IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN WAGNER, BRUCE MACDONALD, SYLBERIA ANN RAJI, and MICHAEL CARL MAMAY, in their individual capacities and on behalf of the Stiefel Laboratories Inc. Employee Stock Bonus Plan,	**CIVIL ACTION FILE**
Plaintiffs,	**NO. 1:12-CV-3234-MHC**
v.	
STIEFEL LABORATORIES, INC., CHARLES W. STIEFEL, BRENT D. STIEFEL, TODD STIEFEL, STEPHEN KARASICK, MICHAEL CORNELIUS, and MATT S. PATTULLO,	
Defendants.	

ORDER

This is at least the fifth lawsuit brought by former employees of Stiefel Laboratories, Inc. ("SLI") alleging a scheme by certain of SLI's board members to manipulate employees' ownership of shares of the privately-held company in order

to profit improperly from the company's eventual sale.[1] This case comes before the Court on: (1) Defendants' (also "SLI" or "Company") motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(1) [Doc. 44] ("Defs.' Mot. to Dismiss"); (2) Defendants' Motion for Summary Judgment [Doc. 74] ("Defs.' Mot. for Summ. J."); and (3) Plaintiffs' Motion for Partial Summary Judgment [Doc. 73] ("Pls.' Mot. for Part. Summ. J.");

I. BACKGROUND[2]

A. The Parties

[1] Bacon, et al. v. Stiefel Laboratories, Inc., No. 09-CV-21871 (S.D. Fla. July 6, 2009); Fried, et al. v. Stiefel Laboratories, Inc., No. 11-CV-20853 (S.D. Fla. March 11, 2011); Martinolich, et al. v. Stiefel Laboratories, Inc., No. 12-CV-24212 (S.D. Fla. Nov. 27, 2012); Beede, et al. v. Stiefel Laboratories, Inc., No. 13-CV-120 (N.D.N.Y. Jan. 13, 2013).

[2] The Court has viewed all evidence and justifiable factual inferences in the light most favorable to Plaintiffs, as required on Defendants' motion for summary judgment. Matshushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Sunbeam TV Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1270 (11th Cir. 2013). Likewise, the Court has viewed all evidence and justifiable factual inferences in the light most favorable to Defendants, on Plaintiffs' motion for partial summary judgment. In addition, the Court has excluded assertions of facts by either party that are immaterial or presented as arguments or legal conclusions or any fact not supported by citation to evidence. LR 56.1B(1), NDGa. The Court accepts as admitted those facts in the moving party's statement that have not been specifically controverted with citation to the relevant portions of the record by the opposing party. LR 56.1B(2), NDGa.

Plaintiffs John Wagner ("Wagner"), Bruce Macdonald ("Macdonald"), Sylberia Ann Raji ("Raji"), and Michael Carl Mamay ("Mamay") are former SLI employees and former participants in SLI's Employee Stock Bonus Plan ("ESBP" or "Plan").[3] Pls.' Statement of Undisputed Material Facts [Doc. 73-2] ("Pls.' SUMF") ¶ 1. SLI was a privately-held pharmaceutical company until July 22, 2009, when it was acquired by GlaxoSmithKline, LLC ("GSK"). Defs.' Statement of Undisputed Material Facts [Doc. 74-1] ("Defs.' SUMF") ¶ 1. Since 2001, and prior to the merger with GSK, Defendant Charles Stiefel had served as Stiefel's Chief Executive Officer and the Chairman of the Board of Directors. Id. ¶ 2. He also served as the Plan's Trustee from August 2001 through October 2008. Pls.' Resp. to Defs.' Statement of Undisputed Material Facts [Doc. 81-27] ("Pls.' Resp. to Defs.' SUMF") ¶ 20. Defendants Brent Stiefel and Todd Stiefel are former officers at SLI and served on SLI's Board of Directors from 2001 through the merger with GSK. Id. ¶ 3. Defendants Steve Karasick, Matt Patullo, and Michael Cornelius were officers at SLI until the GSK merger. Id. ¶ 4. Steve Karasick also served as a Plan Trustee from the end of October 2008 until the merger with GSK in July 2009. Id. ¶ 22.

[3] Another Plaintiff, Joan Peterson, was dismissed by stipulation of the parties on November 20, 2013.

B. The Plan

In 1975, SLI established the Plan[4] under section 401(a) of the Internal Revenue Code, so that company employees could share in the growth of the company. Pls.' Resp. to Defs.' SUMF ¶ 7. The Plan is a defined contribution plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101, *et seq.* ("ERISA"). Id. ¶ 8. SLI contributed shares of stock and/or cash to the Plan each year, which were allocated to the Plan participant accounts. Pls.' SUMF ¶ 4; Pls.' Resp. to Defs.' SUMF ¶ 33. As required by ERISA and the Internal Revenue Code, SLI formed a trust to hold the assets of the Plan. Pls.' Resp. to Defs.' SUMF ¶ 9. Under the terms of the Plan, each eligible Plan participant had "put" rights, i.e., a participant could require, upon a "qualifying event," that SLI purchase the distributed stock at the price set forth in the most recent SLI common stock appraisal. Pls.' Resp. to Defs.' SUMF ¶ 43; Pls.' SUMF ¶ 10. A "qualifying event" included death, disability, termination of employment, and a statutory retirement age. Pls.' SUMF ¶ 10. Because SLI's stock was not publicly traded, the Plan's Trustee would have to determine the fair market value

[4] The Plan was originally set up as employee stock ownership plan ("ESOP"); however, on January 1, 2004, the Plan was amended to terminate the ESOP component and eliminate the Plan's ability to buy SLI stock with qualified loans. Declaration of Matt Pattullo [Doc. 74-6] ("Pattullo Decl.") ¶ 4, attached as Ex. 2 to Defs.' Mot. for Summ. J.

of the Company's common stock at least once a year. Pls.' Resp. to Defs.' SUMF ¶ 23. During the time that Charles Stiefel served as Trustee, he annually engaged Certified Public Accountant Terence Bogush ("Bogush") to perform annual valuations of SLI common stock held by the Plan. Id. ¶ 24. Bogush initially was retained in 1987 by a former Plan Trustee, Werner Stiefel, to conduct the annual appraisals of SLI's stock. Id. ¶ 25. In March 2006, Bogush valued SLI's common stock at $13,012 per share, in March 2007 – at $14,517 per share, and in March 2008 – at $16,469 per share. Id. ¶¶ 29-31.

On May 29, 2008, based on a benefits consulting firm's recommendation, SLI's Board authorized merging the Plan and 401(k) plan ("Merged Plan"). Id. ¶ 59. In the fall of 2008, the Plan was amended to authorize optional diversification and, in November 2008, vested Plan participants who were SLI's employees, were notified that once a year they would have the option, without a "qualifying event," to elect a distribution of the stock held in their Plan accounts. Pls.' SUMF ¶ 11; Pls.' Resp. to Defs.' SUMF ¶ 61; Defs.' Resp. to Pls.' Statement of Undisputed Material Facts [Doc. 83-1] ("Defs.' Resp. to Pls.' SUMF") ¶¶ 11-12; Pattullo Decl. ¶¶ 7-9. In November 2008, it was announced to the eligible Plan participants that the optional diversification would be offered once a year. Pls.'

Resp. to Defs.' SUMF ¶¶ 67, 74. However, a new Merged Plan[5] became effective only on January 1, 2009, and the first election window for exercising optional diversification rights was moved to January 12, 2009, through February 2, 2009. Pattullo Decl. ¶¶ 9, 11; Pls.' Resp. to Defs.' SUMF ¶ 62. After January 1, 2009, Plan participants were permitted to put the SLI stock held in their Plan accounts through an "automatic put" process, which reduced the time to distribute the shares of stock and honor put elections to Plan participants, who elected to put their shares to SLI after receiving a distribution from the Plan. Pattullo Decl. ¶ 13. During this diversification window, Plan participants sold their common stock for $14,469 per share to SLI. Ex. 46 (attached to Pls.' Mot. for Part. Summ. J.).

Macdonald was a long-tenured SLI employee and Plan participant; he was eligible to participate in both statutory and optional diversification. Pls.' Resp. to Defs.' SUMF ¶ 148. In 2007 and 2008, exercising his statutory diversification rights, he took a distribution of a total of nineteen shares of SLI's stock from his Plan account and put the shares to SLI. Id. ¶¶ 149-53. In January 2009, Macdonald exercised his optional diversification rights for nineteen shares of

[5] The Plan did not terminate upon merging with the 401(k) plan; rather, it became and remained a component part of the Merged Plan, with its separate Trust account and Trustee. Pls.' Resp. to Defs.' SUMF ¶¶ 63-64.

stock. Id. ¶¶ 154-55. SLI paid the amounts that Bogush annually determined, i.e., in March 2006, Bogush valued SLI's common stock at $13,012 per share, in March 2007 – at $14,517 per share, and in March 2008 – at $16,469 per share. Id. ¶¶ 29-31. As a result of the SLI-GSK merger, Macdonald received over three million dollars for his 45.261403 shares of SLI's stock he had remaining in his Plan's account. Id. ¶ 159.

When Wagner resigned his employment with SLI on August 31, 2008, his put rights were triggered. Id. ¶¶ 158-59. In October 2008, he requested a distribution of all the stock in his Plan account, and his IRA custodian received Wagner's SLI stock certificates on December 8, 2008. Id. ¶¶ 160-61; Deposition of John A. Wagner, taken August 14, 2013 [Docs. 74-35 & -36] ("Wagner Dep."), Exs. 374-75, attached as Ex. M to Defs.' Mot. for Summ. J. The IRA custodian then exercised Wagner's put rights, and SLI paid the custodian $16,469 per share on February 2, 2009. Pls.' Resp. to Defs.' SUMF ¶ 162.

Raji was eligible to participate in optional diversification; she requested distribution of all SLI stock in her Plan account, and put that distributed stock to SLI in January 2009, at the price per share of $16,469. Deposition of Sylberia Ann Raji, taken August 13, 2013 [Docs. 74-37 & -38] ("Raji Dep."), Exs. 355-56,

attached as Ex. N to Defs.' Mot. for Summ. J. SLI paid Raji for her stock in February 2009. Pls.' Resp. to Defs.' SUMF ¶ 164.

Mamay was eligible to participate in optional diversification; he elected to take a distribution of all the stock in his Plan's account and put the distributed stock to SLI in February 2009, at $16,469 per share. Id. ¶ 168. SLI paid Mamay for the stock the same month. Id. ¶ 169.

C. Acquisition of Connetics and Blackstone's Investment in SLI

In the fall of 2006, SLI received five offers to purchase an interest in the Company from TA Associates, Apax Partners WorldWide LLP, Blackstone Healthcare Partners LLC ("Blackstone"), Summit Partners, and Lindsey Goldberg & Bressemer. See Ex. 15 (filed under seal) at 45 Doc. 73-4, attached to Pls.' Mot. for Part. Summ. J.; see also Pls.' SUMF ¶ 24. The offers ranged from $1.9 billion to $2.9 billion. Id.

However, in November 2006, SLI terminated the private equity negotiations and, instead, obtained a loan from a consortium of banks led by Deutsche Bank in the amount of $600-$700 million ("DB loan") to finance the purchase of Connetics Corporation ("Connetics"). Deposition of Charles Stiefel, taken January 18, 2011 [Docs. 74-8 & -9] ("Charles Stiefel Dep. I") at 156-58. In December 2006, SLI acquired Connetics for $661 million. Doc. 73-4 at 42-44. The DB loan required

that SLI comply with certain financial covenants, and breach of the debt covenants potentially could result in the loan's cancellation. Charles Stiefel Dep. I at 332-34; Pattullo Decl. ¶ 10; Declaration of Charles Stiefel [Doc. 74-3] ("Charles Stiefel Decl.") ¶ 18.

On January 2, 2007, Blackstone proposed to purchase all of SLI's common stock for approximately $1.45 billion. Deposition of Charles Stiefel taken October 10, 2012 [Docs. 74-12 & -13] ("Charles Stiefel Dep. II") at 333-34; Dep. of Anjan Mukherjee taken September 26, 2012 [Docs. 74-23 & -24] ("Mukherjee Dep.") at 37-40. Charles Stiefel, SLI's CEO, controlled the majority of the B shares and had the power to veto any transaction; he rejected Blackstone's offer. Charles Stiefel Dep. II at 54-55, 333-34; Mukherjee Dep. at 44-45. However, later in the year, Charles Stiefel, concerned with the Company's bank indebtedness, resumed "the idea of bringing in a convertible – preferred equity investment to repay some of that bank debt." Mukherjee Dep. at 40-41. SLI approached Blackstone and other private equity companies with the idea of convertible preferred investment. Id. at 41.

On July 31, 2007, Blackstone submitted its proposal regarding preferred stock investment in SLI, and its offer was accepted in early August 2007. Charles Stiefel Decl. ¶ 6, Ex. 16 (filed under seal). SLI's A Convertible Participating

Preferred Stock ("Preferred Stock") that Blackstone acquired for $500 million,[6] included rights that the common stock holders did not have. Charles Stiefel Decl. ¶¶ 5, 8-9, Exs. 1-3. The rights, among other things, included: (1) a 4.5% dividend payable in additional shares of Preferred Stock; (2) reimbursement of up to $1 million in transaction fees and expenses that Blackstone incurred; (3) a stock put right (by exercising this right, Blackstone could compel SLI to repurchase all of its Preferred Stock at the end of eight years for an appraised control premium price, but not less than $60,407 per share); (4) anti-dilution rights; (5) liquidation preferences over common stockholders; (6) veto rights over certain corporate transactions; and (7) the right to appoint one of the nine members of SLI's Board of Directors. Charles Stiefel Decl. ¶¶ 5, 8, Exs. 1-4; Mukherjee Dep. at 47-57. On August 9, 2007, the Company made an announcement to its employees about Blackstone's investment. Charles Stiefel Decl. ¶ 7, Ex. 2. The announcement, among other things, stated that "Stiefel w[ould] continue to be a privately held company," and that there were no plans for SLI "to become a publicly traded company." Id., Ex. 2. Blackstone's Preferred stock investment was also discussed in SLI's 2008 Annual Report, a press release dated March 31, 2008, the Bogush

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[6] Blackstone bought Preferred Stock for $60,407.60 per share. Pls.' SUMF ¶ 26; Defs.' Resp. to Pls.' SUMF ¶ 26.

valuation, and other media. Charles Stiefel Decl. ¶ 8, Ex. 3; Pls.' Resp. to Defs.' SUMF ¶ 119.

In Fall 2008, SLI's revenue was falling and its earnings were sharply reduced. Mukherjee Dep. at 64-67. In November 2008, SLI's financial projections revealed that the Company would be in violation of the DB loan covenants by June 2009. Charles Stiefel Dep. II at 198-200; Charles Stiefel Decl. ¶ 18, Ex. 5. As a result, SLI announced an austerity program on November 19, 2008, and also laid off approximately 2.5% of its global workforce in early December 2008. Charles Stiefel Decl. ¶ 18; Raji Dep. at 100-02, Exs. 12, 33.

D. Merger with GSK

Around November 20-24, 2008, Anjan Mukherjee, Blackstone's representative on SLI's Board, informed Charles Stiefel that Sanofi-Aventis ("Sanofi") was interested in potentially acquiring SLI. Charles Stiefel Dep. I at 202-06. On November 26, 2008, Charles Stiefel informed Mukherjee that he had discussed Sanofi's interest with his sons, Brent and Todd Stiefel, who also were Board members and executives at the Company. Id. at 207-09. Charles Stiefel asked Mukherjee for guidance in the event a decision to sell the Company was reached. Id. at 209. Mukherjee suggested that the Company consider a possible sale now or wait several years until SLI's new products "hit" the market.

Mukherjee Dep. at 74-75. On November 26, 2008, SLI made the decision to explore Sanofi's interest. Pls.' Resp. to Defs.' SUMF ¶ 131. On December 22, 2008, Charles Stiefel and several others met with Sanofi's CEO, but no price or deal details were discussed. Charles Stiefel Dep. I at 239-42. SLI engaged Blackstone Advisory Services to assist in an exploration of the Company's possible sale. Id. at 258-60.

This exploration process, referred to as "Project Jump," was kept confidential, but between January 20, 2009, and February 3, 2009, all the Individual Defendants were aware of it. Id. at 261-62. However, the Board as a whole did not know about it until the March 12, 2009, Board meeting. Id. at 253-54. On March 24, 2009, SLI received preliminary, non-binding proposals from Sanofi and GSK. Id. at 199-200, Ex. 63 at 52. On April 16, 2009, GSK submitted a revised bid to acquire SLI. Id. The Board approved the merger agreement with GSK on April 19, 2009, with GSK acquiring SLI for approximately $2.9 billion in cash. Charles Stiefel Dep. I at 199-200, Ex. 63 at 45, 52-53. On April 20, 2009, the merger agreement was executed, and the merger closed on July 22, 2009. Pls.' Resp. to Defs.' SUMF ¶ 142. The shares of stock that SLI acquired in connection with Plan participants' put elections were cancelled and later became the Company's treasury stock. Id. ¶ 143. In connection with the merger, SLI's

shareholders, including the Plan participants, received approximately $70,000 per share for their stock. Id. ¶ 146. All named Plaintiffs in the instant action learned no later than July-August 2009 that the SLI stock held by the Plan was allegedly undervalued and that the Plan participants were paid too little for the stock they put to SLI. Deposition of Bruce Macdonald taken August 15, 2013 [Doc. 74-30] ("Macdonald Dep.") at 27-29; Wagner Dep. at 90-95; Raji Dep. at 191.

E. General Releases and Covenants Not to Sue

Macdonald signed a general release of all claims agreement on May 31, 2011, and Raji executed an identical one on February 26, 2010. See General Release signed by Bruce D. MacDonald on May 31, 2011 [Doc. 44-5] ("Macdonald Release"), attached as Ex. E to Defs.' Mot. to Dismiss; General Release signed by Sylberia A. Raji on February 26, 2010 [Doc. 44-6] ("Raji Release"), attached as Ex. F to Defs.' Mot. to Dismiss; Macdonald Dep. at 214-15; Raji Dep. at 224-27, 229. In exchange, Macdonald received $232,073 and Raji received the equivalent of eight weeks of her base salary. Doc. 44-8 at 10; Doc. 44-9 at 9; Macdonald Dep. at 201. In relevant part, their releases provide:

> In consideration of the monies and other consideration to be received by me and to which I am not otherwise entitled, the adequacy of which I hereby acknowledge, and intending to be legally bound, I hereby unconditionally and forever release, waive and forever discharge Stiefel Laboratories, Inc., and GlaxoSmithKline LLC, a Delaware limited liability company, and their affiliates, parents,

> successors, predecessors, subsidiaries and assigns, an all of their present or former directors, trustees, officers, employees, representatives, agents, benefit plans (together with all benefit plan administrators, fiduciaries, trustees and insurers) and attorneys (hereinafter referred to individually and collectively as the "Company") from any and all claims, agreements, causes of action, demands or liabilities of any nature whatsoever in law or in equity (collectively referred to as "claims") arising, occurring or existing at any time prior to the signing of this General Release, whether known or unknown, with the sole exception of the claims that are set forth in subparagraph I.B. below.[7]

Macdonald Release at 2; Raji Release at 2. The waiver specifically included "any and all claims arising under" "the Employee Retirement Income Security Act." Id. Further, the General Release included an acknowledgment, which, in relevant part, provided:

> By signing this General Release, I hereby expressly acknowledge, agree and confirm the following:
>
> 1. I have been provided with adequate notice and information as required by the Older Workers' Benefit Protection Act, where applicable, and was advised by the Company to consult with an attorney of my choice prior to signing this General Release and to have such attorney explain to me the terms of this General Release including, without limitation, the terms relating to my release of claims . . . .

[7] Section I.B excepted from the scope of the release claims for workers' compensation benefits, unemployment benefits filed with state agencies, challenges under the Older Workers Benefit Protection Act, and claims that cannot be released under federal law. MacDonald Release at 3; Raji Release at 3.

> 2. I was given at least forty-five (45) calendar days to consider the terms of this General Release and to consult with an attorney of my choosing with respect thereto . . . . I understand that if I sign this release and do not revoke my acceptance of it within the respective Revocation Period, my release of claims will be irrevocable.
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> 3. I am receiving monies or other consideration to which I am not otherwise entitled; the value I am receiving is in full satisfaction of any and all claims, actions or causes of action for payment or other benefits of any kind that I may have against the Company; and I am releasing all my claims against the Company knowingly and voluntarily and without duress, coercion or undue influence of any kind.
>
> 4. . . .
>
> 5. I agree that I will not file or cause to be filed any lawsuit against the Company asserting any of the claims that I have released in this General Release or join as a party with others who may sue the Company on any such claims or accept any relief in any lawsuit regarding such claims.

MacDonald Release at 3-4; Raji Release at 3-4.

Finally, the General Release contained the following language:

> I hereby acknowledge that the monies and other consideration payable to me in accordance with this General Release on and after the date of my termination of employment with the Company are contingent upon my execution of this General Release, without which execution I will not be entitled to such amounts. I agree that this General Release embodies the entire agreement between the Company and me, that this General Release cannot be modified except by a written agreement. . . .

Macdonald Release at 5; Raji Release at 5.

On January 19, 2010, Mamay executed a similar release. See Severance Agreement and General Release of All Claims signed by Michael Carl Mamay on January 19, 2010 [Doc. 44-7] ("Mamay Release"), attached as Ex. G to Defs.' Mot. to Dismiss. In relevant part, the Mamay Release provided for the certain exceptions to the release, including "[e]mployee's rights under the employment benefits plans of the Company, as applicable to Employee on the date Employee received this Agreement." Id. at 3. The release also stated: "Employee promises to refrain from asserting any of the Released Claims against any of the Released Parties. Employee understands that, as a result of executing this Agreement, he/she will have no right to assert . . . any other Released Claims against the Released Parties. . . ." Id. at 3-4. Mamay, by signing the release, acknowledged that he did so knowingly and voluntarily. Id. at 6.

F. The Complaint

On September 14, 2012, Wagner and Macdonald filed the above-styled lawsuit "in their individual capacities and on behalf of the" ESBP against SLI and Individual Defendants alleging breach of fiduciary duty and prohibited transactions in violation of ERISA. Compl. [Doc. 1]. Raji joined this lawsuit on December 17, 2012, when the Amended Complaint was filed. Am. Compl. [Doc. 13]. Mamay was added to the lawsuit on February 15, 2015, when the Second Amended

Complaint was filed. Second Am. Compl. [Doc. 27] Individual Defendants are Charles W. Stiefel, Brent D. Stiefel, Todd Stiefel, Stephen Karasick, Michael Cornelius, and Matt S. Pattullo ("Individual Defendants"). Id. ¶ 3. Plaintiffs allege that the Individual Defendants and SLI were fiduciaries of the Plan under ERISA during the events in question. Id. ¶¶ 131-32.

Plaintiffs allege that their claims are based on statutory rights, "such as ERISA §§ 404-406," that they may bring a civil action under ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) & (a)(3), and they are entitled to recover losses under ERISA § 409, 29 U.S.C. § 1109. Id. ¶ 117. Plaintiffs further state that their claims "are distinguishable from claims based on 'benefits due' or other contractual rights under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)." Id. Plaintiffs point out that they "are not seeking to recover benefits due or to enforce other rights specific to themselves," instead, the relief that they seek is "to remedy breaches of fiduciary duties owed by the Defendants to the Plan." Id. ¶ 121.

In Count I, Plaintiffs allege violations of ERISA § 404, 29 U.S.C. § 1104. Id. ¶ 147. They claim that Defendants breached their fiduciary duties by: (1) developing "the concept of the purported one-time 'opportunity' to diversify in which Stiefel Labs repurchased Company stock from" the Plan participants; (2) controlling "the flow of information to the valuator appraising Stiefel Labs'

Company stock;" (3) setting up "the structure of the eventual sale to GSK for prices well in excess of the amount paid to the employees for their Company stock;" and (4) communicating "false and misleading information" to Plan participants concerning the value and repurchase of SLI stock shares. Id. ¶ 136. In Count II, Plaintiffs allege violations of ERISA § 405, 29 U.S.C. § 1105, and assert that Defendants breached their fiduciary duties by providing false and incomplete information to the Plan members about the true value of SLI stock. Id. ¶¶ 153-54. In Count III, Plaintiffs allege violations of ERISA §§ 406 and 408, 29 U.S.C. § 1106 and 1108, and assert that Defendants engaged in prohibited transactions between the Plan and the Company. Id. ¶¶ 158-68.

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A party seeking summary judgment has the burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and cannot be made by the district

court in considering whether to grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); see also Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999).

If a movant meets its burden, the party opposing summary judgment must present evidence that shows there is a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. Celotex, 477 U.S. at 324. In determining whether a genuine issue of material fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. Anderson, 477 U.S. at 255; see also Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. Anderson, 477 U.S. at 248. A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Id.

"If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. But, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment for the moving party is proper. Matsushita Elec. Indus. Co., 475 U.S. at 587.

III. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants filed a motion to dismiss all claims asserted by MacDonald, Raji, and Mamay, and all claims asserted on behalf of the Plan and on behalf of absent Plan participants, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defs.' Mot. to Dismiss at 1. Defendants assert that the three Plaintiffs lack standing to bring any claims because they knowingly and voluntarily released all claims against Defendants. Id. at 1, 10, 12.

A defendant can file a motion to dismiss to contest a federal court's subject matter jurisdiction over a claim. FED. R. CIV. P. 12(b)(1). These motions come in two varieties: (1) attacking subject matter jurisdiction on the face of the complaint; and (2) using extrinsic evidence to launch a factual attack on jurisdiction. See Morrison v. Amway Corp., 323 F.3d 920, 925 n.5 (11th Cir. 2003). A court deciding a facial attack to subject matter jurisdiction has to accept all well-pled factual allegations as true, viewing them in the light most favorable to the plaintiff. See McElmurray v. Consol. Gov't of Augusta-Richmond Cnty., 501 F.3d 1244, 1250 (11th Cir. 2007). In other words, the court merely looks to "see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990).

Defendants do not make a facial challenge to the Court's subject matter jurisdiction but, instead, contend that the release agreements executed by MacDonald, Raji, and Mamay deprive Plaintiffs of standing to bring their claims. "The Court, however, finds that the existence of a valid and applicable release . . . is an affirmative defense that goes to the merits of a litigant's claim, and not an issue that concerns standing." Beede v. Stiefel Labs., Inc., No. 1:13-CV-120 (MAD/RFT), 2014 WL 896725, at *2 (N.D.N.Y. Mar. 6, 2014). Plaintiffs' Complaint seeks recovery under ERISA, which vests the Court with subject matter jurisdiction. Defendants have raised the same issue in their motion for summary judgment, where it more properly belongs. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) [Doc. 44] is hereby **DENIED**.

B. Defendants' Motion for Summary Judgment

1. Macdonald's, Raji's, and Mamay's General Releases Bar Their Claims in This Case But Wagner May Pursue a Claim For Losses Sustained to His Individual Account.

Defendants claim that they are entitled to summary judgment on all claims asserted by Macdonald, Raji, and Mamay, including claims asserted under ERISA § 502(a)(2) on behalf of a plan, because they signed releases and covenants not to sue. Defs.' Mot. for Summ. J. at 29-31. Further, Defendants assert that all Plaintiffs lack standing to pursue claims on behalf of absent Plan participants

without obtaining class certification. Id. at 44-49. With regard to the representational claims, Defendants contend that because Plaintiffs allege that Defendants breached fiduciary duties they owed to the Plan's individual participants which resulted in money damages, and not to the Plan itself, they cannot proceed under section 502(a)(2). Id. at 39-42. Defendants further argue that most of the Plan participants benefited from an alleged undervaluation, and Plaintiffs here seek to recover money damages for individual harm only. Id. at 42-44.

Plaintiffs, on another hand, assert that there is no distinction between fiduciary duties owed to the Plan and to the Plan participants. Pls.' Mot. for Part. Summ. J. at 13-14. Plaintiffs also contend that they have standing to seek recovery under sections 502(a)(2) and 409 for the harm that their individual Plan accounts suffered when they did not receive the actual value of their shares. Id. at 17.

The majority of circuits that have considered the issue of waiver under ERISA, have concluded that the statute itself "does not explicitly address if and how a plan beneficiary can waive her right to benefits." IBEW Local 613 Defined Contribution Pension Fund v. Moore, No. 1:04-CV-3738-TWT, 2005 WL 3953991, at *4 (N.D. Ga. Oct. 14, 2005) (citing cases from various circuits). "Because ERISA is silent on waiver, these courts have applied prevailing federal

common law and have held that a waiver by a designated beneficiary is valid if it is 'explicit, voluntary, and made in good faith.'" Id. (citation omitted). Plaintiffs do not contend that their waivers and releases were not explicit, voluntary, or not made in good faith.

In Finnerty v. Stiefel Laboratories, Inc.,[8] No. 09-CV-2187 (S.D. Fla. 2009), plaintiffs Mark Palakovich ("Palakovich") and Michael Teller ("Teller") executed almost identical releases and covenants not to sue as MacDonald, Mamay, and Raji. Compare Raji Release with the General Release signed by Mark Palakovich, attached as Ex. 2 [Doc. 55-2] to Defs.' Reply in Support of Their Mot. to Dismiss [Doc. 55] ("Defs.' Reply in Supp. of Mot. to Dismiss"); compare MacDonald Release with the General Release signed by Michael Teller attached as Ex. 1 [Doc. 55-1] to Defs.' Reply in Supp. of Mot. to Dismiss; compare Mamay Release with Polokovich's Severance Agreement and General Release of All Claims in Finnerty, Case No. 09-CV-21871, Doc. 291-16, Ex. 20. Plaintiffs' assertion that the Finnerty court did not consider a virtually identical release as Mamay's in its ruling is erroneous. See Pls.' Opposition to Defs.' Mot. to Dismiss [Doc. 48] ("Pls.'

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[8] The Finnerty putative class action was originally styled James Bacon, Mark Karl Popp, and Marion Burk v. Stiefel Labs., Inc., et al., No. 09-CV-21871 (S.D. Fla. 2009), Doc. 1. Plaintiffs Mark Palakovich and Timothy Finnerty later joined the lawsuit. Id., Docs. 47, 124.

Opp'n to Defs.' Mot. to Dismiss") at 29. The court in Finnerty did analyze a release very similar to Mamay's. See Finnerty, No. 09-CV-21871, Doc. 384 at 2-3 (discussing Palakovich's Severance Agreement and General Release of All Claims). In addition, Plaintiffs' contention that Mamay's release specifically excluded "*claims related to the Plan*" is incorrect. See Pls.' Opposition to Defs.' Mot. for Summ. J. [Doc. 81] ("Pls.' Opp'n to Defs.' Mot. for Summ. J.") at 22-23 (emphasis in original). Mamay's release excludes "Employee's rights under the employment benefits plans of the Company, as applicable to Employee on the date Employee received this Agreement." Mamay Release at 3. This limited exception is inapplicable under the circumstances because Mamay here is asserting his statutory rights under ERISA, and not any contractual rights under the Plan.

The Finnerty court found that the Finnerty,[9] Palakovich, and Teller releases, which are almost identical to the ones here, were executed knowingly and voluntarily, and constituted valid and enforceable contracts. Finnerty, Case No. 09-CV-21871, Doc. 384 at 7. In addition, relying on Kennedy v. Plan Admin. For DuPont Sav. & Invest. Plan, 555 U.S. 285 (2009), the Finnerty court determined that the releases were not affected by ERISA's anti-alienation clause, 29 U.S.C. §

[9] Some of Finnerty's claims were outside the scope of his release. See Finnerty, Case No. 09-CV-21871, Doc. 384 at 13-15.

1056(d)(1). Id. at 11-12. Finally, the Finnerty court concluded that ERISA claims did not have to be separately negotiated or supported by separate consideration, or that a release must specifically mention a waiver of ERISA claims. Id. at 12 (citing Chaplin v. NationsCredit Corp., 307 F.3d 368, 370-73 (5th Cir. 2002); Smart v. Gillette Co. Long-Term Disability Plan, 887 F. Supp. 383, 384 (D. Mass.) aff'd, 70 F.3d 173 (1st Cir. 1995); Sussman v. Rabobank Int'l, 739 F. Supp. 2d 624, 628-29 (S.D.N.Y. 2010); Howell v. Motorola, Inc., 633 F.3d 552 (7th Cir. 2011)).

This Court finds the Finnerty court's analysis on point. Thus, the Court concludes that the releases signed by Macdonald, Mamay, and Raji constitute valid and enforceable contracts, and that they effectively preclude those individuals from bringing section 502(a) claims on behalf of themselves in this case.

However, the Court concludes that Wagner may proceed under section 502(a)(2) and seek relief for the damages incurred by his Plan's individual account. In Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985), a case concerning a defined benefit plan, the Supreme Court held that plan participants may use section 502(a)(2) to enforce section 409 when they seek recovery on behalf of the "entire plan" and not recovery for an "individual injury." Id. at 144. The plan in Russell did not have *individual* accounts; it paid a fixed benefit based on a percentage of

the employee's salary. See Russell v. Mass. Mut. Life Ins. Co., 722 F.2d 482, 486 (9th Cir. 1983). In LaRue v. DeWolff, Boberg & Assoc., 552 U.S. 248 (2008), the Supreme Court clarified that Russell did not preclude a plan participant from seeking recovery for losses in his or her *individual* account under section 502(a)(2) in a defined contribution plan, even if other plan participants did not suffer any losses. The Supreme Court reasoned:

> The "entire plan" language in Russell speaks to the impact of § 409 on plans that pay defined benefits. Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.

Id. at 255. In contrast, in 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 persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409.

Id. at 255-56. Thus, although plan participants of a defined benefit plan cannot recover for individual loss, plan participants of a defined contribution plan can recover for individual losses to their account. Accordingly, LaRue opened the door to section 502(a)(2) suits alleging losses to individual plan accounts in defined contribution plans. Since LaRue, courts have allowed former employees who have cashed out of defined contribution plans to sue as participants to recover

losses to their individual accounts resulting from a breach of fiduciary duty. Lanfear v. Home Depot, Inc., 536 F.3d 1217, 1223 (11th Cir. 2008). And the courts classify such claims as requests for additional benefits rather than for damages:

> We agree with the Third, Sixth, and Seventh Circuits. A complaint for the decrease in value of a defined contribution account due to a breach of fiduciary duty is not for damages because it is limited to the difference between the benefits actually received and the benefits that would have been received if the plan management had fulfilled its statutory obligations. Because their complaint is for benefits, not damages, the former employees qualify as participants.

Id.

It is undisputed that the Plan in this case is a defined contribution Plan. Pls.' Resp. to Defs.' SUMF ¶ 7. Thus, because "it is possible that the injury suffered by [Wagner] may affect 'the plan as a whole,'" he may proceed under section 502(a)(2) with regard to his *individual* Plan account. George v. Kraft Foods Global, Inc., No. 08 C 3799, 2011 WL 5118815, at *6 (N.D. Ill. Oct. 25, 2011). Accordingly, just like the defined contribution participant in LaRue, Wagner can pursue an *individual* claim for the losses caused to his *individual* account.

Accordingly, Defendants' Motion for Summary Judgment is **GRANTED** as to individual claims asserted by Plaintiffs Macdonald, Raji, and Mamay but **DENIED** as to individual claims asserted by Wagner.

2. Plaintiffs Cannot Bring Section 502(a) Claims on Behalf of the Plan.

This Court also concludes that Plaintiffs are unable to bring section 502(a) claims on behalf of the Plan. With respect to the releases executed by Macdonald, Raji, and Mamay, Plaintiffs contend that these individuals could not waive their rights to bring a section 502(a) claim on behalf of the Plan. The Court agrees that "[t]here is very little authority suggesting that an individual who has signed a release is barred from bringing claims under ERISA § 502(a)(2) on behalf of an ERISA plan." In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 594 (3d Cir. 2009). In fact, "[t]he vast majority of courts have concluded that an individual release has no effect on an individual's ability to bring a claim on behalf of an ERISA plan under § 502(a)(2)." Id. (citations omitted).

However, even assuming *arguendo* that "a release does not bar an individual from bringing an ERISA § 502(a)(2) claim on behalf of a plan, it could be argued that the covenant not to sue bars [plaintiff] from filing a lawsuit and serving as a lead plaintiff in an action against [defendant]." Id. at 599. In addition, given the release, "[plaintiff] may not have a monetary stake in the outcome." Id. at 600.

Contrary to Plaintiffs' argument, at least two district courts in the Eleventh Circuit have found that covenants not to sue bar a plaintiff from bringing a section

502(a)(2) claim on behalf of employee stock bonus plans. In Stargel v. SunTrust Banks, Inc., 968 F. Supp. 2d 1215, 1224 (N.D. Ga. 2013), the court stated:

> In response to [plaintiff's] argument that the Release does not extinguish her right to bring a case on behalf of the Plan, Defendants point to § 2.3 in which she "[covenanted, warranted, and agreed] that she will not institute, encourage, or join in as a class member or otherwise, any legal, or other proceeding against SunTrust or the other Defendants involving any of the Claims released by this Agreement."
> . . .
>
> Defendants are correct. The terms of the Release are simply unambiguous – [plaintiff] cannot institute or join in the action before the Court. . . .

Id., 968 F. Supp. 2d at 1224 (citation omitted). The Finnerty court reached the same conclusion. Although the Finnerty court did not explicitly discuss whether an individual release and a covenant not to sue bar claims on behalf of the plan under section 502(a)(2), the second amended complaint in that case explicitly stated that "Plaintiffs bring this action for relief in their individual capacities, and on behalf of all current and former participants of the Employee Plan," and that Plaintiffs sought "Restoration to the Employee Plan and Employee Plan participants all losses caused by the Fiduciary Defendants' breaches." Finnerty, Case No. 09-CV-21871, Doc. 127 ¶¶ 2, 155a.

Further, even assuming *arguendo* that Macdonald, Raji, and Mamay cannot waive a section 502(a)(2) claim on behalf of the Plan, the Court is not persuaded

that any of the Plaintiffs have standing to pursue claims on behalf of *absent Plan participants*. Section 502(a)(2) of ERISA in relevant part provides that civil actions may be brought "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). Section 409 of ERISA (29 U.S.C. § 1109), provides, *inter alia*, that a plan fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." ERISA § 409(a), 29 U.S.C. § 1109(a). Although Plaintiffs are correct that ERISA does not specify the procedures that a plan participant must follow in order to bring a lawsuit on behalf of a plan and other plan participants, "its drafters considered the issue." Coan v. Kaufman, 457 F.3d 250, 259 (2d Cir. 2006).

> As early as 1970, four years before ERISA was enacted, a Senate version of the bill would have required participants and beneficiaries bringing suit for breach of fiduciary duty to bring class actions. See S. 3589, 91st Cong., § 9(e)(2) (1970) *as reprinted in Arnold & Porter Legislative History: Employee Retirement Income Security Act of 1974 ("ERISA–LH")* 16, at *23. In their final versions, the House and Senate ERISA bills contained contrasting class-action requirements: The House bill provided that participants and beneficiaries *must* in most circumstances bring class actions in order to bring suit on behalf of a plan for breach of fiduciary duty, while the Senate bill provided that they *may*. See Summary of Differences Between the Senate Version and the House Version of H.R.2 to Provide for Pension Reform § 10 (Comm. Print 1974), *as reprinted in ERISA–LH 85–C*, at *26.

Id. at 259-60 (footnotes omitted) (emphasis in original). The Second Circuit reasoned that "[t]he fact that Congress, having considered mandatory and permissive provisions relating to class actions, ultimately remained silent on the issue suggests to us that it deliberately declined to adopt any general rule as to whether class actions are mandatory or permissive." Id. at 260.

> But it does not mean that Congress intended to allow individual participants and beneficiaries to bring suit on behalf of an employee benefit plan without observing *any* procedural safeguards for other interested parties. It seems to us, rather, that Congress was content to leave the procedures necessary to protect absent parties, and to prevent redundant suits, to be worked out by parties and judges according to the circumstances on a case by case basis.

Id. (emphasis in original).

The Court finds this reasoning persuasive. Other than filing a complaint and a motion for partial summary judgment and opposing Defendants' motions to dismiss and for summary judgment, Plaintiffs have done nothing to notify or otherwise involve other Plan participants. Particularly in the context of this lawsuit, to permit the action to go forward without any procedural safeguards "would be overly myopic," as individual absent Plan participants may have made decisions to exercise their put rights based on their unique circumstances. Fish v. Greatbanc Trust Co., 667 F. Supp. 2d 949, 951 (N.D. Ill. 2009).

For the above reasons, Defendants' Motion for Summary Judgment on Plaintiffs' representational claims is **GRANTED**.

3. Defendants Are Not Entitled to Summary Judgment on Most of Wagner's Claims Under Counts I and II of the Complaint.

i. Non-Disclosure Claims

Defendants argue that they are entitled to summary judgment on Wagner's Count I ERISA non-disclosure claims because the Eleventh Circuit has held that there is no duty to disclose business information to plan participants, even if that information could be relevant to a plan participant in deciding what to do with his or her stock. Defs.' Mot. for Summ. J. at 31-33. Plaintiffs respond that fiduciaries are required to disclose all complete and accurate information to plan participants. Pls.' Opp'n to Defs.' Mot. for Summ. J. at 26. They also claim that the duty to disclose exists where plan participants may be materially and negatively affected by the non-disclosure, or where affirmative misstatements need to be corrected. Id. Plaintiffs rely on Bacon v. Stiefel Labs, Inc., 714 F. Supp. 2d 1186, 1191 (S.D. Fla. 2010) and Finnerty, 756 F.3d at 1319-21. Id. at 31.

Defendants reply that, under the controlling law in this Circuit, there is no duty to disclose confidential business information to plan participants. In support,

they rely on Lanfear v. Home Depot, 679 F.3d 1267 (11th Cir. 2012) and Fisch v. Suntrust Banks, 511 F. App'x 906 (11th Cir. 2013). Defs.' Reply at 10-11.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). The statute accomplishes this purpose by imposing fiduciary duties of prudence and loyalty on plan fiduciaries. "[T]he duties charged to an ERISA fiduciary are the highest known to the law." Chao v. Hall Holding Co., Inc., 285 F.3d 415, 426 (6th Cir. 2002) (citation omitted). The duty of prudence requires that fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). The duty of loyalty requires fiduciaries to act "solely in the interest" of plan participants and beneficiaries. 29 U.S.C. § 1104(a)(1).

ERISA enumerates several situations in which a plan administrator or fiduciary is required to disclose information to plan participants. 29 U.S.C. §§ 1021-31. For example, plan administrators or fiduciaries must provide participants with updated summary plan descriptions, annual reports, and statements detailing total benefits accrued. Id. at §§ 1024(b)(4), 1025(a)(1). But "ERISA does not

explicitly impose a duty to provide participants with nonpublic information affecting the value of the company's stock." Lanfear v. Home Depot, Inc., 679 F.3d 1267, 1284 (11th Cir. 2012) (citing 29 U.S.C. §§ 1021–1030). Nevertheless, "[c]ourts are now more willing to find an affirmative fiduciary duty to disclose information beyond the traditional duties to disclose specified in the statute or the common law obligation to respond to specific requests from plan participants or beneficiaries." Hill v. BellSouth Corp., 313 F. Supp. 2d 1361, 1368-69 (N.D. Ga. 2004) (citation omitted); see also In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 555 (S.D. Tex. 2003) ("Although the duty to disclose has its roots in the common law of trusts, courts recently have been expanding a fiduciary's affirmative duty to disclose material information to plan participants under ERISA."). "[T]his new affirmative duty to disclose has only been imposed in special circumstances with a potentially extreme impact on a plan as a whole, where plan participants generally could be materially and negatively affected." Hill, 313 F. Supp. 2d at 1369 (citation and quotations omitted).

> [T]he mere fact that an ERISA plan consists, at least in part, in employer stock does not mean that the ERISA fiduciary duty to disclose plan-related information to beneficiaries is transformed into a general duty to disclose the financial details of the business: some sort of "*special circumstance*" will be required to trigger these heightened obligations.

Id. (emphasis added).

"Courts have generally agreed that where an ERISA fiduciary makes statements about future benefits that misrepresent present facts, these misrepresentations are material if they would induce a reasonable person to rely on them." In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d at 556. Although in Varity Corp. v. Howe, 516 U.S. 489, 506 (1996), the Supreme Court chose not to "reach the question whether ERISA fiduciaries have any fiduciary duty to disclose truthful information on their own initiative, or in response to employee inquiries," the courts have been increasingly concerned about uninformed and vulnerable plan participants. For example, the Third Circuit has held that "circumstances known to the plan fiduciary can give rise to an expanded affirmative duty to disclose information necessary to protect a participant or beneficiary because that participant or beneficiary 'may have no reason to suspect that it should make inquiry into what may appear to be a routine matter.'" In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d at 556 (quoting Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc., 93 F.3d 1171, 1181 (3d Cir. 1996)).

Defendants' position, however, is not without support. In Lanfear and Fisch the Eleventh Circuit held that plan fiduciaries had no duty to disclose material, nonpublic financial information to a plan participants. Fisch, 511 F. App'x at 908;

Lanfear, 679 F.3d at 1285-86; see also In re ING Groep, N.V. ERISA Litig., 749 F. Supp. 2d 1338, 1350 (N.D. Ga. 2010) ("ERISA does not impose an obligation to disclose broad categories of non-public financial information regarding *publicly* traded securities.") (emphasis added). However, there are at least two major differences between the instant case and those cited above. First, there is no dispute that SLI was a closely held company, while In re ING Groep, N.V. ERISA Litig., Lanfear, and Fisch involved publicly traded stock with a value set in the open market. Fisch, 511 F. App'x at 908; Lanfear, 679 F.3d at 1271; In re ING Groep, N.V. ERISA Litig., 749 F. Supp. 2d at 1350. The Lanfear court explained the improprieties related to the disclosure of nonpublic information to a plan participants holding stock in a *publicly* traded company:

> It would be difficult, if not impossible, to whisper nonpublic information into the ears of tens of thousands of plan participants without it becoming immediately available to the market as a whole, thus blowing any benefit to the participants. And even if it were possible to disclose nonpublic information to all plan participants without that information becoming generally known, the participants have no legal claim to it. *The only way selective disclosure could benefit them would be if it gave participants an advantage in the market over non-participants, and they are not entitled to that advantage*. ERISA does not require that fiduciaries be corporate insiders . . . .

679 F.3d at 1285-86 (emphasis added). Second, the plan participants in Lanfear were warned about the dangers of investing in "Higher Risk" stock, and the

Eleventh Circuit held that "[a]ll of those warnings adequately informed the participants about the risks of investing in the Common Stock Fund with its concentration in Home Depot stock." Id. at 1285 (footnote omitted).

The same cannot be said about the current case. Wagner did not benefit from the warning that plaintiffs received in Fisch and Lanfear, i.e., that their investment in a non-diversified single stock fund was risky. See Lanfear, 679 F.3d at 1285-86; see also In re SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365, 1377 (N.D. Ga. 2010) (involving a summary plan description which warned plan participants with their investment the Employer Stock fund was a high risk investment). In other words, unlike plaintiffs in Fisch and Lanfear, Wagner did not receive the slightest hint that his shares would not be purchased at a fair market value. Nor did he have the benefit of the open market determining the value of his SLI's stock; instead, Wagner was in a vulnerable position left to trust Defendants that the price at which they were repurchasing his SLI stock was fair and reasonable. Wagner Dep. at 48-49, 116, 126 (testifying that he thought that SLI was purchasing his shares at a *fair, reasonable* market value). And there is evidence in the record that Defendants knew that at the time they repurchased Wagner's stock, they did so at an inadequate price. See E-mails between individual Defendants (March 25, 2009) [Doc. 81-19] at 2, attached as Ex. 18 to

Pls.' Opp'n to Defs.' Mot. for Summ. J. (concerning withholding Bogush's SLI stock valuation for the past five years so potential bidders do not think that "they are overpaying" for the SLI stock); see also Pls.' Resp. to Defs.' SUMF ¶ 131 (indicating that SLI made the decision to explore Sanofi's interest on November 26, 2008); see also E-mails between Todd, Brent, and Charles Stiefel (November 26, 2008) [Doc. 73-4] attached as Ex. 22 to Pls.' Mot. for Part. Summ. J. (indicating that in the event of the Company sale, "the price Blackstone paid will serve as a floor."). Finally, an issue of material fact exists whether Wagner detrimentally relied on Defendants' representations that the Company would remain privately held. Charles Stiefel Decl. ¶ 7; Exs. 2-3 attached to Decl. (Defendants' representations that the Company will remain privately held); see also Wagner Dep. at 96-97 (Wagner attended a meeting after the Blackstone investment that the company was "not up for sale.")

"Although ordinarily ERISA fiduciaries, just like corporate directors, have no duty to disclose merger discussions, when those fiduciaries send communications to shareholders *reporting the price of the stock while knowing that the price is probably inaccurate*, such merger discussions constitute material information that must be disclosed." Bacon, 714 F. Supp. 2d at 1191 (emphasis added); see also Finnerty, 756 F.3d at 1319 (holding that SLI had a duty to disclose

facts that were necessary to make its "will continue to be privately held"' statements not misleading).

There is enough evidence in the record to create a genuine issue of material fact as to whether SLI communicated false information to Wagner concerning the true worth of his stock and the management's plans about the future of the Company. Additionally, the question whether "special circumstances" existed triggering the duty to affirmatively disclose confidential nonpublic information, i.e., SLI's plans of "going public," is for the jury to decide. In light of the above, Defendants' Motion for Summary Judgment as to Wagner's non-disclosure claims is **DENIED**.

ii. Interim Valuation Claim

Defendants claim that they are entitled to summary judgment on Wagner's Count I claim alleging breach of fiduciary duties by not ordering an interim valuation of the stock held by the Plan in late 2008 or early 2009. Defs.' Mot. for Summ. J. at 35. Defendants assert that Wagner has not offered any evidence as to what the value of the stock would have been had the valuation been conducted at that time. Id. at 37.

Wagner responds that Defendants, as fiduciaries, were obligated to act in the best interests of the Plan participants and should have conducted an interim stock

valuation. Pls.' Opp'n to Defs.' Mot. for Summ. J. at 36. He asserts that Bogush was not qualified to perform the stock valuations and, in 2008, Defendants became aware that he was unqualified to value the Plan. Id. at 38. Wagner further contends that no later than December 8, 2008, Defendants had actual knowledge that the Company would sell for no less than for $3 billion, and the $60,000 price per one share of stock that Blackstone paid would serve as a floor for any acquisition. Id. at 40. Wagner further claims that the fact finder should determine the amount of damages, and there are several ways to calculate them. Id. at 41-43.

Defendants reply that they did not abuse their fiduciary duties by not deviating from their standard practice of valuating SLI stock once a year. Defs.' Reply in Support of Their Mot. for Summ. J. [Doc. 84] ("Defs.' Reply in Supp. of Mot. for Summ. J.") at 16-17. They further contend that Plaintiffs were not able to refute their argument that because of a global recession and SLI's financial distress, the interim valuation as of any date in December 2008 or early 2009 could conceivably have been lower than that as of March 31, 2008, fair market valuation.

When relying upon expert advice, the fiduciary of an ESOP must: (1) investigate the expert's qualifications; (2) provide the expert with complete and accurate information; and (3) make certain that *reliance on the expert's advice is reasonably justified* under the circumstances. Chao, 285 F.3d at 430 (emphasis

added). Further, fiduciaries must discharge their fiduciary duties "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D).

The record reveals that, pursuant to Section 7.6 of the Plan (titled "Option to Have Company Purchase Bonus Stock"), a qualifying participant "shall have the right to require the Company to purchase the Bonus Stock for *its current fair market value* (as determined pursuant to Treas. Reg. Section 54.4975-11(d)(5) (the 'put right')." Section 7.6 of SLI Employees' Stock Bonus Plan [Doc. 73-3] attached as Ex. 3 to Pls.' Mot. for Part. Summ. J. The Treasury regulation at issue provides that "valuations must be made in *good faith* and based on *all relevant* factors for determining the *fair market value* of securities." 26 C.F.R. § 54.4975-11(d)(5) (emphases added).

Even assuming, without deciding, that Bogush was qualified to perform appraisal of the SLI stock and was provided with all the necessary information to do so, for the reasons discussed above, there is a genuine issue of material fact as to whether Defendants' reliance on Bogush's valuations was reasonably justified under the circumstances. See supra at 31-38.[10] The trier of fact must answer this

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[10] See E-mails between individual Defendants (March 25, 2009) [Doc. 81-19] at 2, attached as Ex. 18 to Pls.' Opp'n to Defs.' Mot. for Summ. J. (indicating that Defendants intended to withhold Bogush's SLI stock valuation for the past five

question. Thus, Defendants' Motion for Summary Judgment as to Wagner's interim valuation claim is **DENIED**.

iii. Optional Diversification Claim

Because it is undisputed that Wagner was not eligible and, thus, did not participate in optional diversification, Defendants' Motion for Summary Judgment is **GRANTED** as to this Count I claim. See Pls.' Resp. to Defs.' SUMF ¶¶ 68, 159.

iv. Derivative Monitoring and Breach of Co-Fiduciary Claims

Defendants claim that they are entitled to summary judgment on Wagner's derivative monitoring claim asserted in Count I and breach of co-fiduciary duty claim asserted in Count II. Defs.' Mot for Summ. J. at 53-54. They assert that there is no actionable underlying fiduciary breach and there is no evidence that any of the Defendants were aware of any alleged fiduciary breach by any other fiduciary. Id.

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years so potential bidders do not think that "they are overpaying" for the SLI stock); see also Pls.' Resp. to Defs.'SUMF ¶ 131 (on November 26, 2008, SLI made the decision to explore Sanofi's interest on November 26, 2008); see also Doc. 73-4, Ex. 22, to Pls.' Mot. for Part. Summ. J. (November 26, 2008, communications among Todd, Brent, and Charles Stiefel that in the event of the Company sale, "the price Blackstone paid will serve as a floor.").

Wagner responds that because he has established breach of fiduciary duty claims, there is no basis to dismiss his monitoring and co-fiduciary claims. Pls.' Opp'n to Mot. for Summ. J. at 52-53. Plaintiff is correct. As discussed above, there is enough evidence in the record for the case to proceed to the jury concerning the breaches of these fiduciary duties. Thus, Defendants' Motion for Summary Judgment concerning Wagner's Count I derivative monitoring and Count II breach of co-fiduciary duty claims is **DENIED**.

4. Defendants Are Not Entitled to Summary Judgment on Wagner's Claim Under Count III of the Complaint Relating to Prohibited Transactions.

Defendants contend that they are entitled to summary judgment on Wagner's Count III prohibited transactions claim because SLI stock was neither sold nor transferred from the Plan to the Company. Defs.' Mot. for Summ. J. at 33. Defendants assert that the "transaction" at issue here, i.e., a stock put election, was between the individual participant, i.e., Wagner, and the Plan sponsor, i.e., SLI, as opposed to the Plan and SLI. Id. at 33-34. Wagner responds that the substance of the Plan redemptions in connection with diversification requests were direct transactions between the Plan and Stiefel. Pls.' Opp'n to Defs.' Mot. for Summ. J. [Doc. 81] at 31-32. And no Plan participant actually "held" their stock. Id. at 33. According to Wagner, the Plan participant's request to receive SLI stock

from the Plan was to ultimately engage in a transaction with the Company. Id. In addition, Wagner contends that even if the transaction was not a direct one, at a minimum, it was an indirect transaction, which is also prohibited under ERISA, since the sole purpose of the optional diversification initiative was to sell the Plan-held SLI stock back to the Company. Id. at 34-35. Defendants reply that by law, ESOPs are required to give plan participants distribution and stock put rights, and by definition, such an action cannot constitute a prohibited transaction. Defs.' Reply in Supp. of Mot. for Summ. J. at 14-15.

ERISA section 406(a) prohibits a fiduciary from causing a plan to engage in a transaction that constitutes a "direct or indirect" sale or exchange of any property between the plan and a party in interest. ERISA § 406(a)(1)(A), 29 U.S.C. 1106(a)(1)(A). A party in interest, among others, is "an employer any of whose employees are covered by such plan." 29 U.S.C. § 1002 (14)(C).

It is undisputed that: (1) Wagner voluntarily resigned from the Company in August 2008; (2) Wagner requested a distribution of the SLI stock in his Plan account upon his resignation from the Company; (3) his IRA custodian, upon receiving the stock certificates in December 2008 from SLI, exercised Wagner's put rights; and (4) SLI paid the custodian $16,469 per share in February 2009. Exs. 374-76 (included with Defs.' Mot. for Summ. J. under Ex. M). In addition,

the record reveals that the purpose of any request of stock distribution was for SLI to purchase the Plan-held Company stock, as opposed to the Plan participant "holding" the stock of a closely held-corporation. See Dep. of Matt Pattullo, taken January 23, 2014 [Doc. 81-6] at 34-38; see also Dep. of Steven Fischer taken July 16, 2014 [Doc. 81-7] at 82-83.

Defendants' reliance on Lockheed Corp. v. Spink, 517 U.S. 882 (1996), in support of their argument that payment of plan benefits to participants cannot constitute a prohibited transaction is misplaced. The Spink court carved out an exception to the general rule: "If the benefits payment were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme, that might present a different question from the one before us." Id. at 895 n.8. Here, however, Wagner alleges that Defendants did engage in a scheme of redeeming SLI stock from Plan participants by various means, including purposefully triggering statutory redemption rights by laying off employees, offering optional diversification, and re-purchasing the stock for grossly inadequate consideration. Second Am. Compl. ¶¶ 9-14.

Although Wagner left the Company on his own volition and does not claim to being coaxed into exercising the optional diversification rights, a genuine issue of material fact exists whether SLI, by redeeming Wagner's shares, engaged in a

prohibited transaction (whether direct or indirect), especially given the fact that it did so at the time when all of the Individual Defendants were aware of "Project Jump." See Charles Stiefel Dep. at 258-62. Accordingly, Defendants' Motion for Summary Judgment is **DENIED** as to Wagner's prohibited transactions allegation.

5. Defendants Are Not Entitled to Summary Judgment Based Upon Their Contention That Certain of Wagner's Claims Are Barred By the Statute of Limitations.

Defendants also claim that Wagner's §§ 502(a)(2), 406(a)(1)(D) and (b)(1) claims and his appointment of independent fiduciary claim are barred by the three-year statute of limitations. Defs.' Mot. for Summ. J. at 49. Defendants contend that the statute of limitations has not been tolled because these claims were not asserted in any putative class action or subsequent representational actions. Id. at 50-52.

Wagner responds that his claims are timely, since he had until February 2015 to file this action because a six-year and not a three-year statute of limitations is applicable to his claims. Pls.' Opp'n to Defs.' Mot. for Summ. J. at 45-46. Wagner further contends that the claims are timely because the fraud/concealment exception applies, under which the action has to be commenced within six years of discovery of a breach of fiduciary duty. Id. at 45-46. In addition, he asserts that

his claims are timely even under the three-year statute of limitations because the Finnerty action suspended the statute of limitations. Id. at 47-48.

Defendants reply that because Wagner admittedly had knowledge of the alleged violations of the fiduciary duties in July 2009, the latest date to file his complaint would have been in July 2012. Defs.' Reply in Supp. of Mot. for Summ. J. at 27. And, according to Defendants, neither the fraud nor the concealment provision is applicable to Wagner's claims because he is not able to show that Defendants actively concealed their alleged breaches of fiduciary duties. Id. at 27-28. Defendants further assert that the three-year statute of limitations cannot be tolled for the claims that were not asserted in Finnerty. Id. at 29.

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, 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 (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113 (emphasis added). "Although the legislative history of ERISA's statute of limitations is scant, nothing in its language or goals indicates that courts are to read into it anything more than its plain meaning." Fuller v. SunTrust Banks, Inc., 744 F.3d 685, 695 (11th Cir. 2014) (citation omitted).

The record reveals that Wagner filed his complaint on September 14, 2012, and the Finnerty lawsuit was initiated on July 6, 2009. Compl.; Pls.' Resp. to Defs.' SUMF ¶ 175. Wagner learned about the factual allegations in the Finnerty complaint shortly after it was filed, and became a member of that putative class action lawsuit. See Pls.' Resp. to Defs.' SUMF ¶¶ 175, 180. It is undisputed that Wagner had actual knowledge of Defendants' breach of fiduciary duties no later than in July 2009. See Pls.' Opp'n to Defs.' Mot. for Summ. J. at 46; see also Wagner Dep. at 90-95. The record also reveals that SLI issued a payment for the purchase of Wagner's shares on February 2, 2009. See Ex. M [Doc. 74-36] at 61-63, attached to Defs.' Mot. for Summ. J.

In light of the above, there is no doubt that Wagner's claims are timely under ERISA sections 413(1)(A) and (B), because Defendants' "last action" that was a part of the breach was the redemption of Wagner's shares of stock in February 2009. See Ex. M [Doc. 74-36] at 61-63, attached to Defs.' Mot. for Summ. J. And, in the case of Defendants' omissions concerning the value of the stock, "the

latest day" the breach could have been cured, at least theoretically, was in early 2009, by re-evaluating the SLI stock before redeeming Wagner's shares. Thus, if the six-year statute of limitations is applicable, Wagner's claims are timely under 29 U.S.C. §§ 1113(1)(A) & (B).

However, because under the "plain meaning" of the statute, the "earlier of" the enumerated events triggers the statute of limitations. In the instant case, that event is Wagner's awareness of the breach of fiduciary duties, as provided in 29 U.S.C. § 1113(2). If the three-year statute of limitations were to apply, Wagner's claims would be barred, because he admittedly became aware of Defendants' fiduciary duty breaches in July 2009, over three years from the filing of his Complaint. See Pls.' Opp'n to Defs.' Mot. for Summ. J. at 46, Wagner Dep. at 90-95; see also 29 U.S.C. § 1113(2). Nevertheless, Wagner's claims would be timely under 29 U.S.C. § 1113(2), if he was able to show that: (1) the fraud or concealment exception (which provides for a six-year statute of limitations) applies under the circumstances of this case; or (2) the Finnerty action tolled the three-year statute of limitations. Because the Finnerty case is central to many issues in the present case (including Plaintiffs' motion for partial summary judgment), it merits a further discussion.

The Finnerty putative class action was initiated on July 6, 2009. Finnerty v. Stiefel Laboratories, Inc., No. 09-CV-21871 (S.D. Fla. 2009), Doc. 1. The plaintiffs alleged ERISA and securities laws violations. Specifically, the second amended complaint in Finnerty alleged that defendants breached fiduciary duties, a violation of 29 U.S.C. §§ 1104(a)(1)(A) and (B); ERISA §§ 404(a)(1)(A) and (B) (Count I). Finnerty, Doc. 124 at 35-37. In Count II, plaintiffs alleged breaches of co-fiduciary duties, a violation of 29 U.S.C. § 1105(a); ERISA § 405(a). Id. at 37-38. Plaintiffs also advanced prohibited transaction claims in Count III, a violation of 29 U.S.C. § 1106(a)(1)(A); ERISA § 406(a)(1)(A). Id. at 39-41. And in Count IV, plaintiffs alleged that defendants committed securities fraud, a violation of 15 U.S.C. §§ 78j and 78t of the Securities and Exchange Act of 1934. Id. at 41-44. The motion for class certification in Finnerty was denied on July 21, 2011. Id., Doc. 257. Further, on October 17, 2011, the court granted summary judgment in favor of defendants as to all plaintiffs, except for Finnerty, based on their knowing and voluntary executions of general releases and covenants not to sue. Id., Doc. 384. On November 1, 2011, the court, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, granted defendants' motion to bifurcate the trial. Phase I of the trial was to proceed before the jury on the securities fraud claim (Count IV); and Phase II before the judge on the ERISA claims (Counts 1-3). Id., Doc. 390. The

court agreed with defendants that the bifurcation procedure would "minimize jury confusion and maximize efficiency by reserving for later presentation to the Court of the highly technical and detailed evidence related exclusively to Plaintiffs' ERISA claims." Id. The securities fraud count was tried in May 2012, on the theory that SLI had a duty to disclose to Finnerty (who exercised his put option on January 6, 2009) the information relating to the Company's merger negotiations with Sanofi, but failed to do so. The jury found in his favor and awarded compensatory damages of $1,502,484.90. Id., Doc. 515. At the status conference hearing on May 18, 2012, the court found "that the 10B5 portion of the case [did] not resolve the ERISA portion of the case," and the ERISA counts were to be tried on June 25, 2012; however, the parties agreed to dismiss those counts with prejudice. Id., Docs. 517; 529.

Defendants unsuccessfully appealed the jury's verdict. See Finnerty v. Stiefel Labs., Inc., 756 F.3d 1310 (11th Cir. 2014), cert. denied, 135 S. Ct. 1549 (2015). In affirming, the Eleventh Circuit held that SLI "had a *duty to disclose* facts that were necessary to make its 'will continue to be privately held' statements *not misleading*." Id. at 1319 (emphases added). Although the Company was "under no obligation to disclose the existence or the status of its merger negotiations with Sanofi-Aventis . . . it could have merely said that a sale of the

company was under consideration." Id. at 1319. The Court did not decide whether SLI had an immediate duty to update the *public* when the negotiations with Sanofi became serious, but it concluded that the Company "had a duty to update *Finnerty at least before it repurchased shares of its own stock from him*." Id. (footnote omitted) (emphasis added).

In light of the above, a genuine issue of material fact exists as to whether the fraud or concealment exception applies under the circumstances of this case. Thus, summary judgment is not appropriate as to the statute of limitations issue and, therefore, Defendants' Motion for Summary Judgment as to that issue is **DENIED**. Accordingly, the Court need not decide whether the Finnerty action tolled the statute of limitations.

6. Defendants Are Not Entitled to Summary Judgment on Wagner's Undervaluation Claim.

Defendants claim that they are entitled to summary judgment on Wagner's ERISA § 502(a)(3) undervaluation claim because Wagner had an adequate remedy under ERISA § 502(a)(1)(B). Defs.' Mot. for Summ. J. at 53. Wagner responds that there is no requirement that undervaluation claims be brought under ERISA § 502(a)(1)(B). Pls.' Opp'n to Defs.' Mot. for Summ. J. at 50. They further contend that although they received their benefits, their value was diminished by

Defendants' fiduciary misconduct, and such breaches are remediable under § 502(a)(3). Id. at 51.

ERISA § 502(a)(1)(B) allows plan participants to sue to recover benefits that they are owed. The Supreme Court has explained that there are three distinct remedies available to a participant or beneficiary under § 502(a)(1)(B): (1) an action to recover accrued benefits; (2) to obtain a declaratory judgment that he is entitled to benefits under the provisions of the plan contract; and (3) to enjoin the plan administrator from improperly refusing to pay benefits in the future. Heffner v. Blue Cross & Blue Shield of Ala., Inc., 443 F.3d 1330, 1338 (11th Cir. 2006). While ERISA § 502(a)(3), "admits of no limit (aside from the 'appropriate equitable relief' caveat . . .) on the universe of possible defendants. . . . the focus, instead, is on redressing the "*act or practice* which violates any provision of [ERISA Title I]." (emphasis in original). Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 246 (2000). In Varity Corp., 516 U.S. at 512, the Supreme Court concluded that §§ 502(a)(3) and (5), the section's "catchall" provisions, "act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy."

The Court finds merit to Wagner's argument that Defendants' alleged misconduct reduced benefits to which Wagner was entitled. Accordingly, the

appropriate relief would properly be fashioned under §§ 502(a)(3) and 502(a)(2), and not § 502(a)(1)(B). Defendants' Motion for Summary Judgment as to Wagner's undervaluation claim is **DENIED**.

C. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs contend that under the doctrine of collateral estoppel and pursuant to the Eleventh Circuit's order in Finnerty, Defendants should be estopped from denying that Charles Stiefel's and the Company's non-disclosure to Plan participants of the information at issue in Finnerty constitutes a breach of their fiduciary duties under ERISA. Pls.' Brief in Support of Mot. for Part. Summ. J. [Doc. 73-1] at 11-12, 27.

Defendants respond that Plaintiffs cannot show that the elements required to prove a Rule 10b-5 action for failure to disclose material information are identical to the elements needed to prove a breach of fiduciary duty under ERISA § 404. Defs.' Response in Opposition to Pls.' Mot. for Part. Summ. J. [Doc. 83] at 27-36. Defendants also assert that Plaintiffs cannot establish that they were privy to the same alleged misrepresentations and omission as Finnerty, and that any particular misrepresentation or omission was actually litigated in Finnerty. Id. at 36-43.

"Collateral estoppel precludes the relitigation of an issue that has already been litigated and resolved in a prior proceeding." Pleming v. Universal-Rundle

Corp., 142 F.3d 1354, 1359 (11th Cir. 1998). To claim the benefit of collateral estoppel, the party relying on the doctrine must show that: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the first action; and (4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. Id. (citation omitted). The party seeking to invoke collateral estoppel bears the burden of proving that the necessary elements have been satisfied. Matter of McWhorter, 887 F.2d 1564, 1566 (11th Cir. 1989).

"[T]he application of collateral estoppel is committed to the sound discretion of the district court." Deweese v. Town of Palm Beach, 688 F.2d 731, 734 (11th Cir. 1982). To state a securities fraud claim under Rule 10b-5, a plaintiff must establish: "(1) a material misrepresentation or omission; (2) made with scienter; (3) a connection with the purchase or sale of a security; (4) reliance on the misstatement or omission; (5) economic loss; and (6) a causal connection between the material misrepresentation or omission and the loss." Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1236–37 (11th Cir. 2008). To prevail on an ERISA § 404(a) claim, Plaintiffs must prove that: (1) defendants were fiduciaries of an ERISA

plan; (2) defendants engaged in conduct constituting a breach of their fiduciary duties; (3) defendants' conduct was within the scope of their capacity as fiduciaries; and (4) defendants' conduct damaged the ERISA plan or the ERISA plan suffered a loss subsequent to the breach. Pension & Employee Stock Ownership Plan Admin. Comm. of Cmty. Bancshares, Inc., o/b/o Cmty. Bancshares, Inc. v. Patterson, 547 F. Supp. 2d 1230, 1238 (N.D. Ala. 2008).

Although, as previously stated, the Finnerty case is relevant and important to many issues in the instant action, the Court **DENIES** Plaintiffs' Motion for Partial Summary Judgment for the following reasons. It is true that the timing of Finnerty's exercise of his put rights was closely related to that of Wagner's; Finnerty was terminated on August 29, 2008, and Wagner voluntarily resigned from his employment on August 31, 2008. Wagner Dep. at 22; Finnerty, 756 F.3d at 1315. Wagner exercised his put rights in the fall of 2008, SLI did so in January 2009, and SLI repurchased its shares in February 2009. Finnerty, 756 F.3d at 1315. However, it appears that the Company applied pressure tactics on Finnerty, informing him about "major changes" to the Plan twice in the fall of 2008, and also sent him the documents necessary to exercise his put rights at then-effective fair market value of $16,469 per share. Id. It is possible that Wagner's motivation for exercising the put options was different. For example, Wagner testified that he

considered the global recession and that he considered "all the negative information about the Company's performance" when making his decision. Wagner Dep. at 50-53. Further, even though the Court has denied Defendants' Motion for Summary Judgment on Plaintiffs' claims concerning breaches of fiduciary duties in part because of the Eleventh Circuit's reasoning in Finnerty, it is up to the jury to decide whether the fiduciaries had the obligation to disclose nonpublic financial information to Plaintiffs because the corporation was privately held.

In addition, as Defendants correctly contend, there is no *respondeat superior* liability for the alleged fiduciary breaches under ERISA. Woods v. S. Co., 396 F. Supp. 2d 1351, 1370 (N.D. Ga. 2005). The reason behind it is that "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system. We have therefore been especially reluctant to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text." Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002) (citations omitted).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendants' Motion to Dismiss [Doc. 44] is **DENIED**.

It is further **ORDERED** that Defendants' Motion for Summary Judgment [Doc. 74] is **GRANTED** as to all claims raised by Plaintiffs Macdonald, Raji, and Mamay, and they are **DISMISSED** as Plaintiffs in this case.

It is further **ORDERED** that Defendants' Motion for Summary Judgment [Doc. 74] is **GRANTED** as to Wagner's Section 502(a) claim on behalf of the Plan and as to Wagner's optional diversification claim in Count I of the Second Amended Complaint but **DENIED** as to Wagner's fiduciary claims in Count I of the Second Amended Complaint relating to non-disclosure, interim valuation, and derivative monitoring; as to Wagner's claim in Count II relating to breach of co-fiduciary duty; as to Wagner's claim in Count III relating to prohibited transactions; as to Defendants' statute of limitations defense; and as to Wagner's undervaluation claim.

It is further **ORDERED** that Plaintiffs' Motion for Partial Summary Judgment [Doc. 73] is **DENIED**.

It is further **ORDERED** that Plaintiff Wagner and Defendants shall file a Consolidated Pre-trial Order within thirty (30) days of the date of this Order.

IT IS SO ORDERED this 18th day of June, 2015.

MARK H. COHEN
United States District Judge