, which yielded a control value." (Doc. No. 14 ¶ 82). Since "the Plan did not obtain control of Churchill . . . because Hardwick maintained control over the board of directors and, through the board, the company." (Id.). Reading this allegation in the light most favorable to Plaintiffs, Plaintiffs allege that the Trustee Defendants used a deficient process by determining a control value but not discounting the stock for the Plan's lack of control (and Hardwick's continued control) following the 2020 Transaction.
- The Trustee Defendants relied on financial statements as well as cashflow and income projections provided by Churchill management to value Churchill's income. (Id. ¶ 83). Churchill management's projections were "unreasonably optimistic," and the Trustee Defendants "did not adequately challenge" this information. (Id.).
- The Trustee Defendants' market valuation techniques were deficient because they were "based on supposedly comparable companies to Churchill" that were actually "too dissimilar to Churchill to provide a reliable indication of value." (Id. ¶ 84).

- "The Trustee [Defendants] failed to apply a sufficient discount for lack of marketability (DLOM) to its valuation in the 2020 Transaction because it failed to account for the lack of marketability for the stock that was purchased by the [Plan]." (Id. ¶ 85).
- The Trustee Defendants' valuation did not account for the fact that "at or around the closing of the 2020 Transaction . . . Hardwick [took on] synthetic equity . . . which diluted the value of the Plan-owned stock." (Id. ¶ 86).

(See also Doc. No. 45 at 18).

Trustee Defendants attack each of these allegations, arguing that Plaintiffs have not met their plausibility threshold. (Doc. No. 41 at 12-23). Those arguments are fruitless for now. At the motion to dismiss phase of a case, a plaintiff need only "plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." Cabinets to Go, 605 F. Supp. 3d at 1057. Courts are particularly sensitive to the incongruities between the access to information that beneficiaries of an ERISA-governed retirement plan have versus the trustees of that plan. See Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009); Allen v. GreatBanc Trust Co., 835 F.3d 670, 678 (7th Cir. 2016); Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc., 892 F.3d 719, 728–29 (5th Cir. 2018). Prior to discovery, Plaintiffs do not have access to many of the specifics Trustee Defendants argue should have been in the Complaint, such as the identity of the "comparable companies" used in the Trustees' market valuation and how those comparators were "too dissimilar," (Doc. No. 41 at 12), the amount the Plan paid as a control premium, (id. at 16), the nature of the warrants issued, (id. at 20), and whether the Plan paid a grossly inflated price for Hardwick's shares of Churchill's stock in the 2020 Transaction (id. ¶ 66).

Trustee Defendants' arguments only emphasize the need for discovery to determine whether Plaintiffs will ultimately be able to prove their well-pleaded allegations. Indeed, they admit as much. (Id. at 16 ("discovery . . . will show that the [Plan] did not, in fact, pay any control premium"); id. at 20 ("neither the 2013 transaction nor the 2020 Transaction actually involved an

issuance of warrants . . . and discovery . . . will show it"). Viewing the complaint's allegations in their totality at this stage, the Court finds that Plaintiffs have plausibly alleged a deficient process.

d. Whether Plaintiffs have alleged that Churchill Defendants breached their fiduciary duties concerning dividend payments

Churchill Defendants argue that Plaintiffs have failed to allege that they breached their fiduciary duties concerning dividend payments under Count III. (Doc. No. 38 at 17-19). Relatedly, Defendants ask the Court to take judicial notice of documents "confirm[ing] that the $2.4 million annual Dividend Payments were used for the very purposes that Plaintiffs claim they should have been used." (Doc. No. 38 at 18-19). These documents include "audited financial statements that are attached to the [Plan's] annual Forms 5500 from as far back as 2015," which "contain a specific paragraph that shows that each annual payment of $2.4 million was used to service existing debt obligations." (Id. at 18). Defendants attached a 219-page "composite exhibit" of these documents to their motion to dismiss. (Doc. No. 37-2). Plaintiffs respond that the Complaint plausibly alleges misuse of the dividend payments, and clarify that because "the dividends belong to the Plan and not Churchill," they "cannot be used to defray [Churchill's] obligation to contribute to the plan." (Doc. No. 46 at 10-11).

As a threshold matter, the Court will not take judicial notice of Churchill Defendants' composite exhibit of financial statements. "Importantly, Federal Rule of Evidence 201 allows a court to take notice of facts not subject to reasonable dispute." In re Omnicare Securities, Inc. Litigation, 769 F.3d at 467. The Court acknowledges that it may consider the financial statements, as Plaintiffs admit that the Complaint's allegations of misused dividend payments "come straight from the financial statements Defendants provide." (Doc. No. 46 at 10). The Court need not credit allegations in the Complaint that are refuted by these financial statements, id. at 466, but the parties

dispute how to interpret the financial statements. Churchill Defendants argue that the statements "confirm that the $2.4 million annual Dividend Payments were used for the very purposes that Plaintiffs claim they should have been used," (Doc. No. 38 at 18), while Plaintiffs argue the statements are "at best, . . . internally inconsistent." (Doc. No. 46 at 10).

Moreover, Churchill Defendants cite only one statement from the 219-page exhibit to their motion that they say refutes the Complaint: "[t]he Company paid a dividend to the [Plan] of $4.90 per share of $2,400,000 during the year ended December 31, 2019." (See Doc. No. 38 at 18). Churchill Defendants ask the Court to accept this statement as true, which the Court cannot do at this stage of the case. Under the judicial notice doctrine, the Court "c[an] take notice only of the fact that [the defendant] filed the [documents] and what that filing said, but [the Court] c[an] not consider the statements contained in the document for the truth of the matter asserted, even at the motion-to-dismiss stage." Id. In reality, Churchill Defendants' request is a thinly veiled attempt to have the Court weigh documents that will surely be produced in discovery and evaluate whether they disprove Plaintiffs' allegations. That is the work of summary judgment.

The Court now considers whether the Complaint plausibly alleges that the Churchill Defendants breached their fiduciary duties, specifically the duty of loyalty, concerning the use of dividend payments between 2013 and 2019. (See Doc. No. 1 ¶¶ 3, 118). To bring a breach of duty of loyalty claim under ERISA § 404(a), a plaintiff must first allege that the defendant is a fiduciary as defined by ERISA § 1002(21)(A). Here, Churchill Defendants do not dispute that they were fiduciaries of the Plan. (See Doc. No. 38 at 17-19).

Next, Plaintiffs must "allege facts that permit a plausible inference that the defendant engaged in transactions involving self-dealing or in transactions that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Cassell v. Vanderbilt Univ.,

285 F. Supp. 3d 1056, 1062 (M.D. Tenn. 2018). Here, Plaintiffs allege that "each year the Plan received $2.4 million in dividends from the Preferred Shares," which were "used, in part, to pay principal and interest on the [2013 Note]." (Doc. No. 1 ¶¶ 58-59). The remaining portion of the dividends, the Churchill Defendants used the dividends for corporate purposes, to benefit themselves and the company, not the Plan. (Doc. No. 1 ¶ 60). They further make specific allegations concerning the amount of the dividends that were siphoned for corporate purposes in 2017-2019. (Id. ¶¶ 61-63). These allegations are sufficient.

Defendants have only two responses to the allegations. First, they argue that Plaintiffs' allegations are not plausible because the dividend payments were used to pay down the 2013 Note early, and "paying off the debt quite obviously inures to the benefit of the Plan because reducing the debt releases shares to the Plan." (Doc. No. 38 at 19). This argument requires the Court to consider evidence outside of the pleadings, which it cannot do. Worse, it misstates the Complaint's allegations. The Complaint clearly alleges that the dividend payments were used not only to pay down the 2013 Note, but also "for corporate purposes and not for the benefit of the Plan," including "to offset Churchill's obligations to make contributions to the [Plan] as an employee benefit." (Doc. No. 1 ¶¶ 59-60). In fact, Plaintiffs do not appear to contest the 2013 Note payments. (See id. ¶ 59; Doc. No. 46 at 11 ("To be clear, Plaintiffs do not complain that it was improper to use dividends to make payments on the Plan's note to Churchill.")). Churchill Defendants' argument thus completely misses the mark.

Second, Defendants argue that Plaintiffs cannot "assert a breach of fiduciary duty claim for any action that predates 2017," citing ERISA's statute of limitations, 29 U.S.C. § 1113(1). (Doc. No. 38 at 17). That statute of limitations, which Churchill Defendants quote in their motion, states that "[n]o action may be commenced . . . with respect to a fiduciary's breach of any responsibility,

duty, or obligation under this part, or with respect to a violation of this party, after the earlier of – (1) six years after (A) the date of ***the last action*** which constituted a part of the breach or violation . . . or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. 1113(1) (emphasis added). Plaintiffs allege a continuing misuse of dividend payments, in violation of Churchill Defendants' fiduciary duties, from 2013-2019. (Doc. No. 1 ¶ 3). The date from which to apply the statute of limitation is the date of ***the last action***—i.e., the date of the misuse of the 2019 dividend payment. See 29 U.S.C. 1113(1). Defendants have provided no support for their argument that the Court should ignore Plaintiffs' allegations prior to 2017 aside from the language of the statute, which contradicts their argument.

The Court finds that Plaintiffs have plausibly alleged the Churchill Defendants breached the duty of loyalty by misusing the annual dividend payments owed to the Plan between 2013 and 2019.

e. Whether Plaintiffs have plausibly alleged that Churchill Defendants failed to monitor the trustees

Churchill Defendants argue that they only have a limited fiduciary duty to monitor the Plan trustees, and Plaintiffs have not alleged that they failed to do so, requiring that the co-fiduciary duty claim against them must be dismissed. (Doc. No. 38 at 12-13). Plaintiffs respond that they have alleged several facts that should have alerted these Defendants to the problems with the 2020 Transaction and caused them to monitor the Trustee Defendants. (Doc. No. 46 at 7). The Court agrees with Plaintiffs. At this stage of the case, their allegations that the 2020 Transaction was for triple the last valuation of Churchill stock and that the Board adopted the special dividend that

allowed Hardwick to collect $35 million immediately after the transaction are enough to suggest circumstances that should have invoked Churchill Defendants' duty to monitor.

f. Whether Plaintiffs have alleged that Hardwick "knowingly participated" in a transaction prohibited by ERISA when he entered into the 2020 Transaction

Churchill Defendants argue that Plaintiffs have failed to allege that Hardwick "knowingly participated" in a prohibited transaction under ERISA because they have not alleged that he knew the 2020 Transaction was unlawful. (Doc. No. 38 at 13-15). Plaintiffs respond that they need only allege facts that Hardwick knew or should have known that he was transacting with an ERISA fiduciary and that he understood the factual circumstances underlying the transaction. (Doc. No. 46 at 8). They also argue that they need not allege facts rebutting an affirmative defense. (Id. at 7).

Churchill Defendants argue that Plaintiffs have not alleged that "Mr. Hardwick believed he was engaged in an unlawful prohibited transaction." (Doc. No. 38 at 13). This is a distortion of the knowledge element of the claim. Plaintiffs need only allege that Hardwick "knowingly participated" in the fiduciary's breach of ERISA § 406. Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 239 (2000). See also id. at 251 (a defendant "must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful."). It is not a defense that Hardwick may not have known what transactions are unlawful under ERISA § 406 when he entered into the 2020 Transaction. "Ignorance of the law is no excuse." United States v. Fortner, 943 F.3d 1007, 1011 (6th Cir. 2019) (quoting United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971)).

Defendants have offered no support from the Sixth Circuit that rebuts this "general rule." Int'l Minerals, 402 U.S. at 563. The one case they do cite, from the Northern District of California,

does not support their argument. In that case, the plaintiff alleged that two fiduciary defendants had "actual or constructive knowledge" that nonfiduciary defendants violated ERISA "by engaging in, authorizing and permitting prohibited financial transactions." Del Castillo v. Comm. Child Care Council of Santa Clara County, Inc., 2019 WL 6841222, at *2 (N.D. Cal. Dec. 16, 2019). The court held that "mere knowledge that a transaction is (or might be) prohibited under ERISA 406(a)" because "ERISA 408(b) . . . provides for a broad range of statutory and administrative exemptions for 406(a) prohibitions." Id. at *6. Therefore, the plaintiffs needed to plead that the defendants knew they were engaged in conduct that was not exempted by 408(b). The Court did not hold that plaintiffs were required to plead that the defendants believed they were engaged in an unlawful transaction.

Importantly, Plaintiffs raise that several courts disagree with the conclusion in Del Castillo by holding that a plaintiff need not plead the absence of a 408(b) exemption. (See Doc. No. 45 at 14, 14 n.6). The Seventh Circuit explained why:

> An ERISA plaintiff need not plead the absence of exemptions to prohibited transactions. It is the defendant who bears the burden of proving a section 408 exemption, and the burden of pleading commonly precedes the burden of persuasion. . . . We now hold squarely that the section 408 exemptions are affirmative defenses for pleading purposes, and so the plaintiff has no duty to negate any or all of them.

Allen v. GreatBanc Trust Co., 835 F.3d 670, 676 (7th Cir. 2016).

With this in mind, this Court holds that Plaintiffs must allege that Hardwick knew the 2020 Transaction was between the Plan and a "party in interest" concerning the "lending of money or other extension of credit," the "sale or exchange . . . of any property," the "transfer to, or use by or for the benefit of a party in interest." 29 U.S.C. § 406(a).[7] They have done so. They allege:

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[7] The Court has listed the types of transactions implicated in this case; § 406(a) prohibits other forms of transactions between a plan and a party in interest.

- Hardwick sold his remaining shares of Churchill to the Plan. (Doc. No. 1 ¶ 66).
- He sold the shares for more than three times their value one year prior. (Id.).
- Hardwick and "his friends on the Board" appointed PFS and Paredes to serve as the trustee of the Plan with "sole and exclusive authority to negotiate and approve the 2020 Transaction." (Id. ¶ 72).
- Hardwick was "involved in directing the preparation of financial statements and projections by [his] team of subordinate Churchill management for use in valuations in the 2020 Transaction." (Id. ¶ 76).
- Those financial statements and projections overstated Churchill's value. (Id. ¶ 83).
- Hardwick "massively accelerate[d] the [Plan's] payments to him under the 2020 Note" by declaring a $35 million dividend for debt service of that note at the end of 2020. (Id. ¶ 80).

These allegations fit the criteria for a transaction prohibited by 406(a). Moreover, while the Court finds that Plaintiffs were not obligated to plead the absence of a 408(b) exemption, the Court finds that the Complaint plausibly alleges that the 2020 Transaction did not have "adequate consideration." 29 U.S.C. 1108(b)(17).

g. Whether Plaintiffs request equitable relief as to their knowing participation claim against Hardwick.

Churchill Defendants argue that Plaintiffs seek legal damages concerning their knowing participation claim against Hardwick (Count IV), yet they are only entitled to equitable relief. Since Plaintiffs do not seek equitable relief, their claim must be dismissed. (Doc. No. 38 at 15-17). Relatedly, Churchill Defendants also argue that Plaintiffs have failed to trace the funds for which they are seeking disgorgement. (Id. at 16). Plaintiffs respond that their request for disgorgement is a traceable equitable remedy. (Doc. No. 46 at 9-10).

The Supreme Court long ago decided that plaintiffs suing under ERISA § 502(a)(3) are only entitled to equitable relief, not money damages. See Mertens v. Hewitt Assoc., 508 U.S. 248, 248 (1993) ("ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty."); Harris, 530 U.S. at 241 (holding

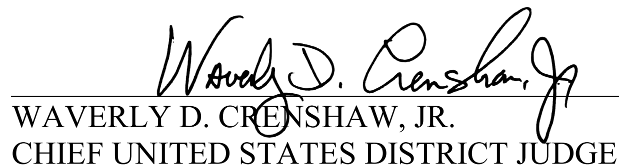
that § 502(a)(3) allows suits for equitable relief against nonfiduciaries). Plaintiffs' knowing participation claim against Hardwick is brought under that provision. (See Doc. No. 1 ¶ 121). Defendants are correct, then, that Plaintiffs are limited to seeking equitable relief for their knowing participation claim against Hardwick.

Here, Plaintiffs request disgorgement of Hardwick's ill-gotten gains from the 2020 Transaction, which is the difference between what Hardwick received for his shares and the fair market value of those shares. (Doc. No. 1 ¶¶ 131). That is an equitable remedy. Harris, 530 U.S. at 250. Churchill Defendants argue that Plaintiffs' disgorgement request "identif[ies] no specific property or traceable funds." (Doc. No. 38 at 16). Churchill Defendants further argue that Plaintiffs actually seek money damages because "[t]hey seek to recover the [Plan's] monetary losses—the amount of the alleged overpayment—from the Trustee" and the Board Defendants, but that argument does not win the day. (Id.). Plaintiffs seek money damages for their breach of fiduciary duty claims against the Trustee Defendants and Board Defendants, but their request for disgorgement from Hardwick under their knowing participation claim is separate. (See Doc. No. 1 ¶ 131). Ultimately, they will not be able to double collect from the Defendants, but that Plaintiffs request different types of relief for different claims is unobjectionable at this phase of the case.

Moreover, Plaintiffs have alleged that the funds requiring disgorgement can be traced. The Sixth Circuit recently described the level of detail required to plead traceability at the motion to dismiss phase of a case. In Patterson v. United Healthcare Ins. Co., the Sixth Circuit held that "[a]lthough we have not so held, there is reason to believe the tracing requirement . . . applies to disgorgement in ERISA cases between two private parties." 76 F.4th 487, 497 (6th Cir. 2023). In Patterson, the defendants argued that "the complaint failed to identify a 'specifically identified fund' in their possession." Id. at 498. The Sixth Circuit found that the plaintiff adequately pleaded

this requirement by "request[ing] the return of the $25,000 . . . Patterson paid to [the defendant] and [the defendant] retained." Id. Plaintiffs do the same here: they request "disgorgement of any ill-gotten gains [Hardwick] received in connection with the 2020 Transaction." (Doc. No. 1 ¶ 131). Moreover, Plaintiffs specifically allege that a portion of that overpayment was made by the Plan to Hardwick in the form of a $35 million paydown of the 2020 Note. As the Sixth Circuit noted in Patterson, "[i]f in the end [the defendant] spent the $25,000 on nontraceable items or transferred it to the plan, as two examples, Patterson can no longer invoke disgorgement and equitable restitution." Patterson, 76 F.4th at 498. Plaintiffs may ultimately not be able to trace Hardwick's funds and as a result, be unable to disgorge his ill-gotten gains. "For now, though, [Plaintiffs] ha[ve] made out a colorable equitable claim." Id.

An appropriate order will be entered.



WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE