IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MBA ENGINEERING, INC., as Sponsor and Administrator of the MBA Engineering, Inc. Employees 401(k) Plan and the MBA Engineering, Inc. Cash Balance Plan, and Craig Meidinger, as Trustee of the MBA Engineering, Inc. Employees 401(k) Plan and the MBA Engineering, Inc. Cash Balance Plan, Plaintiffs, vs. VANTAGE BENEFITS ADMINISTRATORS, INC., JEFFREY A. RICHIE, WENDY K. RICHIE, and MATRIX TRUST COMPANY Defendants.	Case No.: 3:17-cv-03300-L

BRIEF IN SUPPORT OF DEFENDANT MATRIX TRUST COMPANY'S (1) MOTION TO DISMISS FOR IMPROPER VENUE, OR ALTERNATIVELY, TO TRANSFER AND (2) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendant Matrix Trust Company ("Matrix Trust") hereby moves to dismiss all claims in Plaintiffs' Amended Complaint against it (Counts II, IV, VI, VIII, XI, XV and XVIII) pursuant to Federal Rule 12(b)(3) and 28 U.S.C. § 1406(a) for improper venue, or alternatively, to sever the claims against Matrix Trust and transfer those claims to the District of Colorado pursuant to Federal Rule 22 and 28 U.S.C. § 1404(a). Should this Court determine that the case should remain in the Northern District of Texas, Matrix Trust moves the Court to dismiss the action in its entirety pursuant to Federal Rule 12(b)(6) for failure to state a claim.

INTRODUCTORY STATEMENT

Plaintiffs are two Minnesota residents who serve as the plan administrator and trustee, respectively, for two retirement plans (the "Plans," as further defined below). As such, they are the primary fiduciaries for the Plans and bear the ultimate responsibility for the Plans under ERISA, including a duty of care to oversee service providers they hire for the Plans. Plaintiffs allege that they are seeking to recover over $2 million that they have paid to the Plans by way of a forgivable loan to redress a fraud that was perpetrated on the Plans by Vantage Benefits Administrators ("Vantage"). Plaintiffs hired Vantage to be the Plans' "third party administrator" (or "TPA") and record keeper, responsible for, among other things, managing and directing all significant financial transactions involving the Plans and their participants. Vantage and its principals (the "Vantage Defendants") have not appeared in this lawsuit to respond to the claims brought against them, and are in default. Plaintiffs have filed a motion for default judgment against them which is unopposed.

Plaintiffs are now looking to shift their liability to other parties who provided services for the Plans. In their individual capacities and not on behalf of the Plans, Plaintiffs filed an Amended Complaint adding claims against Matrix Trust, who served as a directed custodian for

the Plans. Matrix Trust is a Denver, Colorado-based trust company. It does not have any offices, employees, computer servers or any other physical presence in Texas. Matrix Trust established custodial accounts (the "Custodial Accounts") to maintain custody of the assets held therein and invest those assets as directed by authorized parties (here, Vantage) pursuant to a custodial agreement. Plaintiffs allege that Matrix Trust processed electronic wire instructions under the direction and authority of Vantage through which money was transferred out of the Custodial Accounts to a bank account held by Vantage.

Plaintiffs do not allege any independent basis for venue in this district as to their claims against Matrix Trust. Moreover, Matrix Trust's custodial agreement, pursuant to which it serves as custodian for retirement plans, contains a forum selection clause requiring this lawsuit to be brought in the District of Colorado. Plaintiffs strenuously assert that there was no contract, but that allegation is contrary to the terms of the services agreement through which they hired Vantage, which incorporated Matrix Trust's Custodial Agreement. The relevant form agreements relating to the Custodial Accounts have been filed with this motion, and may be considered in evaluating whether venue is proper. Even in the absence of an enforceable forum selection clause, the convenience of the parties and the interests of justice favor a transfer to the District of Colorado, where Matrix Trust resides.

Alternatively, if the Court determines that the case should remain in this district, it should dismiss the counts in the Amended Complaint against Matrix Trust in their entirety for failure to state a claim. Dismissal is warranted on multiple independent grounds. ***First,*** Plaintiffs lack standing under ERISA to obtain individual relief in the nature of contribution from other alleged co-fiduciaries. ERISA's civil enforcement provisions are designed to provide remedies for plans and their beneficiaries, not fiduciaries. ***Second,*** even if ERISA allowed contribution claims as a

general matter, Plaintiffs have not alleged facts supporting a plausible inference that Matrix Trust is liable under ERISA. There is no allegation that Matrix Trust agreed or otherwise undertook to relieve Plaintiffs of their duty to oversee and monitor the Vantage Defendants. Under ERISA, that duty falls on plan sponsors and administrators (i.e., the employer), who are far better positioned to detect fraud than custodial banks and trust companies whose role is limited to processing transactions. Plaintiffs' conclusory allegations that Matrix Trust knew or "should have known" certain characteristics of the Plans and the wire transfer requests do nothing for their claims. Fiduciary status does not turn on constructive or even actual knowledge, and even if it did, Plaintiffs allege no facts supporting the conclusion that Matrix Trust, a corporation that can only obtain knowledge through its agents, "knew" any particular fact about these transactions. ***Third,*** Plaintiffs' state law claims fail because the Amended Complaint does not plead any basis for any duty owed by Matrix Trust to either Plaintiff, and because Plaintiffs allege no facts regarding what, if any, relevant professional standards were not met.

FACTUAL BACKGROUND

A. The Parties.

Plaintiff MBA Engineering, Inc. ("MBA") is a Minnesota corporation. MBA is the plan sponsor and administrator of the MBA Engineering, Inc. Employees 401(k) Plan and the MBA Engineering, Inc. Cash Balance Plan (collectively, the "Plans"). Plaintiff Craig Meidinger (the "Trustee") is MBA's owner and the Plans' trustee. Plaintiffs allege that the Plans are employee benefit plans governed by ERISA. AC ¶ 19. Matrix Trust, formerly known as MG Trust, is a Colorado corporation headquartered in Denver, Colorado. AC ¶ 15; Declaration in Support of Motion to Dismiss ("Declaration" or "Decl.") ¶ 3(APP 000001-000005).[1] Matrix Trust is not

[1] The Declaration is being filed contemporaneously with this Motion. References to "APP" refer to the Appendix filed contemporaneously with this Motion.

and never has been registered to do business in the state of Texas. Decl. ¶ 4(APP 000002).[2] It does not maintain any physical presence within Texas. Matrix Trust has no offices or employees anywhere in Texas. Id. ¶ 5. It does not own any real property or other assets for its own account in Texas. Id. Nor does Matrix Trust maintain any bank accounts in the state. Id. Matrix Trust does not direct any significant advertising to Texas or actively target business in Texas. Id. Matrix Trust's business activities include providing custodial and related services for institutional customers, including retirement plans. Id. ¶ 3. It maintains "plan level" custodial accounts (as distinguished from individual participant accounts) in Denver. Id.

B. Plaintiffs Hire Vantage To Administer The Plans.

Plaintiffs allege that they hired Vantage to serve as the Plans' third party administrator and recordkeeper. Compl. ¶ 7; AC ¶ 11. MBA's original Complaint alleges that a valid written Services Agreement existed between MBA and Vantage. Doc. 1 ¶ 132. Vantage used a Master Services Agreement ("Master Agreement") to contract with retirement plans to provide third party administration and record keeping services. Decl. ¶ 6 and Ex. 1 (APP 000003 and APP 000006-000044). The Complaint did not attach the Master Agreement, but it cited and directly quoted from the Master Agreement:[3]

Complaint ¶ 7	**Master Services Agreement (Exhibit 1 to Declaration), § 13**
In its Services Agreement with [MBA], Vantage Benefits warranted "that all Services shall be performed in a good and workmanlike manner, in compliance with all applicable Laws, rules and regulations,	**<u>Representations and Warranties</u>.** [Vantage], on behalf of itself and any Affiliated Services Provider: (a) warrants that all Services shall be performed

[2] The Declaration is being filed contemporaneously with this Motion. References to "APP" refer to the Appendix filed contemporaneously with this Motion.

[3] *See Durham v. Ascension Parish School Bd.*, 624 F. App'x 237, 239 (5th Cir. 2015) ("A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

and consistent with current industry standards applicable to service providers in the Benefits Administration industry."	in a good and workmanlike manner, in compliance with all applicable Laws, rules and regulations, and consistent with current industry standards applicable to service providers in the Benefits Administration industry; and…

Consistent with the terms of the Master Agreement, Plaintiffs allege that Vantage provided plan administration services, maintained books and records for the Plans' participants, and operated a participant website. Compl. ¶ 132; Decl. Ex. 1(APP 000006-000044). Plaintiffs further allege that Vantage did, in fact, exercise control over the Plans' assets. See, e.g., AC ¶ 11.

C. The Master Agreement Defines And Incorporates Matrix Trust's Role As Directed Custodian.

The Master Agreement expressly provides that Vantage would use the services of Matrix Trust as custodian, as well as securities trading and settlement services offered by Matrix Trust's affiliate Matrix Settlement and Clearance Services LLC. Decl. Ex. 1 at 18 (APP 000024). It specifically provides that the customer (i.e., plan sponsor) "hereby appoints MG Trust Company, LLC ("MG Trust") as custodian of the plan account established by this Application and Agreement and authorizes MG Trust and its agents to perform the custodial services as described in the custodial agreement. The undersigned also acknowledges receipt of a copy of the custodial agreement (see Exhibit B) and agrees to be bound by the terms of the custodial agreement, including the arbitration provisions hereof." See id.[4] Matrix Trust's records indicate that Vantage typically embedded a copy of its Custodial Agreement in the Master Agreement. Decl. ¶ 6 and Ex. 1 (APP 000003 and APP 000006-000044). Matrix Trust provided form copies of the Custodial Agreement to Vantage for this purpose. Decl. ¶ 7 and Exs. 2 and 3(APP 000003-000004, APP 000045-000064 and APP 000065-000084).

[4] "MG Trust Company, LLC" is Matrix Trust's former business name. Decl. ¶ 8 (APP 000004-000005).

Plaintiffs allege that Matrix Trust did, in fact, establish Custodial Accounts for the Plans, consistent with the Master Agreement. AC ¶ 23. Plaintiffs nonetheless strategically avoid mentioning the Master Agreement in their Amended Complaint, likely because the incorporated Custodial Agreement provides that Matrix Trust does not act as a fiduciary:

> **3.2** **<u>Role</u>.** The Custodian, as agent of the Customer, ***but not as fiduciary***, shall take, hold, invest, and distribute all of the assets of the Fund in accordance with the terms of this Agreement. The Custodian will serve as a non-discretionary, directed custodian of the Custodial Account. The Custodian is responsible for maintaining custody of the assets held in the Custodial Account, and for investing those assets as directed by the Designated Representative, or by the properly designated Investment Manager, on behalf of the Customer.
>
> ***The Custodian (in its capacity as such) will not be an administrative or investment fiduciary of the Qualified Plan***, and nothing in this Agreement is to be interpreted as causing the Custodian to be responsible for the administration or investment of the Fund other than as directed by the Customer, Designated Representative, or properly designated Investment Manager hereunder….

Decl. Ex. 2 § 3.2 (emphasis added) (APP 0000045-000064; Decl. Ex. 3 § 3.2 (emphasis added) (APP 000065-000084). This is followed by additional provisions that authorize the TPA (defined as the "Designated Representative") to direct transactions in the Custodial Account. *See id*. § 3.4 ("Customer hereby designates and authorizes its Designated Representative to provide Instructions to the Custodian on behalf of the Customer…"); § 3.4.2 ("All Instructions, directions, and/or confirmations received by the Custodian from a Designated Representative or Investment Manager shall be deemed to have been authorized by the Customer[.]"). The Custodial Agreement further specifies that Matrix Trust "shall be under no duty to make an investigation with respect to any Instructions received from the Designated Representative or an Investment Manager." *Id.* § 3.4.1.

The Custodial Agreement further provides that it shall be construed and interpreted according to Colorado law, to the extent that such laws are not preempted by federal law. *Id.*

§ 12.2.1. It states that "[a]ll contributions to, and payments from, the Account shall be deemed to take place in the State of Colorado." *Id.* Finally, the Custodial Agreement provides that all controversies, disputes and claims arising under it will be submitted to the United States District Court where the Custodian has its principal place of business, which is Colorado. *Id.* § 12.2.2.

D. The Vantage Defendants Perpetrate A Fraud On The Plans

The Amended Complaint alleges that on 35 occasions in 2016 and 2017, the Vantage Defendants instructed Matrix Trust to wire funds out of the Custodial Accounts to an outside bank account. AC ¶ 32. Plaintiffs allege that in each case, Vantage entered the wire instructions electronically on a "TPA customer portal" provided by Matrix Trust. *Id.* ¶ 30. Matrix Trust processed the wire instructions pursuant to Vantage's directions. *Id.* ¶ 1. As it turns out, the recipient of the wire transfers was a Bank of America account allegedly controlled by Vantage. *Id.* ¶ 29. The Vantage Defendants deliberately labeled and structured the wire instructions so as to convey the appearance that they were for participant distributions to an investment firm, Hilltop Securities, which were non-reportable for tax purposes. *Id.* ¶ 30. There is no allegation that Matrix Trust was involved in the labeling and structuring of the wire instructions. The Vantage Defendants allegedly further concealed their fraud by falsifying individual participant statements and other information on its participant website. *Id.* ¶ 3. There is no allegation that Matrix Trust was involved in any way in the operation of Vantage's participant website or in the alleged falsification of Plan records by Vantage.[5]

E. Discovery Of Vantage's Scheme And Subsequent Events.

[5] Plaintiffs allege that Matrix Trust "suppressed" its custodial statements, AC ¶ 4, but do not allege that they ever requested a statement, such that they could possibly have been suppressed. Copies of account statements for the Custodial Accounts for the relevant period, which are referred to in the Amended Complaint and therefore may be considered for all purposes related to this Motion, are attached as Exhibits 4-7 to the Declaration (APP 000085-000191, APP 000192-000326, APP 000327-000341 and APP 000342-000361).

In response to internal whistleblower complaints by Vantage employees, federal authorities initiated an investigation into Vantage's record keeping and administration of retirement plans. AC ¶ 27. On October 25, 2017, federal investigators executed a search warrant at Vantage's Dallas office. *Id.* ¶ 45. This event led to the discovery that Vantage had apparently stolen funds from the Plans and other retirement plans it administered. *Id.*

Plaintiffs allege that they subsequently made the Plans whole by restoring their losses. AC ¶ 47. Plaintiffs have repaid the Plans in the form of loans that are forgiven to the extent that Plaintiffs do not recover the full amounts of the loans in their litigation efforts. AC ¶ 48. On December 5, 2017, MBA filed its Complaint in this action, naming only the Vantage Defendants as defendants, and asserting claims under ERISA, tort law and breach of contract. [Doc. 1.] The Vantage Defendants failed to respond to the Complaint and have not appeared in this action. On March 30, 2018, MBA moved for entry of default and default judgment. [Doc. 19.] The Clerk entered a default against the Vantage Defendants on April 2, 2018. [Doc. 20.]

I. MOTION TO DISMISS FOR IMPROPER VENUE, OR IN THE ALTERNATIVE, TO TRANSFER

A. Standard of Review.

The Court may dismiss an action, or alternatively, transfer it for improper venue under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3). *See Atlantic Marine Const. Co. Inc. v. U.S. Dist. Ct. for the Western Dist. of Texas* ("*Atlantic Marine*"), 571 U.S. 49, 55, 134 S. Ct. 568, 577 (2013). In a Rule 12(b)(3) motion, "the court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009). "Venue must be proper for each cause of action in a complaint." *Perry v. Dep't of Veteran Affairs*, 2017 WL 6593948, *1 (E.D. La. Dec. 26, 2017) (citing *Tucker v. U.S. Dep't of Army*, 42 F.3d 641 (5th Cir. 1994)).

The Court may also transfer an action under 28 U.S.C. § 1404(a) to enforce a forum selection clause or whenever the Court determines in its discretion that a transfer would "serve the convenience of parties and witnesses and otherwise promote the interest of justice." *Atlantic Marine*, 571 U.S. at 62-63 (internal quotes omitted). To the extent that severance of the claims against Matrix Trust is required to facilitate a transfer of the claims involving a particular defendant, the Court has broad discretion to sever claims pursuant to Federal Rule 22. *See, e.g., In re Rolls Royce Corp.*, 755 F.3d 671, 683 (5th Cir. 2014).

B. Venue Is Improper As To The Claims Against Matrix Trust.

The Amended Complaint purports to assert seven causes of action against Matrix Trust, yet it lays no factual foundation for venue in this district as to those claims. Since the disposition of all claims against the Vantage Defendants by default judgment will leave Plaintiffs and Matrix Trust as the only parties, there will be no claims as to which venue in this district is proper.

The Amended Complaint relies on ERISA's jurisdiction and venue statute, 29 U.S.C. § 1132(e)(2), which provides that an action brought under the statute "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found." AC ¶ 18. While § 1132(e)(2) authorizes nationwide service of process and personal jurisdiction over any defendant having minimum contacts with the United States (which Matrix Trust does not contest), a plaintiff nonetheless must independently show that venue is proper in this district. See *Verizon Emp. Ben. Comm. v. Jaeger*, 2006 WL 2880451, *4 (N.D. Tex. Sept. 28, 2006) (Lindsay, J.).

Paragraph 18 of the Amended Complaint states in conclusory fashion that venue is proper "because this is the District where Matrix's and the Vantage Defendants' breaches took place and where the Vantage Defendants reside or may be found," but the Amended Complaint is

devoid of factual allegations that would indicate that any of the three prongs of § 1132(e)(2) are applicable to Matrix Trust. The Amended Complaint does not state where the Plans are administered. Cases interpreting § 1132(e)(2) have found that the situs of plan administration is where the administrator resides, which in this case is Minnesota. *See, e.g., Bostic v. Ohio River Co.*, 517 F. Supp. 627, 631-32 (S.D. W. Va. 1981). Turning to "where the breach took place," the Amended Complaint acknowledges that Matrix Trust's principal place of business is in Denver, Colorado. AC ¶ 15. There is no allegation that Matrix Trust has any employees or operations in Texas, and no allegation that it performed or failed to perform its custodial services from anywhere other than Colorado.

Finally, the Amended Complaint does not allege that Matrix Trust resides or "may be found" in Texas, and there are no allegations that would support a finding that venue is proper under this prong. Cases interpreting § 1132(e)(2) have held that it refers to any district in which the defendant is subject to personal jurisdiction. *See, e.g., Nieves v. Houston Indus., Inc.*, 771 F. Supp. 159, 161 (M.D. La. 1991). As a result, this district could only be a proper venue if (1) Matrix Trust established "minimum contacts" with Texas, and (2) the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *See Johnston v. Multidata Sys. Intern. Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Minimum contacts can arise from continuous and systematic contacts from the forum state (called general jurisdiction) or from specific, purposeful activities by the defendant that give rise to the cause of action (called specific jurisdiction). *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). "The continuous and systematic contacts test is a difficult one to meet, requiring extensive contacts between a defendant and a forum." *Johnston*, 523 F.3d at 609 (internal quotations omitted). "For general jurisdiction to exist, a defendant must not only do business

with Texas, but it must also have a business presence in Texas." *American Univ. Sys., Inc. v. American Univ.*, 858 F. Supp. 2d 705, 713 (N.D. Tex. 2012) (Lindsay, J.) (citing *Johnston*, 523 F.3d at 613). For specific jurisdiction to exist, the defendant's contacts must arise from, or be directly related to, the plaintiff's cause of action. See *Helicopteros*, 466 U.S. at 414 n.8.

As shown in the Declaration attached to this motion, Matrix Trust does not have the sort of "business presence in Texas" that would permit the exercise of general jurisdiction over it. *See Helicopteros*, 466 U.S. at 416 (holding that Colombian corporation that had no place of business in the forum state and no employees residing there did not have continuous or systematic contacts). As for specific contacts, Plaintiffs cannot satisfy the minimum contacts test by pointing to contacts between the Vantage Defendants and Texas—only Matrix Trust's own contacts are relevant. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (explaining that the minimum contacts analysis protects parties from being "haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the unilateral activity of another party or a third person.'").

C. Even If Venue Is Proper In Texas, A Transfer Is Warranted.

Alternatively, transfer of this action is warranted under 28 U.S.C. § 1404(a). The statute permits transfer to any court in which the action might have been brought, which here includes the District of Colorado, where Matrix Trust resides. As the Supreme Court explained in *Atlantic Marine*, the standards under which a motion under § 1404(a) is evaluated differ based on whether a valid forum-selection clause exists. *See* 571 U.S. at 62-63. If there is an enforceable forum-selection clause, that fact is given "controlling weight in all but the most exceptional cases." *Id.* at 63. In cases not involving a forum-selection clause, the court "must evaluate both the convenience of the parties and various public-interest considerations." *Id.* at 62.

The Custodial Agreement pursuant to which Matrix Trust provided custodial services for

the Plans calls for litigation to be submitted to the district where Matrix Trust has its principal place of business, which is Colorado. Plaintiff alleges that no contract between the parties exists, but that allegation is contrary to the terms of the Master Agreement, which provide for the appointment of Matrix Trust as custodian and incorporate the Custodial Agreement. *See Bosarge v. Mississippi Bur. of Narcotics*, 796 F.3d 435, 440-41 (5th Cir. 2015) (allegations contrary to the terms of a contract are not afforded a presumption of truth). Plaintiffs cannot point to exceptional circumstances that would cause this case to depart from the general rule requiring enforcement of a valid forum-selection clause.

Even in the absence of a forum-selection clause, a balancing of relevant factors favors a transfer to the District of Colorado. These factors include "private interests" such as the relative ease of access to sources of proof, the availability of compulsory process to secure the attendance of witnesses and the cost of attendance for willing witnesses, and "public interests" such as court congestion, the local interest in having localized interests decided at home, the courts' familiarity with the governing law, and the avoidance of conflicts of law problems. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989). Among the "private interest" factors, Plaintiffs' choice of forum is afforded less weight here than in the typical case, because Plaintiffs chose a foreign forum. *See Indusoft v. Taccolini*, 560 Fed. Appx. 245, 252 (5th Cir. 2014). The "relative ease of access to sources of proof" favors Colorado, where the Plans' custodial records are maintained, and where Matrix Trust's employees reside. For the same reason, the "availability of compulsory process to secure the attendance of witnesses" and "cost of attendance for willing witnesses" will favor Colorado. Among "public interest" factors, a transfer will not cause any significant administrative difficulties. According to the most recent Federal Court Management Statistics available from the Administrative Office of the U.S. Courts, there is no material

difference between the average time to trial between cases filed in the District of Colorado and cases filed in this district as of December 31, 2017, and the overall caseload in the District of Colorado (both overall and per judgeship) is substantially smaller than in this district.[6] There is no particular "local interest" invoked by this commercial dispute between two out-of-state parties. Nor do the claims against Matrix Trust implicate a peculiar or important issue of Texas law. Accordingly, there is no significant public factor weighing against a transfer.

D. The Court Should Sever The Claims Against Matrix Trust If Necessary To Effectuate A Transfer.

Finally, to the extent that there is any need to sever the claims against Matrix Trust from those against the Vantage Defendants, the Court should do so. First, for the reasons stated above, the claims against Matrix Trust should be transferred to the District of Colorado. "[W]here claims are more properly tried in another forum, severance is the judicial tool of choice." *Delce v. National Passenger Rail Road Corp.*, 180 F.R.D. 316, 319 (E.D. Tex. 1998). This is true regardless of whether Matrix Trust was properly joined. *See U.S. v. O'Neil*, 709 F.2d 361, 369 (5th Cir. 1983) (holding that authority to sever claims is not limited to cases of misjoinder). Second, considerations of judicial economy favor severance in this case. The Vantage Defendants have defaulted, and all that remains in the case against them is the resolution of the unopposed motion for default judgment, and any post-judgment matters that may arise. The claims against Matrix Trust, on the other hand, are at the pleadings stage and will involve entirely different issues, including the legal issues raised in the motion to dismiss for failure to state a claim as set forth below. If any of the claims against Matrix Trust survive

[6] *See* United States District Courts—National Judicial Caseload Profile (December 2017), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2017.pdf (accessed May 2, 2018) (showing 462 pending cases per judgeship and an average time to trial for civil cases of 24.7 months in the District of Colorado, versus 1,298 pending cases per judgeship and an average time to trial for civil cases of 22.8 months in the Northern District of Texas, as of the 12-month period ended December 31, 2017).

dismissal, Plaintiffs' claims against Matrix Trust will require them to present entirely different legal theories of liability and different evidence than are needed to finalize the default judgment against the Vantage Defendants.

II. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Standard of Review.

To survive a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (reversing denial of motion to dismiss). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While a complaint "does not need detailed factual allegations . . . [the] allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations and internal footnote omitted). The plausibility test is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

B. Plaintiffs Fail To State A Claim Under ERISA.

Plaintiffs' ERISA claims are brought under Sections 502(a)(2) and 502(a)(3). *See* 29 U.S.C. §§ 1132(a)(2) ("Subsection (a)(2)") and 1132(a)(3) ("Subsection (a)(3)"). Subsection (a)(2) provides for a civil cause of action "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title," referring to ERISA's breach of fiduciary duty provision, Section 409, which states:

> Any person ***who is a fiduciary*** with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable ***to make good to such plan*** any losses to the plan

> resulting from each such breach, and to ***restore to such plan*** any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109 (emphasis added). As the highlighted text indicates, only a "fiduciary" may have liability under Section 409, and that liability is owed to the plan.

Subsection (a)(3) authorizes an ERISA participant, beneficiary, or fiduciary to bring an action to enjoin any act or practice which violates ERISA or the terms of a plan, or to obtain "other appropriate equitable relief" to redress such violations or to enforce any provisions of ERISA or an ERISA plan. 29 U.S.C. § 1132(a)(3). The equitable relief allowed under Subsection (a)(3) refers to "those categories of relief that were *typically* available in equity." *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 2010 (2002) (emphasis in original) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)). The Supreme Court has "observed repeatedly that ERISA is a 'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system," and warned against expanding the enforcement scheme embodied in the statute. *Id.* at 209.

Plaintiffs' ERISA claims fail because (1) they lack standing to bring the asserted claims; (2) their allegations fail to support a plausible inference that Matrix Trust was a fiduciary for purposes of ERISA's civil enforcement scheme; and (3) this is not one of the highly limited situations in which ERISA authorizes relief against a non-fiduciary.

1. <u>Plaintiffs lack standing under ERISA.</u>

Plaintiffs bring their claims against Matrix Trust in their individual capacities as sponsor and administrator of the Plans, and as the Plans' trustee, respectively. AC ¶¶ 9-10. Plaintiffs do not—and cannot—seek recovery on behalf of the Plans or any of the Plans' participants or beneficiaries for the simple reason that the Plans have already been made whole by Plaintiffs

themselves. *See id.* at ¶ 47. Any alleged injury previously sustained by the Plans has been remedied, and there is no risk of further injury to the Plans since the loans will be forgiven if Plaintiffs are unsuccessful in their litigation efforts.

This is fatal to any claim under Section 409 of ERISA, and by extension, any claim seeking relief under Subsection (a)(2). The plain text of Section 409 sets forth only specific remedies to "make good to such plan any losses" and to "restore to such plan any profits." The Supreme Court has interpreted this to mean that claims for breach of fiduciary duty under Section 409 must be brought on behalf of the plan. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) ("[A]ctions for breach of fiduciary duty [must] be brought in a representative capacity on behalf of the plan as a whole."). Subsection (a)(2) does not authorize a fiduciary, or anyone else, to assert a claim seeking individual relief. *See Russell*, 473 U.S. at 144 ("Congress did not intend [ERISA § 409] to authorize any relief except for the plan itself."); *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (Subsection (a)(2) "does not provide a remedy for individual beneficiaries."); *see also Perez v. Bruister*, 823 F.3d 250, 257-58 (5th Cir. 2016) ("The Supreme Court has held that claims for relief under ERISA § 502(a)(2) must inure to the benefit of the plan as a whole, not to individual beneficiaries.").

Plaintiffs' allegations reveal that this is effectively an action for contribution against an alleged co-fiduciary. Plaintiffs' own fiduciary status is admitted and beyond doubt. As the Plans' sponsor and administrator and the Plans' trustee, Plaintiffs were solely responsible for monitoring and supervising service providers to the Plans (including financial advisors, auditors and Vantage as the Plans' TPA). *See Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996); *In re Enron Secs., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 552-53 (S.D. Tex. 2003). ERISA does not provide an avenue for ERISA fiduciaries to shift their liability for failing

to do so to others, and the Supreme Court has repeatedly warned against extending the remedies available under ERISA. *See Great-West*, 534 U.S. at 209; *Russell*, 473 U.S. at 135 ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (expressing "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly" (citations and punctuation omitted)).

While the Fifth Circuit has not explicitly addressed whether ERISA permits fiduciaries to bring contribution claims, the majority of district courts in this circuit to consider the question have held that it does not, citing the Supreme Court's consistent position against creating implied remedies under the statute. *See In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 228 F.R.D. 541, 552 (S.D. Tex. 2005) ("After reviewing the law, this Court is persuaded . . . by the Supreme Court's consistent reiteration of the exclusivity of the express remedies available under ERISA's civil enforcement section, and concludes that a remedy for indemnification or contribution among plan fiduciaries is not available under ERISA."); *Lawrence v. Jackson Mack Sales, Inc.*, 837 F. Supp. 771, 791 (S.D. Miss. 1992) (holding that employer may not seek indemnity or contribution from co-defendants under ERISA); *Schloegel v. Boswell*, 766 F. Supp. 563, 569 (S.D. Miss. 1991) (finding that the Supreme Court's *Russell* decision "clearly implies . . . that a fiduciary's right to contribution cannot be found in section 1109 of ERISA"). The Eighth and Ninth Circuits have reached the same conclusion. *See Travelers Cas. & Surety Co. of Am. v. IADA Svcs., Inc.*, 497 F.3d 862, 867 (8th Cir. 2007); *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33

(9th Cir. 1989); *Call v. Sumitomo Bank of Cal.*, 881 F.2d 626, 630-31 (9th Cir. 1989).[7]

Plaintiffs cannot circumvent their lack of standing to pursue individual relief under Subsection (a)(2) by labeling their claims as seeking "equitable relief" under Subsection (a)(3). Subsection (a)(3) does not create any new right of action, but simply authorizes a court to grant the types of relief traditionally available in equity. *See Great-West*, 534 U.S. at 210 (The "equitable relief" allowed by Subsection (a)(3) refers to "those categories of relief that were *typically* available in equity." *Id.* (emphasis in original) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993))). All that Plaintiffs seek from Matrix Trust are compensatory damages, which are traditionally *unavailable* in equity. *See id.* at 210 (suits seeking to compel the defendant to pay a sum of money to the plaintiff are suits for "money damages," and "money damages are, of course, the classic form of *legal* relief," not equitable relief (emphasis in original)); *Varity*, 516 U.S. at 509-10 (Subsection (a)(3) authorizes only equitable relief, not compensatory or punitive damages); *Mertens*, 508 U.S. at 257-58 (relief under Subsection (a)(3) is limited to equitable remedies, and such relief does not include compensatory or punitive damages).

Even if the relief sought by Plaintiffs were truly equitable and not merely a claim for money damages, there is no authority supporting the notion that Subsection (a)(3) authorizes such relief in favor of fiduciaries on their individual behalf. Rather, Subsection (a)(3) seems to enforce individual relief only for participants and beneficiaries. *See, e.g., Varity*, 516 U.S. at 510. Fiduciaries who bring an action under Subsection (a)(3) must do so in a representative capacity to obtain relief that would benefit the plan, not themselves. *See Harris Trust and Sav. Bank,*, 530 U.S. at 252. This interpretation comports with the underlying purposes of ERISA,

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[7] Courts are split as to this question, and two circuits along with one district court in this Circuit have permitted contribution claims under federal common law. *See Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12 (2d Cir. 1991); *Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016); *Maher v. Strachan Shipping Co.*, 817 F. Supp. 43 (E.D. La. 1993).

which are "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

2. Plaintiffs Do Not Plausibly Allege That Matrix Trust Was A Fiduciary

Even if ERISA permitted fiduciaries to obtain individual relief against other fiduciaries as a general matter, the Amended Complaint fails to state a claim for the independent reason that Matrix Trust was not a fiduciary under the facts alleged. While Plaintiffs use the "fiduciary" label to describe Matrix Trust throughout the Amended Complaint, the facts alleged in their pleadings do not support this conclusory assertion. This is fatal to Counts II and IV, which require Plaintiffs to prove that Matrix Trust breached a fiduciary duty, and to Counts VI and IX, which are based on alleged violations of ERISA that apply only to fiduciaries. Likewise, the remedy of surcharge is available only against fiduciaries. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011) (surcharge is historically a remedy "against a trustee").

Under ERISA, a party can assume the status of a fiduciary in two ways. It can be a "named" fiduciary if it is named in the plan documents or identified as a fiduciary pursuant to a procedure specified in the plan. The Amended Complaint does not allege that Matrix Trust was named as a fiduciary in the plan documents, and it does not describe or refer to any procedure in the plan documents for naming a fiduciary.[8] Accordingly, Matrix Trust can only be a fiduciary if it satisfies ERISA's "functional fiduciary" definition, 29 U.S.C. § 1002(21)(A):

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[8] The Amended Complaint references a purported "Letter of Acceptance" in which Matrix Trust purportedly identified itself as a "successor trustee." *See* AC ¶ 24. The document bears the signature of a former Matrix Trust employee who had not been at the company for over a year, does not use Matrix Trust's letterhead, and does not bear other physical characteristics of a letter of authorization from Matrix Trust; accordingly, Matrix Trust has determined it to be a forgery. Decl. ¶ 8(APP 000004-000005). Even if the letter were genuine, it says nothing about whether Matrix Trust is named in the plan documents or pursuant to any procedure in those documents.

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Courts interpret the prefatory words "to the extent" as a further limitation to the functional fiduciary concept. *See American Fed. of Unions Local 102 v. Equitable Life Assur. Soc.*, 841 F.2d 658, 662 (5th Cir. 1988) ("A person is a fiduciary only with respect to those portions of a plan over which he exercises discretionary authority or control."); *Briscoe v. Fine*, 444 F.3d 478, 486 (6th Cir. 2006) (collecting cases explaining the relationship between functional fiduciary liability and the specific conduct at issue in the complaint).

Plaintiffs allege that Matrix Trust held Plan funds in custody and that it processed wire transfers at Vantage's direction. Courts interpreting ERISA have carefully distinguished mere custody of plan funds from control over those funds, holding that "[c]ustody of plan assets alone cannot establish control sufficient to confer fiduciary status." *McLemore v. Regions Bank*, 682 F.3d 414, 423 (6th Cir. 2012). A contrary rule would effectively convert anyone happening to hold physical possession of an asset belonging to an ERISA plan into a full-time fiduciary for all purposes, subject to the full panoply of fiduciary duties under ERISA regardless of whether it actually exercised any meaningful control over the asset. To avoid this result, ERISA defines "fiduciary" in functional terms, looking to the party's practical control and authority over the plan. *See Ariz. State Carpenters Pension Trust Fund v. Citibank (Ariz.)*, 125 F.3d 715, 720 (9th Cir. 1997) (holding that custodial bank bound by agreements giving it no discretionary authority was not an ERISA fiduciary); *McLemore*, 682 F.3d at 423 (holding that custodial bank that

maintained accounts holding plan assets, received deposits, and permitted fiduciaries to transfer and withdraw money from accounts pursuant to custodial agreement was not an ERISA fiduciary); *Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982) (holding that custodian bank did not act as a fiduciary when it processed fraudulent withdrawals). "A person or entity who performs only ministerial services or administrative functions within a framework of policies, rules, and procedures established by others is not an ERISA fiduciary." *Arizona State*, 125 F.3d at 721-22. Theoretical control over plan assets is insufficient. Rather, the defendant must actually exercise control through some *unilateral* action. *Erickson v. ING Life Ins. & Annuity Co.*, 731 F. Supp. 2d 1057, 1065 (D. Idaho 2010) (ERISA fiduciary status "does not merely arise because an entity has some authority or control over plan assets, it requires ***an exercise*** of that authority or control ***on the entity's own initiative***." (emphasis added)); *Nagy v. DeWese*, 771 F. Supp. 2d 502, 516 (E.D. Pa. 2011).

Here, Plaintiffs allege that *Vantage* exercised control of the Plans' assets when they instructed Matrix to wire funds out of the Custodial Accounts. Plaintiffs' claims against Matrix Trust, on the other hand, are premised on the theory that Matrix Trust *failed* to exercise control when it moved funds at the instruction of those who did have authority and control over the Plans' assets; namely, the Vantage Defendants. "[T]o adopt an argument that [a defendant] could be an ERISA fiduciary merely because it disposed of plan funds at the express direction of [a plan's] trustees would expand ERISA liability beyond the scope intended in the fiduciary statute and recognized in the case law." *Erickson*, 731 F. Supp. at 1065.

Plaintiffs repeatedly allege that Matrix Trust knew or "should have known" various facts about the Plans and the subject transfers. These allegations fail to advance their claims for two reasons. First, fiduciary status does not turn on a party's actual or constructive knowledge. *See*

McLemore, 682 F.3d at 423 ("Section 1002(21)(A)(i) directs us to focus on the extent of Regions' control over plan assets, rather than on what Regions knew or should have known.") Second, Plaintiffs fail to allege any facts that would support imputation of knowledge to Matrix Trust, a corporation. "A corporation cannot act or have a mental state by itself." *U.S. ex rel. Vavra v. Kellogg, Brown & Root, Inc.*, 848 F.3d 366 (5th Cir. 2017); *see also Mathis v. DCR Mortgage III Sub, I, LLC*, 952 F. Supp. 2d 828, 837 (W.D. Tex. 2013) ("The corporate defendants can only act through their employees or agents."). Plaintiffs do not identify any agent of Matrix Trust whose knowledge can be imputed to the corporation. *See id.* ("[O]nly knowledge of the proper corporate agent must be regarded, in legal effect, as the knowledge of the corporation.") (Internal quotes omitted).

Plaintiffs' allegations fail to state a claim even if, for purposes of a Rule 12(b)(6) analysis, the Court assumes as true Plaintiffs' allegation that there was no operative custodial agreement. Plaintiffs have not identified any alternative source of a duty on Matrix Trust's part to review or investigate transactions in the Custodial Accounts. And while the Court need not consider the Custodial Agreement in reviewing whether the Amended Complaint states a claim, it is notable that Plaintiffs nowhere allege that Matrix Trust acted in a manner inconsistent with the role defined in the Custodial Agreement, or undertook to perform functions not described in that document. For instance, there is no allegation that anyone at Matrix Trust was involved in the Vantage Defendants' structuring of wire transactions to appear to be participant distribution requests. Likewise, there is no allegation that Matrix Trust was involved in Vantage's operation of a participant website or their preparation of participant account records. In sum, Plaintiff has not alleged or shown that Matrix Trust was named or appointed as a fiduciary, nor that Matrix Trust unilaterally on its own initiative exercised any authority or control over Plan assets.

Plaintiff also has not shown that Matrix Trust falls within the limited class of non-fiduciaries against whom an action under Subsection (a)(3) can be brought based on their knowing participation in an ERISA violation. Accordingly, Plaintiffs' ERISA claims must be dismissed.

3. <u>Plaintiffs have no other right to relief against Matrix Trust as a non-fiduciary.</u>

As discussed above, relief under Subsection (a)(2) is available only against fiduciaries. While Subsection (a)(3) may permit claims to be brought against non-fiduciaries, this case does not fall under any of the situations under which courts have allowed such relief. For instance, while ERISA may provide a remedy against "parties in interest" who are not fiduciaries, Plaintiffs do not allege that Matrix Trust is a party in interest. Nor do Plaintiffs allege that Matrix Trust was the recipient of any of the funds stolen by the Vantage Defendants, or that it is in possession of funds allegedly belonging to the Plans. *Cf. Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, 354 F.3d 348, 353 (5th Cir. 2003), *abrogated in part on other grounds by ACS Recovery Servs., Inc. v. Griffin*, 723 F.3d 518 (5th Cir. 2013) (recognizing possibility of claim against non-fiduciary, non-party in interest who held disputed funds on behalf of a "traditional ERISA party"); *ACS Recovery*, 723 F.3d at 518 (trust that received funds allegedly subject to lien in plaintiff's favor was proper ERISA defendant). Because Matrix Trust is not alleged to be in possession of any funds at issue in this lawsuit, the damages sought against it cannot be considered "appropriate equitable relief." *See Bombardier*, 354 F.3d at 353, 355 (concluding that Subsection (a)(3) authorizes a cause of action against a non-fiduciary defendant when the defendant holds the funds at issue, but acknowledging that a plaintiff's seeking the imposition of personal liability on the defendant to pay a sum of money to which the plaintiff is owed is a legal remedy that falls outside the scope of Subsection (a)(3)); *Great-West*, 534 U.S. at 214 ("[F]or [the remedy of] restitution to lie in equity, the action generally must seek not to

impose personal liability on the defendant, but to restore to the plaintiff particular funds or property ***in the defendant's possession***." (emphasis added)).

Finally, to the extent that Plaintiffs claim an entitlement to relief solely based on allegations that Matrix Trust "knowingly participated" in an unlawful transaction, it fails for reasons already stated—there is no plausible factual allegation establishing Matrix Trust's corporate knowledge. Moreover, the conduct attributed to Matrix Trust—processing electronic wire instructions—does not constitute "participation" in a transaction in any meaningful sense.

C. Plaintiffs Fail To State A Claim Under The Common Law.

The remaining counts against Matrix Trust are for common law professional negligence (Count XV) and negligence (Count XVIII). Plaintiffs do not specify what state's common law principles should apply to these claims. Texas courts apply the "most significant relationship" test, which takes into account (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the residence/place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered. *See Ashford Hosp. Prime Inc. v. Sessa Capital (Master) LP*, 2017 WL 2955366, *10 (N.D. Tex. Feb. 17, 2017). Here, the allegedly injured parties (Plaintiffs) are in Minnesota, Matrix Trust is in Colorado, anything that Matrix Trust allegedly did or failed to do occurred in Colorado, and the Custodial Accounts were in Colorado. The most significant relationship analysis therefore favors Colorado law.[9]

Plaintiffs fail to state any type of negligence claim because, first and foremost, they do not allege facts showing the existence of any duty owed by Matrix Trust to themselves. *See Weil*

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[9] Moreover, should the Court transfer the action to Colorado because venue is improper or because of the forum selection clause in the Custodial Agreement, the applicable law would be that of the transferee court. *See Eggleton v. Plasser & Theurer Export von Bahnbaumaschinen Gesellschaft, MBH*, 495 F.3d 582, 588 (8th Cir. 2007) (law of the transferee court applies in cases transferred under 28 U.S.C. § 1406); *Atlantic Marine*, 571 U.S. at 63 (transfer based on forum-selection clause does not carry with it the transferor court's choice of law rules).

v. First Nat. Bank of Castle Rock, 983 P.2d 812, 814 (Colo. App. 1999) ("To establish a claim for negligence, a plaintiff must show the existence of a legal duty owed by the defendant."); *see also Ryan Constr. Svcs., LLC v. Robert Half Int'l, Inc.*, 541 S.W.3d 294, 297 (Tex. App. 2017) ("A party who has no duty cannot be liable for negligence."). Like the rest of this action, Plaintiffs' common law claims are brought on their own behalf, to recover money they allegedly paid to the Plans. Yet the Amended Complaint does not advance any theory as to how Matrix Trust owes a legal duty to them. Courts have consistently declined to impose extra-contractual duties on custodians, such as to supervise transaction activity. *See Lamm v. State Street Bank & Trust*, 749 F.3d 938, 947-48 (11th Cir. 2014) (collecting cases).

Plaintiffs' professional negligence allegations also fail to state a plausible claim because there are no allegations as to what relevant professional standards applied to Matrix Trust during the relevant period. Instead, Plaintiffs simply allege that Matrix owed duties "consistent with current industry standards applicable to custodians and service providers in the benefits administration industry." AC ¶ 164. Under *Twombly* and *Iqbal*, this allegation is far too vague and lacking in content to be entitled to any weight in evaluating a motion to dismiss. Even under pre-*Twombly* notice pleading standards, this allegation fails to provide Matrix Trust with any notice as to what, if any, applicable industry standards it is alleged to have violated.

CONCLUSION

For the reasons stated above, the Court should (1) dismiss all claims against Matrix Trust for improper venue or, alternatively, transfer it to the District of Colorado, or (2) alternatively, dismiss all claims against Matrix Trust for failure to state a claim.

This 2nd day of May, 2018.

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: /s/ Bradley J. Purcell

Bradley J. Purcell
Texas Bar No. 24063965
2200 Ross Avenue, Suite 3300
Dallas, TX 75201
Telephone: (214) 721-8000
Facsimile: (214) 721-8100

Michael P. Carey
Georgia Bar No. 109364
Ann W. Ferebee
Georgia Bar No. 431941
BRYAN CAVE LEIGHTON PAISNER LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree St., NW
Atlanta, GA 30309
Telephone: (404) 572-6600
Facsimile: (404) 572-6999

ATTORNEYS FOR MATRIX TRUST COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all counsel of record through CM/ECF on the 2nd day of May, 2018 and was also mailed to counsel of record.

By: */s/ Bradley J. Purcell*
Bradley J. Purcell