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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARMANDO ZAVALA,  
Plaintiff,  
v.  
KRUSE-WESTERN, INC., et al.,  
Defendants.

No. 1:19-cv-00239-DAD-SKO

ORDER DENYING DEFENDANTS’  
MOTION FOR JUDGMENT ON THE  
PLEADINGS, OR ALTERNATIVELY,  
MOTION FOR SUMMARY JUDGMENT

(Doc. No. 54)

This matter is before the court on the motion for judgment on the pleadings filed on behalf of defendant Kevin Kruse and defendants the Kruse-Western, Inc. Board of Directors and Administration Committee (collectively, “defendants”) on December 6, 2019. (Doc. No. 54.) Plaintiff Armando Zavala filed his opposition brief and defendants filed their reply thereto. (Doc. Nos. 58, 61.) Pursuant to Local Rule 230(g) and the undersigned’s standing order addressing the ongoing judicial emergency in the Eastern District of California, the court took this matter under submission on February 18, 2020 to be decided on the papers, without holding a hearing. For the reasons set forth below, the court will deny defendants’ motion for judgment on the pleadings.<sup>1</sup>

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<sup>1</sup> The undersigned apologizes to the parties for the excessive delay in the issuance of this order. This court’s overwhelming caseload has been well publicized and the long-standing lack of judicial resources in this district long-ago reached crisis proportion. That situation, which has continued unabated for twenty-two months now, has left the undersigned presiding over approximately 1,300 civil cases and criminal matters involving 732 defendants at last count. Unfortunately, that situation sometimes results in the court not being able to issue orders in

1 **BACKGROUND**

2 **A. Undisputed Facts**

3 The following facts are taken from defendants’ statement of undisputed facts, plaintiff’s  
4 response to defendants’ statement of undisputed facts, and defendants’ reply thereto. (Doc. Nos.  
5 54-2, 59, 61-1.) On November 4, 2015, the Western Milling Employee Stock Ownership Plan  
6 (the “ESOP” or “Plan”) was formed and purchased all of the outstanding shares of Kruse  
7 Western, Inc. stock. (Doc. No. 54-2 at ¶ 1.) The ESOP was designed to be and is invested  
8 primarily in shareholder stock of Kruse Western, Inc. (*Id.* at ¶ 2.) Section 1.3 of the ESOP Plan  
9 Document (“Plan Document”) provides for a trust and trustee to manage the ESOP’s assets:

10 Amounts contributed under the Plan are held and invested, until  
11 distributed, by the trustee (the “Trustee”) appointed by the  
12 Company acting by its Board of Directors. The Trustee acts in  
13 accordance with the terms of a trust agreement between the  
14 Company and the Trustee, which trust agreement is known as the  
15 Western Milling Employee Stock Ownership Trust (the “Trust”).  
The Trust implements and forms a part of the Plan. The provisions  
of and benefits under the Plan are subject to the terms and  
provisions of the Trust. In the event of any conflict between the  
Plan and the trust agreement, the terms of the trust agreement shall  
control.

16 (Doc. Nos. 59 at ¶ 3; 61-1 at ¶ 3.) All stock purchased by the ESOP is held in its Trust, including  
17 all the outstanding shares of Kruse Western, Inc. stock it purchased when the ESOP was formed.  
18 (Doc. No. 54-2 at ¶¶ 4–5.) GreatBanc Trust is the trustee of the ESOP Trust. (*Id.* at ¶ 6.)

19 A Trust Agreement details the terms by which the ESOP Trust is overseen and  
20 administered. For instance, under the Trust Agreement, the Trust Fund includes “all property of  
21 every kind held by the Trustee from time to time pursuant to this Trust Agreement.” (Doc. Nos.  
22 59 at ¶ 6; 61-1 at ¶ 6.) The Trust Agreement also describes the identity of the Plan Administrator,  
23 the distribution of the responsibilities of the Plan Administrator and the Trustee, and states that  
24 “[a]ll contributions made under the Plan will be held, managed, and controlled by the Trustee  
25 acting under this Trust Agreement, which forms a part of the Plan. The administration of the

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27  
28 submitted civil matters within an acceptable period of time. This situation is frustrating to the  
court, which fully realizes how incredibly frustrating it is to the parties and their counsel.

1 Trust Fund shall be coordinated with the administration of the Plan.” (Doc. Nos. 59 at ¶ 6; 61-1  
2 at ¶ 6.)

3 Defendant Administration Committee is the Plan Administrator of the ESOP (Doc. No.  
4 54-2 at ¶ 11), and defendant Kevin Kruse is a director of Kruse Western, Inc. (*Id.* at ¶ 10.) Kruse  
5 Western, Inc. operates four entities: Western Milling, LLC, OHK Transport LLC, OHK Logistics,  
6 LLC, and Winema Elevators, LLC. (Doc. No. 54-2 at ¶ 8.) The ESOP provides that, except for  
7 unionized employees, “Leased Employee[s],” and nonresident alien employees, all employees  
8 over the age of 21 will become a participant in the ESOP on the next January 1st or July 1st after  
9 completing a year of employment. (*Id.* at ¶ 14; Doc. Nos. 59 at ¶ 14; 61-1 at ¶ 14.)

10 Plaintiff was hired by the Western Milling family of companies, which includes Western  
11 Milling, LLC and OHK Logistics, LLC (collectively, “Western Milling”) on December 8, 2015  
12 and resigned on or about May 18, 2018. (Doc. No. 54-2 at ¶¶ 13, 16.) Upon resignation from his  
13 position as a Truck Loading and Transfer 1, plaintiff was offered a severance payment of \$2,500  
14 and a severance agreement that provided in exchange for execution of the agreement, Western  
15 Milling would not contest unemployment benefits and would provide a neutral reference. (Doc.  
16 No. 59 at ¶¶ 17, 22.) Plaintiff signed the offered severance agreement on May 18, 2018 and  
17 received \$2,500 as a severance payment. (*Id.* at ¶¶ 21, 23; Doc. No. 59 at ¶ 23.)

18 Section 2 of the severance agreement is a general release clause that provides:

- 19 a. In consideration of Employee’s agreement hereunder, including,  
20 but not limited to, the Severance Payment offered by Employer  
21 to Employee hereunder, Employee . . . hereby releases and  
22 forever discharges Employer, its subsidiaries and affiliates, and  
23 their respective present, former, and future officers, directors,  
24 employees, stockholders, attorneys, insurers, and agents, and  
25 their respective heirs, executors, administrators, successors and  
26 assigns (collectively, “the Releasees”) from any and all claims,  
27 demands, causes of action, obligations and liabilities  
28 whatsoever, whether or not presently known or unknown, or  
fixed or contingent . . . including, but not limited to, claims,  
demands or causes of action under . . . Employee Retirement  
Income Security Act . . .

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1                   b. (i) The foregoing release is a general release of claims,  
2                   demands, causes of action, obligation, damages, and liabilities  
3                   of any nature whatsoever, and is intended to encompass all  
4                   known and unknown, foreseen and unforeseen claims which he  
5                   may have against the Releasees, or any of them, as of the  
6                   moment he signs this Agreement, except for those claims which  
7                   may arise out of the terms of this Agreement.

8 (Doc. No. 54-2 at ¶¶ 26, 27.)

9 In addition, paragraph 19 of the severance agreement provides:

10                   19. Voluntary Execution of Agreement. Employee understands and  
11                   agrees that he executed this Agreement voluntarily, without any  
12                   duress or undue influence on the part or behalf of Employer or any  
13                   third party, with the full intent of releasing all of his claims against  
14                   Employer and any of the other Releasees. Employee acknowledges  
15                   that: (a) he has read this Severance Agreement; (b) he has been  
16                   represented in the preparation, negotiation, and execution of this  
17                   Severance Agreement by legal counsel of his own choice or has  
18                   voluntarily elected not to retain legal counsel; (c) he understands  
19                   the terms and consequences of this Severance Agreement and of the  
20                   releases it contains; and (d) he is fully aware of the legal and  
21                   binding effect of this Severance Agreement.

22 (*Id.* at ¶ 28.)

## 23 **B. Disputed Facts**

24                   Defendants also allege the following facts that plaintiff asserts he cannot admit or deny  
25                   without conducting discovery in this action: (1) Kruse Western, Inc. is the sole manager of  
26                   Western Milling, LLC, and Western Milling, LLC is the sole manger of OHK Transport, LLC,  
27                   OHK Logistics, LLC, and Winema Elevators, LLC (Doc. No. 54-2 at ¶ 9); (2) defendant  
28                   Administration Committee administers the ESOP according to the terms of the Plan Document,  
29                   which states that “[t]he Plan is administered by an Administrator appointed by the Company,  
30                   which shall consist of one or more individuals (who may but need not be Employees of the  
31                   Employers) to conduct Plan Administrative functions” (Doc. Nos. 59 at ¶ 12; 61-1 at ¶ 12); (3)  
32                   plaintiff became a participant in the ESOP on January 1, 2017 (Doc. No. 59 at ¶ 15); and (4) the  
33                   \$2500 severance payment offered to plaintiff equaled approximately four weeks of plaintiff’s  
34                   salary with Western Milling (*Id.* at ¶ 18).

35                   Defendants allege that the severance agreement was presented to and discussed with  
36                   plaintiff during his exit interview on May 18, 2018, and that plaintiff was not told he had to sign

1 the severance agreement on that same day. (Doc. No. 54-2 at ¶¶ 19, 20.) Plaintiff disputes that  
2 the severance agreement was discussed “in any detail with him during the exit interview.” (Doc.  
3 No. 59 at ¶ 19.) Plaintiff contends that a human resources representative attended his exit  
4 interview with a stack of documents she described as “standard” and directed him to sign the  
5 documents in several places. (*Id.*) Plaintiff contends he understood he would not receive the  
6 offered severance payment if he did not sign the documents, but was not otherwise told what he  
7 was signing. (*Id.*) Plaintiff contends that when he signed the paperwork presented to him at the  
8 exit interview, including the severance agreement, he believed that his signing was a necessary  
9 part of the exit interview process and he was not informed he could take the documents home or  
10 otherwise review them before signing. (*Id.* at ¶ 20.) Plaintiff also contends that he was not aware  
11 he could apply for unemployment benefits and did not apply for such benefits. (*Id.* at ¶ 23.)

### 12 **C. Procedural Background**

13 On February 19, 2019, plaintiff filed this action against defendants Kruse-Western, Inc.,  
14 Kevin Kruse, GreatBanc Trust Company, and Does 1 through 30, inclusive. (Doc. No. 1.) On  
15 July 26, 2019, following briefing and oral argument by the parties, this court issued an order  
16 granting in part defendants’ prior motion to dismiss filed on April 15, 2019. (Doc. Nos. 17, 31.)  
17 Pursuant to that order, this court dismissed plaintiff’s first cause of action as to the selling  
18 shareholder defendants, including defendant Kruse, and dismissed plaintiff’s second cause of  
19 action in its entirety. (Doc. No. 31 at 17–18.)

20 On August 16, 2019, plaintiff filed his FAC, in which he added the Kruse-Western Board  
21 of Directors and the Administration Committee as defendants, and removed Kruse-Western, Inc.  
22 as a defendant. (*See* Doc. No. 34 at ¶¶ 13–16, 21–24.) In his FAC, plaintiff asserts five claims  
23 against defendants under the Employee Retirement Income Security Act (“ERISA”) related to the  
24 defendants’ alleged management and administration of the Western Milling Employee Stock  
25 Ownership Plan (the “ESOP”). (*Id.* at 17–25.) Count one alleges a violation of 29 U.S.C.  
26 § 1106(a) against the selling shareholders defendants, defendant Kruse, and defendant GreatBanc,  
27 alleging that they engaged in a transaction prohibited by ERISA. (*Id.* at ¶¶ 98–109.) Count two  
28 alleges a violation of 29 U.S.C. § 1106(b) against the Administration Committee defendants who

1 sold Kruse-Western stock to the ESOP, and in which plaintiff also contends that these individuals  
2 engaged in a transaction prohibited by ERISA. (*Id.* at ¶¶ 110–20.) In count three plaintiff alleges  
3 that defendant GreatBanc violated 29 U.S.C. § 1104(a)(1)(A) and (B) by breaching its fiduciary  
4 duties to the ESOP. (*Id.* at ¶¶ 121–131.) Count four alleges that the Board defendants and  
5 defendant Kruse violated 29 U.S.C. § 1104(a)(1)(A) and (B) by failing to monitor GreatBanc and  
6 ensure that the ESOP paid no more than fair market value for the Kruse-Western stock. (*Id.* at ¶¶  
7 132–38.) Count five alleges a claim for co-fiduciary liability in violation of 29 U.S.C.  
8 §§ 1105(a)(1), (a)(3) against defendants Kruse, the Administration Committee, the Board of  
9 Directors, and the selling shareholders. (*Id.* at ¶¶ 139–57.)

10 On August 30, 2019, defendant Kruse moved to dismiss plaintiff’s FAC as to the three  
11 claims brought against him. (Doc. No. 38.) On September 24, 2019, the Board defendants and  
12 the Administration Committee moved to dismiss counts two and five of the FAC. (Doc. No. 46.)  
13 Plaintiff filed an opposition to both motions on October 15, 2019, and defendants filed a joint  
14 reply thereto on October 22, 2019. (Doc. Nos. 49, 50.) On October 29, 2019, plaintiff filed a  
15 request for the court to consider a surreply or, in the alternative, to strike arguments defendants  
16 raised for the first time in their reply brief, and attached the surreply to the request. (Doc. Nos.  
17 51, 51-1.) On the same day this order is being issued, defendants’ motions to dismiss (Doc. Nos.  
18 38, 46) were granted in part and denied in part. (Doc. No. 69.)

19 Below the court will first set out the applicable legal standards applicable to the pending  
20 motion and then turn to address the parties’ arguments.

## 21 LEGAL STANDARD

### 22 A. Judgment on the Pleadings

23 Rule 12(c) of the Federal Rules of Civil Procedure provides that: “After the pleadings are  
24 closed—but early enough not to delay trial—a party may move for judgment on the pleadings.”  
25 A motion for judgment on the pleadings “challenges the legal sufficiency of the opposing party’s  
26 pleadings. . . .” *Morgan v. County of Yolo*, 436 F. Supp. 2d 1152, 1154–55 (E.D. Cal. 2006),  
27 *aff’d*, 277 F. App’x 734 (9th Cir. 2008). In reviewing a motion brought under Rule 12(c), the

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1 court “must accept all factual allegations in the complaint as true and construe them in the light  
2 most favorable to the nonmoving party.” *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

3 The same legal standard applicable to a Rule 12(b)(6) motion applies to a Rule 12(c)  
4 motion. *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

5 Accordingly, “judgment on the pleadings is properly granted when, taking all the allegations in  
6 the non-moving party’s pleadings as true, the moving party is entitled to judgment as a matter of  
7 law.” *Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 623 (9th Cir. 2012)  
8 (quoting *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)); *see also Fleming*,  
9 581 F.3d at 925) (stating that “judgment on the pleadings is properly granted when there is no  
10 issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law”).

11 The allegations of the complaint must be accepted as true, while any allegations made by the  
12 moving party that contradict the allegations of the complaint are assumed to be false. *See*  
13 *MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1081 (9th Cir. 2006); *see also Hal Roach*  
14 *Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990) (“[T]he allegations of  
15 the non-moving party must be accepted as true, while the allegations of the moving party which  
16 have been denied are assumed to be false.”). The facts are viewed in the light most favorable to  
17 the non-moving party and all reasonable inferences are drawn in favor of that party. *See Living*  
18 *Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 360 (9th Cir. 2005).

19 When deciding a motion for judgment on the pleadings, courts may consider facts set forth in the  
20 pleadings as well as facts that are contained in materials of which the court may take judicial  
21 notice. *See Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999)  
22 (citation omitted); *see also Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th  
23 Cir. 1990) (a Rule 12(c) motion “is designed to dispose of cases where the material facts are not  
24 in dispute and a judgment on the merits can be rendered by looking to the substance of the  
25 pleadings and any judicially noticed facts”). Under Federal Rule of Civil Procedure 10(c), a copy  
26 of any written instrument which is an exhibit to a pleading is a part thereof for all purposes and  
27 may be considered on a motion for judgment on the pleadings. *See Qwest Commc’ns Corp. v.*

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1 *City of Berkeley*, 208 F.R.D. 288, 291 (N.D. Cal. 2002) (“materials properly attached to a  
2 complaint as exhibits may be considered” on a motion for judgment on the pleadings).

3 Courts have discretion both to grant a motion for judgment on the pleadings with leave to  
4 amend or to simply grant dismissal of causes of action rather than grant judgment as to them.  
5 *Lonberg v. City of Riverside*, 300 F. Supp. 2d 942, 945 (C.D. Cal. 2004) (citations omitted); *see*  
6 *also Pac. W. Grp. v. Real Time Sols., Inc.*, 321 Fed. App’x 566, 569 (9th Cir. 2008);<sup>2</sup> *Woodson v.*  
7 *State of California*, No. 2:15-cv-01206-MCE-CKD, 2016 WL 524870, at \*2 (E.D. Cal. Feb. 10,  
8 2016). Generally, of course, dismissal without leave to amend is proper only if it is clear that “the  
9 complaint could not be saved by any amendment.” *Intri-Plex Techs. v. Crest Grp.*, 499 F.3d  
10 1048, 1056 (9th Cir. 2007) (citing *In re Daou Sys., Inc.*, 411 F.3d 1006, 1013 (9th Cir. 2005)); *see*  
11 *also Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (noting that  
12 “[l]eave need not be granted where the amendment of the complaint . . . constitutes an exercise in  
13 futility”).

#### 14 **B. Summary Judgment**

15 Summary judgment is appropriate when the moving party “shows that there is no genuine  
16 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.  
17 Civ. P. 56(a).

18 On summary judgment, the moving party “initially bears the burden of proving the  
19 absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387  
20 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party  
21 may accomplish this by “citing to particular parts of materials in the record, including  
22 depositions, documents, electronically stored information, affidavits or declarations, stipulations  
23 (including those made for purposes of the motion only), admissions, interrogatory answers, or  
24 other materials” or by showing that such materials “do not establish the absence or presence of a  
25 genuine dispute, or that the adverse party cannot produce admissible evidence to support the  
26 fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). If the moving party meets its initial responsibility, the

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27 <sup>2</sup> Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule  
28 36-3(b).



1 burden then shifts to the opposing party to establish that a genuine issue as to any material fact  
2 actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
3 (1986). In attempting to establish the existence of this factual dispute, the opposing party may  
4 not rely upon the allegations or denials of its pleadings but is required to tender evidence of  
5 specific facts in the form of affidavits, and/or admissible discovery material, in support of its  
6 contention that the dispute exists. *See Fed. R. Civ. P. 56(c)(1); Matsushita*, 475 U.S. at 586 n.11;  
7 *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (“A trial court can only consider  
8 admissible evidence in ruling on a motion for summary judgment.”). The opposing party must  
9 demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the  
10 suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W.*  
11 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the  
12 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the  
13 nonmoving party. *See Wool v. Tandem Computs., Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

14 In the endeavor to establish the existence of a factual dispute, the opposing party need not  
15 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual  
16 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at  
17 trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce  
18 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”  
19 *Matsushita*, 475 U.S. at 587 (citations omitted).

20 “In evaluating the evidence to determine whether there is a genuine issue of fact,” the  
21 court draws “all reasonable inferences supported by the evidence in favor of the non-moving  
22 party.” *Walls v. Cent. Contra Costa Cty. Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011). It is  
23 the opposing party’s obligation to produce a factual predicate from which the inference may be  
24 drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985),  
25 *aff’d*, 810 F.2d 898, 902 (9th Cir. 1987). Undisputed facts are taken as true for purposes of a  
26 motion for summary judgment. *Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740, 745  
27 (9th Cir. 2010). Finally, to demonstrate a genuine issue as to a disputed issue of material fact, the  
28 opposing party “must do more than simply show that there is some metaphysical doubt as to the

1 material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find  
2 for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587  
3 (citation omitted).

#### 4 **REQUEST FOR JUDICIAL NOTICE**

5 In connection with their motion for judgment on the pleadings, or alternatively, motion for  
6 summary judgment, defendants request that the court take judicial notice of: (1) the First  
7 Amended Complaint filed in this matter; (2) the Board defendants’ Answer to the First Amended  
8 Complaint; (3) defendant Kruse’s Answer to the First Amended Complaint; and (4) defendant  
9 GreatBanc’s Answer to the First Amended Complaint. (Doc. No. 54-3 at 2.)

10 Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a fact that is  
11 not subject to reasonable dispute because it: (1) is generally known within the trial court’s  
12 territorial jurisdiction; or (2) can be accurately and readily determined from sources whose  
13 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201. A court may also take judicial  
14 notice of undisputed “matters of public record.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688–  
15 89 (9th Cir. 2001). A court may take judicial notice of a public record not for the truth of the  
16 facts recited therein, but for the existence of the document. *Id.* at 690. Courts “cannot take  
17 judicial notice of the contents of documents for the truth of the matters asserted therein when the  
18 facts are disputed.” *Cal. Sportfishing Prot. Alliance v. Shiloh Grp.*, 268 F. Supp. 3d 1029, 1038  
19 (N.D. Cal. 2017).

20 It is unclear to the court why defendants seek judicial notice to be taken of the documents  
21 identified above. Those documents are all part of the record of this action and need not be  
22 judicially noticed for this court to consider them in evaluating defendants’ motion for judgment  
23 on the pleadings. To the extent defendants seek to have the court take judicial notice of the  
24 exhibits attached to defendants’ answers, including the Trust Agreement and the severance  
25 agreement, the court is only able to take judicial notice of the existence of the documents, and not  
26 the truth of any facts asserted therein. *See Cal. Sportfishing Prot. Alliance*, 268 F. Supp. 3d at  
27 1038. Finding no reason to take judicial notice of documents appearing on the docket in this  
28 action, the court will deny defendants’ request for judicial notice, but will consider the documents

1 identified above as part of the record before the court in considering defendants’ converted  
2 motion for summary judgment below.

### 3 ANALYSIS

#### 4 A. Motion for Judgment on the Pleadings

5 Defendants move for judgment on the pleadings, or alternatively for summary judgment,  
6 on the basis that plaintiff knowingly and voluntarily released the claims brought in this action  
7 against each of the defendants, and that plaintiff cannot otherwise bring the claims on behalf of  
8 the ESOP. (Doc. No. 54-1 at 9.) Defendants argue that the “unambiguous plain language of the  
9 Release” in the severance agreement, including an acknowledgement of the release immediately  
10 above plaintiff’s signature, and the severance payment equal to one month’s salary that plaintiff  
11 received “support[] the conclusion that, based on the totality of the circumstances, the Release  
12 was knowing and voluntary.” (*Id.* at 9–12) (citing *Morais v. Cen. Beverage Corp. Union*  
13 *Employees’ Supplemental Retirement Plan*, 167 F.3d 709, 713 (1st Cir. 1999)). Defendants also  
14 assert that plaintiff knowingly and voluntarily released his claims and “had the power to negotiate  
15 the agreement” because plaintiff requested that Western Milling issue him another check equal to  
16 the amount of taxes withheld from his original severance paycheck. (*Id.* at 12.) Defendants  
17 contend that each of the named defendants are covered by the release of claims incorporated into  
18 plaintiff’s severance agreement as stockholders or administrators of a stockholder of Kruse  
19 Western stock, directors of Kruse Western, Inc., and agents of the ESOP as an affiliate of  
20 Western Milling LLC. (*Id.* at 12–15.) Defendants contend that plaintiff’s claims are barred by  
21 the severance agreement because the release of claims specifically includes “any and all claims  
22 . . . under . . . Employee Retirement Income Security Act [(‘ERISA’)]” and each of plaintiff’s  
23 claims in this action are brought under ERISA. (*Id.* at 15.) Defendants distinguishes this action  
24 from the situation presented in *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999), in which the Ninth  
25 Circuit held that an individual plaintiff cannot release claims of an ERISA plan to recover losses  
26 to the plan under ERISA § 502(a)(2) without the plan’s consent. Specifically, defendants contend  
27 that they argue only that plaintiff is not entitled to pursue § 502(a)(2) claims on behalf of the  
28 ESOP, and do not argue that the ESOP cannot pursue such claims. (*Id.* at 15–16); *see* ERISA

1 § 502(a)(2), 29 U.S.C. § 1132(a)(2). Finally, defendants argue that plaintiff “is not a proper  
2 person to bring a claim ‘on behalf of’ the Plan” because “losses as a result of any breach of  
3 fiduciary duty or overpaying for company stock are incurred at the time of the transaction in  
4 question” and plaintiff did not become a participant in the ESOP until January 1, 2017, more than  
5 a year after the ESOP’s purchase of Kruse Western stock at allegedly inflated prices. (*Id.* at 16–  
6 17.)

7 In his opposition, plaintiff argues that defendants’ motion for judgment on the pleadings is  
8 procedurally improper because it was filed while motions to dismiss (Doc. Nos. 38, 46) remained  
9 pending before the court and at a time when the defendant Administration Committee had not yet  
10 filed an answer. (Doc. No. 58 at 11.) Plaintiff also contends that the documents upon which  
11 defendants’ motion relies, including the Trust Agreement and plaintiff’s alleged release of claims  
12 within the severance agreement, may not be considered in connection with a motion for judgment  
13 on the pleadings because courts cannot take judicial notice of the contents of documents for the  
14 truth of the matters asserted therein when the facts are disputed, as they are here. (*Id.* at 12–13.)  
15 Plaintiff also points out that defendants’ motion relies heavily on the declaration of Julie Landers  
16 Krueger (“Krueger Declaration”), Director of People Operations for Western Milling since  
17 September of 2017 (Doc. No. 54-4), filed in conjunction with the pending motion, which cannot  
18 be properly considered for a motion for judgment on the pleadings. (*Id.* at 13.)

19 In reply, defendants contend that the pending motion is procedurally proper because the  
20 court in its discretion may decide a motion for judgment on the pleadings before defendant  
21 Administration files an answer, and that the court can also sever defendant Administration  
22 Committee from the pending motion. (Doc. No. 61 at 15) (citing *Watson v. County of Santa*  
23 *Clara*, 06-cv-04029-RMW, 2007 WL 2043852, at \*1 (N.D. Cal. July 12, 2007)). Defendants also  
24 argue that the Trust Agreement and severance agreement may be considered in addressing the  
25 motion for judgment on the pleadings because the FAC “necessarily relies” on those documents  
26 to the extent the Trust Agreement “implements and forms part of the Plan” and governs in the  
27 “event of a conflict” and the release of claims in the severance agreement “must also be  
28 considered for the Court to understand the full contractual relationship of the parties.” (*Id.* at 16–

1 17.) Defendants additionally assert that even if the court were to conclude that it cannot consider  
2 the documents on a motion for judgment on the pleadings, it may convert the pending motion to a  
3 motion for summary judgment and properly consider the documents. (*Id.* at 17.)

4 The court concludes that the Trust Agreement, severance agreement, and Krueger  
5 declaration cannot be considered in ruling on defendants' pending motion for judgment on the  
6 pleadings. Although a court may consider judicially noticed documents when analyzing such a  
7 motion, as discussed above, it may not take judicial notice of the contents of the documents for  
8 the truth of the matters asserted when the facts are disputed, as they are here. *See Cal.*  
9 *Sportfishing Prot. Alliance*, 268 F. Supp. 3d at 1038. As explained above, for this reason the  
10 court has declined to take judicial notice of the Trust Agreement and the severance agreement.  
11 The court is unpersuaded by defendants' argument that in his FAC plaintiff necessarily relies  
12 upon the Trust Agreement by alleging the existence of the ESOP. Defendants have cited no  
13 authority in support of their conclusory contention that the severance agreement signed by  
14 plaintiff, which is not referenced in the FAC and is a completely separate document than the  
15 documents governing the ESOP, may be considered on a motion for judgment on the pleadings.  
16 Additionally, defendants have advanced no argument that the Krueger Declaration, which  
17 contains detailed factual allegations, may be considered either as "facts set forth in the pleadings  
18 [or] facts that are contained in materials of which the court may take judicial notice" for purposes  
19 of ruling on their motion for judgment on the pleadings. *See Heliotrope Gen., Inc.*, 189 F.3d at  
20 981 n.18. For purposes of judicial efficiency, the court will therefore convert defendants'  
21 pending motion into a motion for summary judgment and address the merits of the defendants'  
22 arguments below.

### 23 **B. Motion for Summary Judgment**

24 In his opposition to the pending motion, plaintiff contends that his claims are brought on  
25 behalf of the ESOP seeking to restore losses to the ESOP as a whole under ERISA §§ 502(a)(2)–  
26 (3), and that he cannot have released those claims without the ESOP's consent. (Doc. No. 58 at  
27 7) (citing *Bowles*, 198 F.3d at 759–60); *see* 29 U.S.C. §§ 1132(a)(2)–(3). Plaintiff argues that all  
28 of his claims, including his claims under § 502(a)(3), are brought on behalf of the ESOP and all

1 of its participants because he seeks plan-wide equitable relief. (Doc. No. 58 at 7.) Plaintiff  
2 maintains that his plan-wide claims are based upon the alleged fiduciary breaches that improperly  
3 benefited defendants but did not cause losses to the ESOP, and are therefore not redressable under  
4 § 502(a)(2). (*Id.* at 8 n. 2.) In support of this argument, plaintiff notes that an ERISA plan is not  
5 itself statutorily authorized to sue under ERISA § 502(a)(2) and he cites a number of post-*Bowles*  
6 decisions in which courts have declined to bar claims brought on behalf of all participants in an  
7 ERISA plan where the individual plaintiff signed a release of claims and neither the plan itself  
8 nor its fiduciaries were plaintiffs in the litigation. (*Id.* at 8.)

9         Additionally, plaintiff argues that even if he became a participant in the ESOP after the  
10 ESOP's purchase of Kruse-Western stock, he "still suffered a concrete loss that is redressable in  
11 this lawsuit because the value and number of the shares in his ESOP account were and are  
12 affected by the ESOP's payment of more than fair market value for the stock purchased in 2015."  
13 (*Id.* at 9–10.) Plaintiff asserts that "the loan for this Transaction was inflated by the amount of  
14 overpayment, thereby reducing the number of shares allocated to ESOP participants each year."  
15 (*Id.* at 10.) Plaintiff supports his assertion in this regard by pointing out that the ESOP Plan  
16 Document notes that ESOP borrowed funds for its purchase of the Kruse-Western stock, shares  
17 are allocated to ESOP participants annually when the ESOP makes loan payments, and the  
18 number of shares released to participants is based on the amount of the transaction loan. (*Id.*)  
19 Plaintiff asserts that he suffered an injury in fact because he would have been allocated more  
20 shares if the ESOP had paid less for the stock than the allegedly greatly inflated value. (*Id.* at 10–  
21 11.)

22         In reply, defendants do not dispute that ERISA § 502(a)(2) authorizes suit by an ERISA  
23 plan participant for appropriate relief under § 409, including claims to restore any losses to the  
24 plan from a breach of fiduciary duty. Instead, defendants contend that plaintiff must himself have  
25 suffered an injury in order to bring suit under ERISA § 502(a)(2). (Doc. No. 61 at 6, n. 1)  
26 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n. 6 (2016)). According to defendants,  
27 plaintiff suffered no redressable injury because he resolved any claims he might have by signing  
28 the severance agreement and its release of claims in exchange for a severance payment. (*Id.*)

1 More specifically, defendants dispute plaintiff’s contention that he would have received a greater  
2 aggregate value in his individual ESOP account if he had in fact received more Kruse-Western  
3 shares pursuant to an allegedly more accurate valuation of the stock. (*Id.* at 6–7.) Defendants  
4 rely on the decision in *Dorman v. Charles Schwab Corp.*, 780 F. App’x 510 (9th Cir. 2019) to  
5 argue that plaintiff’s standing turns on his individual injury because § 502(a)(2) claims are  
6 “inherently individualized when brought in the context of a defined contribution plan” like the  
7 ESOP. *Id.* at 514 (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008)).  
8 Defendants also seek to distinguish this action from that at issue in *Bowles* by clarifying that they  
9 seek to bar only this suit brought by plaintiff on behalf of the ESOP, not *any* suit asserting such  
10 claims on behalf of the ESOP. (*Id.* at 7); *see Bowles*, 198 F.3d at 756–57, 761.

11 In *Bowles*, a retired plan participant, brought various claims, including breach of fiduciary  
12 duty seeking relief under ERISA § 502(a)(3), against her employer, its retirement plan and  
13 individuals who were trustees of the plan. *Bowles*, 198 F.3d at 756. Two years after the  
14 plaintiff’s first complaint was filed, the participant signed a settlement agreement with the  
15 representative of the estate of one of the individual defendants and sought to dismiss all of her  
16 claims against that defendant. *Id.* The district court dismissed “all claims against [that individual  
17 defendant] belonging to Bowles” but found that “the agreement released ‘only those claims  
18 legally brought by Plaintiff Bowles and that Bowles [could not] and did not release the Plans’  
19 claims against [the individual defendant].” *Id.* at 757. The Ninth Circuit affirmed, holding that  
20 the participant could not settle her claim for breach of fiduciary duty without the ERISA plan’s  
21 consent to release its § 502(a)(2) claims, because her claims “are not truly individual” since the  
22 remedy she sought under § 502(a)(3) was “the precise remedy Congress prescribed in §  
23 502(a)(2): a return to The Plans and all participants of all losses incurred and any profits gained  
24 from the alleged breach of fiduciary duty.” *Id.* at 760. In addition, the Ninth Circuit affirmed the  
25 district court’s decision that Bowles “remained as a plaintiff in her representative capacity on  
26 behalf of The Plans and the participants notwithstanding the release of her individual claims  
27 against [the individual defendant].” *Id.* at 761.

28 ////

1 Defendants' arguments that plaintiff released the claims at issue in this action and their  
2 attempts to distinguish *Bowles* by relying on the decision in *Dorman* are unpersuasive. In  
3 *Dorman*, the Ninth Circuit held that a former employee's ERISA claims were subject to  
4 arbitration under the plan document's arbitration provision because both the plan "expressly  
5 agreed in the Plan document that all ERISA claims should be arbitrated" and the plaintiff had  
6 agreed to arbitration on an individualized basis. But the Ninth Circuit in *Dorman* limited the  
7 arbitration to "individual claims . . . seeking relief for the impaired value of the plan assets in the  
8 individual's own account resulting from the alleged fiduciary breaches." *Dorman*, 780 F. App'x  
9 at 513–14. In this way, the decision in *Dorman* clarifies that while a plan participant "can bring a  
10 § 502(a)(2) claim for the plan losses in her own individual account," the threshold question in  
11 considering whether a plaintiff is bound to arbitrate such individual claims "is whether *the Plan*  
12 agreed to arbitrate the § 502(a)(2) claims" because "such claims belong to a plan—not an  
13 individual." *Id.* at 513–14 (emphasis added) (citing *Munro v. Univ. of S. Cal.*, 896 F.3d 1088,  
14 1092 (9th Cir. 2018)).

15 Here, unlike in *Dorman*, even if plaintiff's release of claims were found to be valid,  
16 defendants do not point to any evidence demonstrating that the ESOP released any of its  
17 § 502(a)(2) claims. Furthermore, just like the plaintiff in *Bowles*, plaintiff's § 502(a)(3) claim  
18 seeks a return to the ESOP and all ESOP participants of all losses incurred and any profits gained  
19 by defendants from the alleged breaches of fiduciary duty, such that plaintiff's "claims for breach  
20 of fiduciary duty are not . . . individual" claims that plaintiff may release. (Doc. No. 34 at 26–  
21 27); *see Bowles*, 198 F.3d at 760. According to binding Ninth Circuit precedent, plaintiff's  
22 § 502(a)(2) and § 502(a)(3) claims therefore seek relief on behalf of the ESOP and "are not truly  
23 individual," and plaintiff "could not settle them [by virtue of a release of claims] without [t]he  
24 Plan[']s consent." *Bowles*, 198 F.3d at 759–60 (finding that § 502(a)(3) claims seeking relief for  
25 an ERISA plan and all plan participants seeking a return to the plan and all participants "of all  
26 losses incurred and any profits gained from the alleged breach of fiduciary duty" and § 502(a)(2)  
27 claims are not individual claims and cannot be released without the plan's consent). As such, the  
28 claims brought in this action are not barred by plaintiff's individually signed release of claims



1 because there is no evidence establishing that the ESOP consented to the release of its claims  
2 under ERISA § 502(a)(2).<sup>3</sup> See, e.g., *Munro*, 896 F.3d at 1092 (affirming the district court’s  
3 ruling that an individual employee’s consent to arbitrate ERISA claims does not bar § 502(a)(2)  
4 claims filed by that employee on behalf of the ERISA plan because the plan did not also consent  
5 to arbitration); *Johnson v. Couturier*, No. 2:05-cv-02046-RRB-KJM, 2006 WL 2943160, at \*2  
6 (E.D. Cal. Oct. 13, 2006) (holding that a plaintiff could waive his individual claims against  
7 defendants but not claims brought under § 502(a)(2) for the benefit of the ERISA plan without the  
8 consent of the plan); *Cryer v. Franklin Templeton Res., Inc.*, No. 16-cv-04265-CW, 2017 WL  
9 818788, at \*3 (N.D. Cal. Jan. 17, 2017) (same); *In re JDS Uniphase Corp. ERISA Litig.*, No. 03-  
10 cv-04743-WWS, 2006 WL 2597995, at \*1–2 (N.D. Cal. Sept. 11, 2006) (same).

11 Defendants’ argument that plaintiff lacks standing to bring an action under §§ 502(a)(2)–  
12 (3) are similarly unavailing. Although the Supreme Court in *Spokeo* stated that “even named  
13 plaintiffs who represent a class ‘must allege and show that they personally have been injured, not  
14 that injury has been suffered by other, unidentified members of the class to which they belong,’”  
15 plaintiff filed this action on behalf of the ESOP under ERISA § 502(a), not as a class action.  
16 *Spokeo, Inc.*, 578 U.S. at 338 n. 6. The Ninth Circuit in *Bowles* specifically held that a plaintiff  
17 may remain “as a plaintiff in her representative capacity on behalf of [the ERISA plan] and the  
18 participants notwithstanding the release of her individual claims against [the individual  
19 defendant].” *Bowles*, 198 F.3d at 761. According to defendant, and plaintiff does not seriously  
20 dispute, plaintiff became an ESOP participant on January 1, 2017, and that the ESOP’s purchase  
21 of all Kruse-Western stock at an allegedly greatly inflated value, the act which underlies  
22 plaintiffs’ claims for breaches of fiduciary duties, occurred in 2015. Instructive under these  
23 circumstances is the decision in *Johnson*, where another judge of this district court considered  
24 whether a former employee had standing to bring suit under ERISA § 502(a)(2) when he had

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25 <sup>3</sup> Plaintiff also argues that his release of individual claims is invalid because it was not knowing  
26 and voluntary, and that even if valid, the release of claims within the severance agreement does  
27 not release defendants GreatBanc or Administration Committee. (Doc. No. 58 at 15–20.)  
28 Because the court finds that plaintiff’s claims seek relief on behalf of the ESOP and the ESOP  
participants, and therefore he could not have released the claims brought in this action without the  
ESOP’s consent, the court need not address these arguments advanced by plaintiff.

1 received a distribution of all shares of stock in the ERISA plan in which he was vested at the time  
2 of his termination. 2006 WL 2943160, at \*3. The defendants in that case argued that the plaintiff  
3 lacked standing to sue for damages because he had already received all of the vested benefits  
4 owed to him under the plan. *Id.* The district court rejected that argument, holding that because  
5 the “complaint in this case seeks only equitable relief, *i.e.*, the imposition of a constructive trust,”  
6 the plaintiff had standing to sue because he had “an equitably vested interest in that constructive  
7 trust held for the benefit of the [ERISA plan].” *Id.* at 3 (quoting *Amalgamated Textile Workers v.*  
8 *Murdock*, 861 F.2d 1406, 1419 (9th Cir.1988) (in turn holding that “for the limited purpose of  
9 granting plan participants and beneficiaries standing to sue in cases such as this one [where  
10 former employees who had received a full distribution under an ERISA Plan], ill-gotten profits  
11 held in a constructive trust for plan participants and beneficiaries may be construed as equitably  
12 vested benefits under an ERISA plan”)).

13 Similarly, here, in the operative complaint plaintiff seeks only equitable relief including  
14 but not limited to disgorgement of ill-gotten gains, fees, and profits and the imposition of a  
15 constructive trust and/or equitable lien. (Doc. No. 34 at 26–27.) Although defendants contend  
16 that plaintiff has suffered no injury because he received all vested benefits owed to him under the  
17 plan solely based on the commencement of his participation in the ESOP in 2017, after the  
18 ESOP’s purchase of the Kruse-Western stock in 2015, plaintiff has an equitably vested interest in  
19 those alleged ill-gotten profits held in a constructive trust held for the benefit of the ESOP. *See*  
20 *Johnson*, 2006 WL 2943160, at \*3; *Amalgamated Textile Workers*, 861 F.2d at 1419.

21 Furthermore, the losses in a breach of fiduciary claim arising from an ESOP’s purchase of private  
22 company stock are determined based “not only on the purchased shares’ price, but also on their  
23 value.” *Henry v. U.S. Trust Co. of Cal., N.A.*, 569 F.3d 96, 100 (2d Cir. 2009). In his FAC  
24 plaintiff alleges that the ESOP purchased the Kruse Western shares for approximately \$244  
25 million in 2015, whereas the true value of those shares was \$24.8 million at the end of 2016 and  
26 \$27.4 million at the end of 2017. (Doc. No. 58 at ¶¶ 57, 64, 65.) Plaintiff has also come forward  
27 with evidence in the form of the ESOP’s Plan Document to support his contention that if the  
28 valuation of Kruse Western’s stock had not been grossly inflated in 2015, plaintiff would have

1 been allocated more shares of Kruse Western stock when he became an ESOP participant on  
2 January 1, 2017. (Doc. No. 58 at 10) (citing the ESOP Plan document and 26 C.F.R. § 54.4975-  
3 7(b)(8) to demonstrate that Kruse Western shares are released and allocated to participants each  
4 year when the ESOP makes loan payments using company contributions, and that the number of  
5 shares of employer stock released each year for allocation to participants' individual ESOP  
6 accounts is based on the amount of the transaction loan). Defendants do not dispute that the  
7 allocation of shares released to the ESOP participants was based on the amount of the transaction  
8 loan, and thus the allegedly inflated value ascribed to the Kruse-Western stock in 2015. If the  
9 alleged valuations prove to be accurate, plaintiff will have suffered an injury in fact by receiving  
10 fewer shares of Kruse Western stock on January 1, 2017. By receiving fewer shares than he  
11 would otherwise have been entitled to, plaintiff lost profit that he would have otherwise earned  
12 from the increased value (the value of Kruse Western stock rose from \$24.8 million at the end of  
13 2016 to \$27.4 million at the end of 2017) of the additional shares plaintiff was allegedly entitled  
14 to. Therefore, plaintiff has presented evidence that he suffered an injury in fact due to  
15 defendants' alleged breaches of fiduciary duties that is redressable in this action. *See Spokeo,*  
16 *Inc.*, 578 U.S. at 338 (holding that standing to sue requires that the "plaintiff have (1) suffered an  
17 injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is  
18 likely to be redressed by a favorable judicial decision."

### 19 CONCLUSION

20 For all of the reasons explained above, defendants' motion for judgment on the pleadings  
21 (Doc. No. 54), converted by the court into a motion for summary judgment, is denied.

22 IT IS SO ORDERED.

23 Dated: December 13, 2021

24   
25 \_\_\_\_\_  
26 UNITED STATES DISTRICT JUDGE  
27  
28