TENTATIVE ORDER: NOT TO BE FILED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SANDRA TRUONG, Plaintiff, v. KPC HEALTHCARE, INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE et al., Defendants.	Case No. 8:23-cv-01384-SB-BFM TENTATIVE ORDER[1] GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS [DKT. NOS. 73, 74]

In 2015, the owner and CEO of KPC Healthcare Holdings, Inc. (KPC), Defendant Dr. Kali Pradip Chaudhuri, sold 100 percent of KPC's stock to KPC's Employee Stock Ownership Plan (ESOP). In December 2021, while a class action was pending to challenge that transaction, the ESOP (whose leadership includes Dr. Chaudhuri) sold the stock to an affiliated company without disclosing the sale, the sale price, or Dr. Chaudhuri's interest in the purchasing company to ESOP participants. Upon learning of the sale, Plaintiff Sandra Truong, a participant in the ESOP, brought this action alleging violation of disclosure and reporting requirements under the Employee Retirement Income Security Act (ERISA) and seeking to obtain information about the valuation of the stocks. Plaintiff's First Amended Complaint (FAC) alleges claims against the KPC Healthcare, Inc. Employee Stock Ownership Plan Committee (the Committee) and its members, Dr. Chaudhuri, Amelia Hippert, William E. Thomas, and Lori Van Arsdale (collectively, the KPC Defendants) and against Alerus Financial, N.A., the former trustee for the ESOP. Defendants move to dismiss the FAC for lack of subject-

[1] The purpose of the tentative ruling is to focus the discussion at the hearing. *No party shall submit any written response to the tentative ruling—or submit the tentative ruling as an exhibit in any filing—without prior leave of court*.

matter jurisdiction and failure to state a claim. Dkt. Nos. 73, 74. The Court grants the motions in part and denies them in part.

I.

The KPC ESOP is a plan governed by ERISA. Dkt. No. 59 ¶¶ 3, 11. KPC's board members make up the Committee, which serves as the plan administrator. *Id*. ¶¶ 6, 12. Alerus served as the trustee for the ESOP from 2015 through at least the end of 2021. *Id*. ¶ 18. At some point thereafter, a substitute trustee replaced Alerus, but the FAC does not identify the substitute trustee or state when Alerus's role ended. *See, e.g.*, *id*. ¶ 124 (alleging that Alerus should have provided records to substitute trustee). From other filings, it appears that Alerus resigned effective July 10, 2023, and that Prudent Fiduciary Services is the substitute trustee. Dkt. No. 102-3 at 13 of 24; Dkt. No. 104-1 ¶ 10.

In August 2015, the ESOP purchased 100 percent of KPC's shares from Dr. Chaudhuri, and the ESOP retained full ownership of KPC until December 2021. Dkt. No. 59 ¶¶ 21–22. Dr. Chaudhari is the CEO of KPC and the chairman of its board of directors, and the FAC alleges that he continued to exercise operational control of KPC both directly and through a group of loyal insiders on the board. *Id*. ¶ 23. The ESOP Committee consists of all members of KPC's board of directors. *Id*. ¶ 24. In June 2020, Plaintiff's counsel in this case filed an ERISA class action against KPC, the KPC Defendants, and Alerus, among others, challenging the 2015 sale. *Danielle Gamino v. KPC Healthcare Holdings, Inc. et al.*, Case No. 5:20-cv-01126-SB-SHK. This Court approved a class settlement of the claims in *Gamino* against the KPC Defendants and Alerus in March 2023.

Meanwhile, in late December 2021, the ESOP, through Alerus, sold the entirety of its KPC stock to Victor Valley Hospital Acquisition, Inc. and converted the ESOP into a profit-sharing plan. Dkt. No. 59 ¶¶ 4, 25, 31. Plaintiff alleges that Dr. Chaudhuri and Defendant Thomas are the sole or majority owners of Victor Valley and its only board members. *Id*. ¶ 28. The ESOP Committee did not notify the plan participants of the sale until August 24, 2022—approximately eight months later—and the notification did not disclose the sale amount, the price per share, or the fact that Victor Valley was owned by Dr. Chaudhuri and Thomas. *Id*. ¶¶ 25–29. The Committee's August 2022 notice to plan participants stated that the assets from the sale would not be distributed until after the Internal Revenue Service had issued a favorable determination and "all Plan assets ha[d] been marshalled." *Id*. ¶ 26. To date (nearly two and a half years after the sale), no

proceeds have been distributed to plan participants, and the Committee still has not disclosed either the total sale price or the price per share. *Id*. ¶¶ 4, 29.

In November 2022, Plaintiff submitted a written request to the ESOP Committee for information to which she claimed she was entitled under ERISA, including: the most recent summary plan description (SPD); any summaries of material modification (SMMs) to the plan; the latest full annual report (known as the Form 5500); summary annual reports for the plan; any trust agreements; other instruments under which the plan was established or operated; and Plaintiff's annual benefit statements. *Id*. ¶ 33; Dkt. No. 74-3 at 4–6 of 31.[2] Plaintiff's letter specifically requested valuation reports and extensively cited case law to support her assertion that she was entitled to the reports used to determine the sale price of the KPC stock, which affected her benefits. Dkt. No. 74-3 at 5–6 of 31. Approximately one month later, the ESOP Committee responded, sending most of the documents requested but stating that she was not entitled to valuation reports under ERISA. Dkt. No. 59 ¶¶ 36–38; Dkt. No. 74-3 at 10–14 of 31.

Plaintiff then filed this action against the KPC Defendants alleging violations of ERISA for: (1) failing to update the SPD; (2) failing to timely file an annual Form 5500 report for the plan year ending August 31, 2022; and (3) failing to provide the requested valuation documents. Dkt. No. 1. After the KPC Defendants asserted that they did not have the valuation report used in setting the price for the 2021 stock sale and that Alerus had the report but refused to provide it to the KPC Defendants, Plaintiff filed her FAC, which added claims against Alerus for breach of fiduciary duty and knowing participation in the KPC Defendants' violations of ERISA. Dkt. No. 59. Defendants now move to dismiss the claims against them under Rule 12(b)(1) and Rule 12(b)(6). Dkt. Nos. 73, 74. To resolve a jurisdictional dispute related to Count 3, the Court also issued an order to show

[2] The KPC Defendants request that judicial notice be taken of various documents, including the November 15, 2022 letter from Plaintiff and the ESOP Committee's response thereto (along with attachments). The Court grants the request as to Plaintiff's letter and the ESOP Committee's response, as they are repeatedly referenced in the FAC and central to Plaintiff's claims. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (documents forming the basis of the plaintiff's claim or extensively referenced in the complaint may be considered under incorporation-by-reference doctrine). The request is otherwise denied as moot, as the Court does not rely on any of the other documents produced by the KPC Defendants in their request for judicial notice.

cause and invited additional briefing by Plaintiff and the KPC Defendants. Dkt. No. 97.

II.

A complaint must be dismissed under Rule 12(b)(1) if the plaintiff lacks Article III standing to bring suit. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). The standing doctrine is derived from Article III's limitation on the judicial power of federal courts to hear only "actual cases or controversies." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016) (internal citations omitted). "The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* Standing "is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). "The irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at 338 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (cleaned up). A plaintiff must show that the injury was "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted). The party invoking federal jurisdiction bears the burden of demonstrating standing. *TransUnion*, 594 U.S. at 442.

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the facts pleaded "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In resolving a Rule 12(b)(6) motion, a court must accept all well-pleaded factual allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555). Assuming the veracity of well-pleaded factual allegations, a court must "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. There is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Id.*

III.

A.

The KPC Defendants move for dismissal of all three counts against them under Rule 12(b)(1). They contend that Counts 1 and 2 are moot because Plaintiff has obtained all relief sought except attorneys' fees and that Plaintiff lacks standing to assert Count 3 because the KPC Defendants' nonproduction of the valuation report cannot be redressed by this claim. The KPC Defendants also move to dismiss Count 3 on the merits, arguing that they were not required to provide the valuation report under ERISA §§ 104(b)(4) and 404(a)(1)(A). The Court begins, as it must, with the jurisdictional arguments. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction . . . .").

1.

Under Article III of the U.S. Constitution, a federal court's jurisdiction is limited to an actual "case or controversy." *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 857 (9th Cir. 2014). Where an issue has been "mooted by developments subsequent to the filing of the complaint," there is no justiciable controversy. *Id.*; *see also Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016–17 (9th Cir. 2012) (where a court cannot grant "effective relief, the claim is moot and must be dismissed").

In Counts 1 and 2, Plaintiff alleges that the KPC Defendants failed to provide an updated SPD or to file the Form 5500 annual report for the year ending in August 2022, and she seeks injunctive relief and attorney's fees in connection with these claims. The KPC Defendants argue that Plaintiff's claims in Counts 1 and 2 are moot because Defendants provided an updated SPD to Plaintiff and filed the Form 5500.

The FAC itself concedes that because the KPC Defendants issued an updated SPD, Count 1 is moot apart from Plaintiff's request for attorney's fees and expenses. Dkt. No. 59 at 22 n.1. As to Count 2, Plaintiff appears to argue that the KPC Defendants improperly relied on an unsigned draft version of the Form 5500, but she concedes that a signed Form 5500 has been filed on the Department of Labor's website. Plaintiff contends that the KPC Defendants used a 2023 form when they should have used a 2021 form, but the KPC Defendants assert—and

Plaintiff has not disputed—that the 2021 version of the form was unavailable and that the Department of Labor has accepted the filing and correctly identifies it as a 2021 plan year filing on its website. Dkt. No. 91 at 6. Plaintiff cites no authority suggesting that a justiciable dispute remains over the Form 5500 under these circumstances. To the contrary, she received the relief she seeks in Count 2 (apart from attorney's fees) when the KPC Defendants filed the Form 5500.[3]

Plaintiff's principal argument is that Counts 1 and 2 are not moot because she still seeks attorneys' fees on both claims. However, "the existence of an attorneys' fees claim does not resuscitate an otherwise moot controversy." *Lafayette*, 767 F.3d at 857 (cleaned up) (quoting *Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996)); *Directors of Motion Picture Indus. Pension Plan v. Nu Image Inc.*, No. 2:13-CV-03224-CAS, 2014 WL 6066105, at *10 (C.D. Cal. Nov. 10, 2014) (relying on *Lafayette* to dismiss as moot ERISA claim where plaintiff had received requested information and relied only on remaining demand for attorney's fees). "[C]laims for attorneys' fees ancillary to the case survive independently under the court's equitable jurisdiction, and may be heard even though the underlying case has become moot," but they do not save a plaintiff's causes of action from dismissal on mootness grounds. *Cammermeyer*, 97 F.3d at 1238. The cases on which Plaintiff relies for her contrary argument did not address *Lafayette* or *Cammermeyer*, and they are factually distinguishable. *E.g.*, *Luman v. NAC Mktg. Co., LLC*, No. 2:13-CV-00656, 2017 WL 3394117, at *3 (E.D. Cal. Aug. 8, 2017) (finding no mootness where defendant refunded money but did not agree to injunctive relief sought in complaint).

Because Plaintiff does not identify any relief she still seeks in Counts 1 and 2 other than attorney's fees and costs (which may be addressed in a post-judgment motion if the parties are unable to resolve their dispute), those claims are dismissed as moot.

2.

In Count 3, Plaintiff alleges that she requested "any valuation or other document used to determine the price at which her shares had been allocated and a copy of the most recent valuation and other documents setting forth how the value of her shares was determined," and that the KPC Defendants breached their

[3] To the extent Count 2 also sought an order for Defendants to timely file future annual reports and to undergo training (as Plaintiff argued in her opposition), Plaintiff filed a notice clarifying that she no longer seeks that relief. Dkt. No. 87.

disclosure obligations under ERISA when they failed to provide "the valuations that [she] had specifically requested." Dkt. No. 55 ¶¶ 101, 105. The parties' dispute has focused on a 2021 valuation report prepared by a third party for Alerus in connection with the KPC stock sale, although Plaintiff contends that Count 3 also encompasses other unspecified valuation reports and the SMM. Among other relief, Plaintiff in Count 3 seeks statutory penalties under 29 U.S.C. § 1132(c)(1), which gives courts discretion to impose daily penalties against a plan administrator who "fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator)." Dkt. No. 55 ¶¶ 105–06.

The KPC Defendants argue that Plaintiff lacks Article III standing because her claim in Count 3 is not redressable, since KPC has never possessed the report and Alerus has refused to produce it to KPC. Indeed, the fact that the KPC Defendants did not possess the report was what led Plaintiff to amend her complaint to add claims against Alerus. Because Plaintiff in her opposition relied on conclusory allegations that the KPC Defendants did possess or could have obtained the valuation report (despite other specific allegations that Alerus refused to produce it to the Committee), the Court issued an order to show cause (OSC) re subject-matter jurisdiction and invited briefing and evidence relating to Plaintiff's factual basis for her allegation. Dkt. No. 97. In her OSC response, Plaintiff identifies no evidence to support her allegation that the KPC Defendants ever had the valuation report, instead focusing on other arguments for standing.[4] Defendants, on the other hand, produce uncontroverted evidence that the KPC Defendants have never had the report; that when they requested it from Alerus, Alerus refused to produce it; and that the KPC Defendants have been unable to obtain the valuation report from the successor trustee, which also has not received it from Alerus. Dkt. No. 104-1; *see also* Dkt. No. 73-1 at 7–8 (Alerus's motion to dismiss, asserting that it has maintained the report in confidence "as required by the terms of the engagement agreement between Alerus and the valuation advisor"

[4] Notwithstanding its conclusion that dismissal of Count 3 is not appropriate at this time, the Court finds concerning (1) Plaintiff's initial reliance in both her FAC and her opposition to dismissal on an allegation for which she evidently lacked any factual basis and (2) her decision not to address that issue in her OSC response despite its centrality to the Court's OSC. *See* Dkt. No. 97 at 2 ("Plaintiff shall identify evidence to support her allegation that the KPC Defendants possessed . . . the disputed valuation report.").

and that Alerus declined to produce the report to the KPC Defendants as requested).

Even assuming that Count 3 is predicated only on the valuation report, the Court is nevertheless unpersuaded that the claim must be dismissed based on lack of redressability at this stage. In her OSC response, Plaintiff identifies authority holding that a plan administrator was not relieved of its obligation under ERISA to produce documents in a third party's possession even when the third party refused a request to turn them over to the plan administrator. *Mondry v. Am. Fam. Mut. Ins. Co.*, 557 F.3d 781, 801–02 (7th Cir. 2009) (explaining that "the duty to produce the[] documents" still belonged to the plan administrator, and while "[t]hat may pose a bit of a challenge for the plan administrator when the documents in question are within the exclusive possession of the claims administrator," the plan administrator's "dilemma" "did not excuse its statutory obligation" to the plaintiff). *Mondry* involved different facts than this case, and the Court need not decide now whether a more developed record might establish that those differences are material. Alerus's refusal to turn over the valuation report may be relevant to whether the Court will exercise its discretion to award civil penalties against the KPC Defendants for not providing it to Plaintiff—or may even preclude penalties, if the factual record ultimately establishes that there was nothing more the KPC Defendants could have done to obtain the report and that earlier requests for it would have been fruitless. *See* 29 U.S.C. § 1132(c)(1) (allowing court to impose per-day penalty "unless such failure or refusal results from matters reasonably beyond the control of the administrator"). On this record at the pleading stage, however, the KPC Defendants have not shown that their likely affirmative defense of inability to comply permits dismissal on jurisdictional grounds. *See Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) ("Redressability is a constitutional minimum, depending on the relief that federal courts are *capable* of granting."). Because it appears at this time that Plaintiff's alleged injury in Count 3 could possibly be redressed by a favorable decision, she has standing to pursue her claim. The Court therefore denies the KPC Defendants' Rule 12(b)(1) motion as to Count 3 and discharges the OSC re subject-matter jurisdiction.[5]

[5] The KPC Defendants' application at Dkt. No. 100 to file under seal one of the exhibits to their OSC response, which contains confidential settlement discussions, is granted.

3.

Apart from their redressability argument, the KPC Defendants argue that Count 3 fails on the merits because Plaintiff received all documents to which she was entitled under ERISA §§ 104(b)(4) and 404(a)(1)(A). The parties focus principally on whether the 2021 valuation report prepared for Alerus is within the category of documents that ERISA § 104(b)(4) requires the Committee to produce upon request.

That provision, codified at 29 U.S.C. § 1024(b)(4), requires a plan administrator upon a participant's written request "to furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." While most of the documents Plaintiff requested are expressly listed in the provision, it does not specifically reference valuation reports. Plaintiff contends, however, that the valuation report is encompassed by the catchall phrase, "other instruments under which the plan is established or operated."

Both sides acknowledge that the controlling legal authority is *Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686 (9th Cir. 1995), in which the Ninth Circuit, sitting en banc, interpreted the "other instruments" clause. In *Hughes*, the plaintiffs requested that the plan administrator provide them with a list of names and addresses of all retired participants of the plan to enable the plaintiffs to communicate with them. The district court dismissed the complaint, and the en banc court affirmed, holding that the information sought by the plaintiffs did not fall within the meaning of "other instruments under which the plan is established or operates." *Id*. at 689. Applying the principle that words grouped in a list should be given related meaning, the court explained that § 104(b)(4) encompasses "those documents that provide individual participants with information about the plan and benefits"—that is, documents "that allow the individual participant to know exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan funds have been entrusted." *Id*. at 690 (cleaned up). In explaining that participants' names and addresses did not meet this definition, the en banc court contrasted them with examples of documents district courts had found to be covered instruments, including valuation reports:

> Unlike the documents specifically listed in § 104(b)(4)—plan descriptions, annual and terminal reports, and bargaining and trust agreements—participants' names and addresses provide no information about the plan or benefits. As the district court said so aptly, it would strain the meaning of "other instruments under which the plan is operated" to interpret it to include participant names and addresses. *Cf. Werner v. Morgan Equip. Co.*, 15 Employee Benefits Cas. (BNA) 2295, 2301, 1992 WL 453355 (N.D. Cal. 1992) (stock valuation report is an instrument under which a plan is established or operated when the plan measures benefits by the value of stock); *Lee v. Dayton Power & Light Co.*, 604 F. Supp. 987, 1002 (S.D. Ohio 1985) (manual containing charts essential to the calculation of benefits is an instrument under which the plan is established or operated).

Id.

Defendants are correct that the *Hughes* court did not itself directly analyze whether valuation reports are "other instruments" within the meaning of § 104(b)(4). But neither can the court's citation of *Werner* be ignored as a meaningless passing reference, as the KPC Defendants suggest. *Werner* did directly consider the issue and denied summary judgment on a claim for failure to disclose a valuation report, explaining that the requested report "was specifically prepared to determine the put option value and exercise price for liquidation and distribution of ESOP benefits. The determination of benefits was a regular, required and necessary function of the operation of the ESOP. This function was carried out by the preparation of these valuation reports. Under such circumstances, the valuation reports can only be categorized as instruments under which the plan was operated, especially when requested by participants, such as plaintiffs, who question the accuracy of the computation of their benefits." 1992 WL 453355, at *6.

Although the en banc court in *Hughes* did not discuss *Werner*'s reasoning, it cited *Werner*'s holding that valuation reports fall within the statutory definition to provide a contrasting example of documents that—unlike the information sought in *Hughes*—are covered by § 104(b)(4). This citation would be puzzling, if not misleading, if the Ninth Circuit had not believed that *Werner* was correctly decided. Thus, it appears clear that the en banc panel specifically considered the example of valuation reports and determined that, at least in the circumstances described in *Werner*, they fall within the court's interpretation of the statutory

language as encompassing "documents that provide individual participants with information about the plan and benefits." At a minimum, the Court cannot read *Hughes*'s description of the scope of § 104(b)(4) to categorically exclude valuation reports, as Defendants urge, since *Hughes* itself contemplated their inclusion.

This Court is bound by the *Hughes* court's interpretation of § 104(b)(4), and that interpretation appears to encompass at least some valuation reports.[6] Thus, the KPC Defendants' reliance on out-of-circuit authority to argue for a contrary conclusion is unavailing. This Court's conclusion in *Gamino* that *Hughes* precludes dismissal of a § 104(b)(4) claim based on the nonproduction of a valuation report applies equally here. As in *Gamino*, Plaintiff sought the valuation report to understand how the value of her shares was determined. Dkt. No. 59 ¶ 34. And as in *Gamino*, "[t]he Court cannot conclude (for purposes of a motion to dismiss at least) that this allegation is insufficient to state a claim. Though this request was not made in the context of a claim for specific benefits, an understanding of the true value of Plaintiff's shares has direct bearing on where Plaintiff stands with respect to the plan and to what benefits Plaintiff may ultimately be entitled." 2021 WL 162643, at *9 (citing *Hughes*, 72 F.3d at 690).

The Court need not—and does not—decide that under *Hughes*, all valuation reports necessarily are in all circumstances "instruments under which the plan is established or operated" for purposes of ERISA § 104(b)(4). The KPC Defendants argue the opposite—that valuation reports categorically are not encompassed by § 104(b)(4). *Hughes* forecloses that argument. At the pleading stage, Plaintiff has plausibly alleged that the 2021 valuation report prepared for Alerus was a document that would "provide individual participants with information about the plan and benefits," *Hughes*, 72 F.3d at 690, including the value of their shares in the 2021 KPC stock sale. The Court therefore need not reach the other issues raised in the KPC Defendants' challenges to Count 3, including whether Defendants' failure to provide the valuation report also violated ERISA § 404(a)(1)(A) and whether Plaintiff has a viable claim based on failing to provide

[6] The KPC Defendants argue that the plain text of the statute compels dismissal because valuation reports are not "instruments under which the plan is established or operated." In the absence of *Hughes*, this Court might agree. But *Hughes* interpreted that language more broadly as describing documents that provide participants with information about the plan and benefits, and it implicitly (but strongly) indicated that the statutory language covers at least some valuation reports. This Court is not free to substitute its own reading of the plain language of § 104(b)(4) for that of the Ninth Circuit.

an SMM in response to Plaintiff's request. *See Franklin v. Midwest Recovery Sys., LLC*, No. 8:18-CV-02085-JLS, 2020 WL 3213676, at *1 (C.D. Cal. Mar. 9, 2020) (Rule 12(b)(6) "does not provide a mechanism for dismissing only a portion of a claim.") (collecting cases). The KPC Defendants' motion to dismiss Count 3 is denied.

B.

In Counts 4 and 5, Plaintiff alleges that Alerus breached its fiduciary duties and knowingly participated in the KPC Defendants' breach of their ERISA obligations by failing to provide the valuation report to the KPC Defendants and to the successor trustee. Alerus challenges both Plaintiff's Article III standing to allege these claims against it and the adequacy of the claims on the merits. The Court first addresses the jurisdictional argument.

1.

Alerus raises two distinct challenges to Plaintiff's standing. First, it argues that Plaintiff fails to allege an injury in fact. Article III requires Plaintiff to show "that [s]he suffered an injury in fact that is concrete, particularized, and actual or imminent." *TransUnion*, 594 U.S. at 423. A "bare procedural violation" of a statute is not enough; "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 578 U.S. at 341. An informational injury—i.e., the deprivation of information to which the plaintiff is statutorily entitled—may be a cognizable injury in fact, *Animal Legal Def. Fund v. United States Dep't of Agric.*, 935 F.3d 858, 867 (9th Cir. 2019), but "[a]n asserted informational injury that causes no adverse effects cannot satisfy Article III." *TransUnion*, 594 U.S. at 442 (cleaned up).

Alerus argues that Plaintiff has not been truly injured, but rather alleges a bare procedural injury so that she can use this lawsuit as an investigative tool to attempt to uncover some other injury. But Plaintiff does not merely allege that Alerus violated a statutory obligation in the abstract. She contends—plausibly, as the Court found with respect to Count 3—that she has requested information to which she is statutorily entitled (at a minimum, the valuation report) and has been unable to obtain it. Plaintiff also plausibly alleges facts suggesting that in the wake of the secret sale of all of KPC's stock to a company owned by Dr. Chaudhuri, for which neither the KPC Defendants nor any other fiduciaries have ever disclosed information about the sale price, the valuation report is necessary for Plaintiff to

understand the benefits to which she will be entitled when the sale proceeds are eventually distributed to participants. Dkt. No. 59 ¶¶ 25–30, 32, 34, 101.

Plaintiff has adequately alleged an injury in fact—namely, that the withholding of the requested valuation report in violation of ERISA prevents her from fully understanding the benefits to which she is entitled under the plan. *See Lundstrom v. Young*, No. 18-CV-2856, 2022 WL 15524624, at *15–16 (S.D. Cal. Oct. 27, 2022) (finding informational injury sufficient where the plaintiff was not provided information that limited his ability to "evaluate his options"). Alerus's contrary authorities are distinguishable. In *TransUnion*, "[t]he plaintiffs did not allege that they failed to receive any required information." 594 U.S. at 441. And in *Draney v. Westco Chemicals, Inc.*, the complaint was "utterly silent as to what injuries-in-fact [the plaintiff] suffered" and did not allege facts showing that the plaintiff ever clearly requested the information he sought. No. 2:19-CV-01405-ODW, 2019 WL 6465510, at *4 (C.D. Cal. Dec. 2, 2019). Here, in contrast, it is undisputed that Plaintiff requested the valuation report and has not received it. Alerus is not entitled to dismissal for lack of a cognizable injury in fact.

Alerus's second jurisdictional argument is that even if Plaintiff suffered an injury in fact, she cannot show that Alerus caused the injury, since the KPC Defendants independently determined that they were not required to turn over the valuation report and would have refused to do so even if it were in their possession. To establish that an injury is fairly traceable to the defendant's challenged conduct, Article III requires "a causal connection between the injury and the conduct complained of." *United States v. Hays*, 515 U.S. 737, 742–43 (1995). That is, the plaintiff must allege that her injuries "are 'fairly traceable' to [the defendants'] conduct and not the result of the independent action of some third party not before the court." *Winsor v. Sequoia Benefits & Ins. Servs. LLC*, 62 F.4th 517, 525 (9th Cir. 2023). "[T]he traceability requirement is less demanding than proximate causation," and is not necessarily defeated just because a third party's interactions intervened. *O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023)

In Count 4, Plaintiff alleges that Alerus breached its fiduciary duties at three different times and in three discrete ways: (1) by not providing the Committee with the valuation report as part of Alerus's duties to provide an accounting while serving as a trustee; (2) by not providing the report to the successor trustee as part of Alerus's duty to transfer records and provide an account upon Alerus's removal as trustee; and (3) by refusing to provide the report to the KPC Defendants when they requested it in connection with this lawsuit, after Alerus was no longer a trustee. Dkt. No. 59 ¶¶ 112–17; *see also* Dkt. No. 88-3 at 16–17 (Plaintiff's

description of her theories). Although the parties both take an all-or-nothing approach to traceability, "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), and it appears that the traceability analysis differs as to Plaintiff's various theories.

As to Plaintiff's first two theories, the Committee's December 14, 2022 response to Plaintiff's request for documents makes clear the KPC Defendants "declined" to provide the 2021 valuation report based on their position that Plaintiff was not legally entitled to it. Dkt. No. 74-3 at 11–13 of 31 (providing legal analysis and concluding that the requested report "fall[s] outside the scope of ERISA § 104(b)'s requirements"). In light of the KPC Defendants' consistent position that Plaintiff was not entitled to the valuation report and that they would not provide it to her for that reason, Plaintiff identifies no basis to believe that Alerus's failure to turn over the valuation report to the Committee or to the successor trustee had any bearing on her inability to obtain it from the KPC Defendants. *O'Handley*, the principal case on which Plaintiff relies, does not compel a contrary conclusion; the court found traceability based on the plaintiff's allegation that Twitter had never imposed disciplinary action against him until the defendant "placed his account on the company's radar." 62 F.4th at 1162. Here, there are no comparable facts alleged that suggest a genuine possibility—much less the substantial probability—that Alerus's failure to produce the valuation report while serving as trustee caused Plaintiff's injury. Thus, Plaintiff has not established the necessary causal link for the first two theories of her claim in Count 4. *See Winsor*, 62 F.4th at 525 (finding no Article III causation where plaintiffs had not alleged a "substantial probability" that the defendant's conduct caused the harm they claimed to have suffered).

In contrast, Plaintiff has established the requisite traceability as to her third theory of fiduciary breach in Count 4—that Alerus refused the Committee's request for the valuation report in November 2023. This refusal is also the basis of Plaintiff's claim against Alerus in Count 5. *See* Dkt. No. 59 ¶ 123 ("Alerus was made aware that the Committee Defendants were attempting to obtain a copy of [the] valuation report in order to comply with the Committee's obligations as Plan Administrator . . . ."). Both sides rely on the Committee's November 10, 2023 letter to Alerus, which is central to Plaintiff's claims in Counts 4 and 5, and therefore incorporated by reference into the complaint. While that letter states the Committee's belief that Plaintiff is not legally entitled to a copy of the valuation report, it also states the Committee's desire to resolve this action and specifically requests that Alerus produce the report so that KPC can provide it to Plaintiff. Dkt. No. 84-2. Thus, unlike with Plaintiff's other theories addressing earlier events,

there is a substantial probability that if Alerus had provided the valuation report to the Committee in November 2023, the Committee would have given it to Plaintiff.

Accordingly, Plaintiff has established traceability and standing to pursue her claims in Counts 4 and 5 based on Alerus's November 2023 refusal to produce the valuation report to KPC. Plaintiff's claims in Count 4 for earlier alleged violations of Alerus's fiduciary duties are dismissed for lack of standing.

2.

Turning to the merits of the portion of Count 4 as to which Plaintiff has standing, Alerus first argues that Plaintiff's fiduciary breach claim fails on the merits because Alerus was not a fiduciary when KPC requested the valuation report in November 2023. For any ERISA claim alleging breach of fiduciary duty, "the threshold question is . . . whether [the defendant] was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

There are two types of fiduciaries under ERISA: named fiduciaries designated in the plan instruments and "functional fiduciaries" as defined in 29 U.S.C. § 1002(21)(A). *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 653 (9th Cir. 2019). It is undisputed that by November 2023, Alerus was no longer serving as a trustee for the ESOP and therefore was not a named fiduciary. The parties dispute whether Alerus was a functional fiduciary within the meaning of § 1002(21)(A)(i), which provides that "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan *or exercises any authority or control respecting management or disposition of its assets*." 29 U.S.C. § 1002(21)(A) (emphasis added). Plaintiff contends that the valuation report was a plan asset, such that Alerus's continuing control over the report makes it a fiduciary. *See Smith v. Provident Bank*, 170 F.3d 609, 613 (6th Cir. 1999) (former trustee was liable as ERISA fiduciary during time it retained plan assets).

"ERISA defines 'plan assets' to mean 'plan assets as defined by such regulations as the Secretary [of Labor] may prescribe.'" *Depot*, 915 F.3d at 657 (quoting 29 U.S.C. § 1002(42)). Noting that the Secretary has "not prescribed a comprehensive regulation defining 'plan assets,'" the Ninth Circuit in *Depot* adopted the prevailing approach of other circuits that look to "ordinary notions of

property rights" to determine whether something is a plan asset within the meaning of § 1002(21)(A). *Id*. at 657–58.[7]

While Plaintiff identifies the correct legal standard, she cites no authority holding that a valuation report retained by a trustee is an asset of the plan under ordinary notions of property rights. The cases on which she relies are readily distinguishable. In *Smith*, a former trustee was a functional fiduciary when it retained control over a plan participant's account holding stocks and money—undisputedly assets. 170 F.3d at 612. In *New England Biolabs, Inc. v. Miller*, the court found adequate to survive dismissal the plaintiff's allegations that a plan participant who was mistakenly sent more than $100,000 in plan assets was a functional fiduciary over that money. No. 20-CV-11234, 2020 WL 6871015, at *2, 5 (D. Mass. Nov. 23, 2020). Again, there was no dispute that the money was an asset. *Briscoe v. Fine* likewise involved sums of money received by a bank, with no dispute that the money was an asset. 444 F.3d 478, 492 (6th Cir. 2006). And *In re Luna* looked to ordinary definitions of assets to conclude that an ERISA plan had a future property interest in its contractual right to collect unpaid contributions. 406 F.3d 1192, 1199–1200 (10th Cir. 2005). These cases identifying money, stocks, and financial rights as assets do not suggest that a valuation report is also a plan asset; if anything, they highlight the difference between Plaintiff's theory and the cases finding functional fiduciary status based on possession of traditional monetary assets.

Plaintiff also cites *Patel v. City of Los Angeles*—a Fourth Amendment case—for the proposition that businesses have a property interest in their records. 738 F.3d 1058, 1061 (9th Cir. 2013), *aff'd*, 576 U.S. 409 (2015). But the question for purposes of the functional fiduciary test is not whether *Alerus* has a property interest in the valuation report; it is whether the report is an asset *of the ERISA*

[7] Alerus relies on the Ninth Circuit's statement in *Acosta v. Pacific Enterprises* that "[t]o determine whether a particular item constitutes an 'asset of the plan,' it is necessary to determine whether the item in question may be used to the benefit (financial or otherwise) of the fiduciary at the expense of plan participants or beneficiaries." 950 F.2d 611, 620 (9th Cir. 1991). *Acosta* addressed the meaning of that term as it is used in ERISA's prohibited transaction provision, 29 U.S.C. § 1106, and the Ninth Circuit in *Depot* distinguished *Acosta*'s test as "not helpful in determining whether a party is in fact a fiduciary under 29 U.S.C. § 1002(A)(21)(i)" because *Acosta*'s test assumes fiduciary status. *Depot*, 915 F.3d at 658 n.10; *see also Acosta*, 950 F.2d at 617 ("[Defendant] acknowledges that it is a fiduciary.").

plan. Plaintiff relies on general trust principles about a trustee's duty to maintain records, which belong to the trust, but she does not cite a single case—binding or otherwise—holding or suggesting that an ERISA plan has a property interest in a valuation report commissioned by a trustee.

Finally, Plaintiff contends that Alerus's assertion that it must maintain the report in confidence is evidence of a fiduciary duty. *See* Dkt. No. 88-3 at 17 ("If Alerus had no continuing duty and the report belonged to Alerus (rather than the Plan), then Alerus could use the report for its own purposes."). This argument is a non sequitur. Alerus's contention that it is contractually bound to maintain the confidentiality of the report based on its agreement with the entity that prepared the report does not suggest that Alerus is acting as a functional fiduciary.

In the absence of any case supporting her theory that a valuation report prepared for Alerus by a third party is an asset of the ESOP that imposes on Alerus continuing duties as a functional fiduciary to the plan, Plaintiff has not plausibly alleged that Alerus acted as a fiduciary in November 2023 when it declined to produce the report to KPC. The portion of Count 4 based on that refusal (the only part of Count 4 for which Plaintiff has established standing) is therefore dismissed for failure to state a claim.[8]

3.

In Count 5, Plaintiff alleges that Alerus knowingly participated in the KPC Defendants' breach of fiduciary duty by refusing to provide the valuation report to the KPC Defendants. Dkt. No. 59 ¶¶ 120–25. Count 5 invokes ERISA § 502(a)(3), which permits ERISA participants and beneficiaries to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). The Supreme Court has construed this provision broadly, stating that it "admits no limit . . . on the universe of possible defendants" and focuses instead on "redressing the *act or practice* which violates any provision of ERISA Title I." *Harris Tr. And Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000) (cleaned up). Thus, Alerus may be liable under § 502(a)(3) even for its acts when it was not a plan fiduciary.

[8] The Court does not reach the parties' additional arguments about whether the FAC adequately alleges a breach of fiduciary duty or resulting loss.

To state a claim against a nonfiduciary under ERISA § 502(a)(3), the plaintiff must plead facts sufficient to show: "(1) that there is a remediable wrong, *i.e.*, that the plaintiff seeks relief to redress a violation of ERISA or the terms of a plan; (2) that the relief sought is appropriate equitable relief; and (3) that the defendant had actual or constructive knowledge of the circumstances that rendered any prohibited transaction wrongful." *Gamino v. SPCP Grp., LLC* (*Gamino II*), No. 5:21-CV-01466-SB, 2022 WL 336469, at *3 (C.D. Cal. Feb. 2, 2022) (cleaned up). Alerus briefly raises three arguments that go to the first and third elements of the claim.

Alerus first contends that Plaintiff has not plausibly alleged an underlying breach because ERISA § 104(b)(4) does not require production of the valuation report. This argument fails because, as the Court has explained in its analysis of Count 3, Plaintiff plausibly alleges that § 104(b)(4) encompasses the valuation report, such that the KPC Defendants had an obligation to produce it to Plaintiff upon her written request.

Alerus next argues that a violation of § 104(b)(4) "does not automatically give rise to a breach of fiduciary duty claim." Dkt. No. 73-1 at 18–19. But even assuming that the FAC does not plausibly allege that the KPC Defendants violated a fiduciary duty in addition to violating § 104(b)(4), which the Court does not decide, Alerus cites no authority suggesting that § 502(a)(3) limits liability to underlying fiduciary breaches. As the Supreme Court recognized in *Harris*, § 502(a)(3) provides a remedy for "any act or practice which violates any provision of [ERISA Title I]," 530 U.S. at 246 (quoting 29 U.S.C. § 1132(a)(3)), which would appear to include violations of § 104(b)(4). *See also Gamino II*, 2022 WL 336469, at *3 (identifying the "remediable wrong" element of a § 502(a)(3) claim as requiring "a violation of ERISA or the terms of a plan") (quoting *Del Castillo v. Cmty. Child Care Council of Santa Clara Cnty., Inc.*, No. 17-CV-07243, 2019 WL 6841222, at *3 (N.D. Cal. Dec. 16, 2019)). Accordingly, Alerus has not shown that the KPC Defendants' alleged violation of § 104(b)(4) cannot support liability under § 502(a)(3) as a matter of law.

Finally, Alerus challenges the third element of the § 502(a)(3) claim, arguing that there are no plausible allegations that Alerus *knowingly* participated in any breach by the KPC Defendants. Alerus's argument focuses on the KPC Defendants' initial response to Plaintiff's request—at a time when there is no suggestion that Alerus was aware of the request. But it is undisputed that Alerus knew of Plaintiff's request in November 2023 when the KPC Defendants asked Alerus for the valuation report so that they could provide it to Plaintiff. Alerus's

refusal at that time is the subject of Plaintiff's claim in Count 5. And the alleged violation by the KPC Defendants is ongoing. *Cf.* 29 U.S.C. § 1132(c) (providing a per-day penalty for failure to provide documents requested under ERISA § 104(b)(4)). Thus, the FAC plausibly alleges that when Alerus refused to turn over the report to the Committee, it had knowledge of the circumstances that rendered the Committee's nondisclosure of the valuation report wrongful.

Accordingly, Alerus has not shown that it is entitled to dismissal of Count 5.

IV.

"The court should freely grant leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave may be denied, however, for reasons such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Plaintiff argues that dismissal with prejudice on Rule 12(b)(6) grounds would be improper and suggests that she could amend her complaint to add allegations about the Committee's communications with Alerus. The Court's dismissal of Counts 1, 2, and 4, however, is based primarily on Plaintiff's failure to establish Article III standing, and it is not obvious that the problems identified by the Court—for example, that her claims in Counts 1 and 2 are moot because she has obtained the substantive relief she sought—are curable through amendment. To the extent Plaintiff seeks leave to amend, she must identify at the hearing the specific facts she wishes to allege that would cure the deficiencies identified by the Court. In the absence of such a proffer, the Court expects to deny leave to amend as futile.

V.

Defendants' motions to dismiss the FAC are granted in part as follows. Counts 1 and 2 are dismissed without prejudice as moot.[9] Count 4 is dismissed without prejudice for lack of standing to the extent it is based on Alerus's acts while serving as a trustee, including during the transition to the new trustee. The

[9] As the KPC Defendants acknowledge in their motion, "[d]ismissal of Counts I and II will not prevent this Court from resolving any potential attorney fee dispute after the conclusion of this litigation." Dkt. No. 74-1 at 10.

remainder of Count 4, which is based on Alerus's acts in November 2023, is dismissed on the merits with prejudice because Alerus was not a fiduciary at that time. Defendants' motions are otherwise denied. Plaintiff's claims against the KPC Defendants in Count 3 and against Alerus in Count 5 remain.

Date: April 18, 2024

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Stanley Blumenfeld, Jr.
United States District Judge