No. 20-1252

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**EUGENE SCALIA, Secretary of Labor, U.S. Department of Labor,
Plaintiff-Appellee,**

v.

**ADAM VINOSKEY & THE ADAM V. VINOSKEY REVOCABLE TRUST,
Defendants-Appellants.**

**On Appeal from the United States District Court
for the Western District of Virginia
in Case No. 6:16-cv-00062-NKM-RSB (Moon, J.)**

BRIEF OF APPELLEE

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

JEFFREY HAHN
Litigation Counsel

STEPHEN SILVERMAN
STEPHANIE BITTO
B.A. SCHAAFF
Attorneys
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(202) 693-5616

Counsel for the Secretary of Labor

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

I. Statement of Facts 3

A. Prompted by Vinoskey's Interest in Selling His Stock to the ESOP, Sentry Hires Evolve to Represent the ESOP 3

B. Vinoskey Meets With Evolve and Asserts His Control 5

C. Vinoskey Receives, Reviews, and Provides Input Regarding Napier's Appraisals of Sentry Stock 6

II. Decision Below 7

A. Evolve Entered into a Prohibited Transaction and Violated Its Fiduciary Duties 7

B. Vinoskey Knew the ESOP Overpaid for His Stock and Thus Violated His Fiduciary Obligations to Remedy Evolve's Breach and Knowingly Entered into a Prohibited Transaction 8

C. The ESOP Overpaid for Sentry Stock by $6.5million 11

STANDARD OF REVIEW 12

SUMMARY OF THE ARGUMENT 12

ARGUMENT 16

I. The District Court Correctly Held That Vinoskey Was Liable as a Co-Fiduciary 16

A. Vinoskey Was an ESOP Fiduciary and Failed to Take Any Action to Remedy Evolve's Breach 18

TABLE OF CONTENTS - (continued)

B. Vinoskey Knew He Was Selling His Sentry Stock to the ESOP for More Than Fair Market Value 21

1. The District Court Properly Relied on Reasonable Inferences From the Evidence Presented in Finding Vinoskey Had Actual Knowledge 22

2. The District Court's Finding That Vinoskey Knew the ESOP Paid More Than Fair Market Value Was Not Clear Error 25

a. Vinoskey Was Intimately Familiar With the Finances and Valuation of the Company He Founded 26

b. Vinoskey Reviewed Napier's 2010 Transaction Appraisal and Knew That the Price Was Too High 28

i. Vinoskey Knew the Valuation Showed a 40% Increase in One Year for No Business Reason 28

ii. Vinoskey Knew the ESOP Was Paying More for Control But Not Getting It 30

c. The Judgment Needed to Prepare Business Valuations Does Not Preclude Vinoskey From Knowing the ESOP Overpaid 38

II. The District Court Properly Found That Vinoskey Was Liable as a Party In Interest Who Knowingly Participated in a Prohibited Transaction 40

A. The District Court's Finding That Vinoskey Should Have Known the ESOP Was Overpaying for Sentry Stock Was Not Clear Error 41

B. Vinoskey Did Not Need Knowledge of the Law to be Liable for Knowingly Participating in Evolve's Fiduciary Breach 44

TABLE OF CONTENTS-(continued)

III. The District Court Properly Refused to Offset Damages by Vinoskey's Unrelated Forgiveness of ESOP Debt 47

CONCLUSION 53

REQUEST FOR ORAL ARGUMENT 53

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Federal Cases:

Acosta v. Saakvitne,
355 F. Supp. 3d 908 (D. Haw. 2019) 20

Anderson v. City of Bessemer City, N.C.,
470 U.S. 564 (1985) 22

Beech Aircraft Corp. v. Rainey,
488 U.S. 153 (1988) 22

Brock v. Hendershott,
840 F.2d 339 (6th Cir. 1988) 10, 23, 24 n.5

Brundle v. Wilmington Trust, N.A.,
241 F. Supp. 3d 610 (E.D. Va. 2017) 31, 35 n.10

Brundle v. Wilmington Trust, N.A.,
919 F.3d 763 (4th Cir. 2019) .... passim

Chesemore v. All. Holdings, Inc.,
948 F. Supp. 2d 928 (W.D. Wis. 2013) 48

Colonial Penn Ins. Co. v. Coil,
887 F.2d 1236 (4th Cir. 1989) 29 n.8

Cox v. Quinn,
828 F.3d 227 (4th Cir. 2016) 24

Dawson-Murdock v. Nat'l Counseling Group, Inc.,
931 F.3d 269 (4th Cir. 2019) 20

Federal Cases-(continued):

DiFelice v. U.S. Airways, Inc.,
497 F.3d 410 (4th Cir. 2007) 37

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983) 2, 9, 37

Estate of Godley v. Comm'r,
286 F.3d 210 (4th Cir. 2002) 32, 36, 44

Farmer v. Brennan,
511 U.S. 825 (1994) 22, 23, 24

Fifth-Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014)...1

Haley v. Teachers Ins. & Annuity Ass'n. of Am.,
377 F. Supp. 3d 250 (S.D.N.Y. 2019) .... passim

Hans v. Tharaldson,
2011 WL 7179644 (D.N.D. Oct. 31, 2011)..39

Harris Tr. & Sav. Bk. v. Salomon Smith Barney, Inc.,
530 U.S. 238 (2000)... passim

Helton v. AT & T Inc.,
709 F.3d 343 (4th Cir. 2013) 12

Henry v. U.S. Trust Co. of Cal., N.A.,
569 F.3d 96 (2d Cir. 2009) .... passim

Hibbs v. Winn,
542 U.S. 88 (2004) 19

Federal Cases-(continued):

Hoschar v. Appalachian Power Co.,
739 F.3d 163 (4th Cir. 2014) 42

HSBC Bank USA v. F & M Bank Northern Va.,
246 F.3d 335 (4th Cir. 2001) 12, 25

Hugler v. First Bankers Tr. Servs. Inc.,
2017 WL 1194692 (S.D.N.Y. Mar. 30, 2017).......... 51

Intel Corp. Investment Pol'y Cmte. v. Sulyma,
--- U.S., ---, 140 S. Ct. 768 (2019) 18 n.3, 23, 24

Jackson v. Virginia,
443 U.S. 307 (1979).......... 22

Lewin v. C.I.R.,
335 F.3d 345 (4th Cir. 2003) 22

N.L.R.B. v. Amax Coal Co.,
453 U.S. 322 (1981).......... 17

Neil v. Zell,
667 F. Supp. 2d 1010 (N.D. Ill. 2009).......... 20 n.4

Neil v. Zell,
753 F. Supp. 2d 724 (N.D. Ill. 2010).......... 45

Neil v. Zell,
767 F. Supp. 2d 933 (N.D. Ill. 2011).......... 48, 49, 50

Pegram v. Herdrich,
530 U.S. 211 (2000).......... 19

Federal Cases-(continued):

Perez v. Bruister,
823 F.3d 250 (5th Cir. 2016) .... passim

Reich v. Valley Nat. Bank of Ariz.,
837 F. Supp. 1259 (S.D.N.Y. 1993) 48, 51

Simms v. United States,
839 F.3d 364 (4th Cir. 2016) 12

Staples v. United States,
511 U.S. 600 (1994) 23

Tatum v. RJR Pension Inv. Comm.,
855 F.3d 553 (4th Cir. 2017) 37

Teets v. Great-W. Life & Annuity Ins. Co.,
286 F. Supp. 3d 1192 (D. Colo. 2017) 47 n.15

United States v. $79,650.00 Seized from B. of Am. Account Ending in 8247,
650 F.3d 381 (4th Cir. 2011) 23

United States v. Harris,
720 F.3d 499 (4th Cir. 2013) 22

United States v. Heyer,
740 F.3d 284 (4th Cir. 2014) 32 n.9

United States v. Lawson,
682 F.2d 480 (4th Cir. 1982) 25

United States v. Manbeck,
744 F.2d 360 (4th Cir. 1984) 28

Federal Cases-(continued):

Willet v. Blue Cross & Blue Shield,
953 F.2d 1335 (11th Cir. 1992) 19

Federal Statutes:

Section 3(18), 29 U.S.C. § 1002(18) 39, 48

Section 3(21), 29 U.S.C. § 1002(21) 20

Section 402(a)(1), 29 U.S.C. § 1102(a)(1) 20

Section 403(a), 29 U.S.C. § 1103(a) 20

Section 405(a), 29 U.S.C. § 1105(a)...17, 19

Section 405(a)(1), 29 U.S.C. § 1105(a)(1) 19

Section 405(a)(3), 29 U.S.C. § 1105(a)(3) .... passim

Section 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A)... 38 n.12

Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D)... 38 n.12

Section 408(e), 29 U.S.C. § 1108(e) 38 n.12, 39, 48

Section 409(a), 29 U.S.C. § 1109(a) 47

Section 413(2), 29 U.S.C. § 1113(2) 23

Section 502(a)(5), 29 U.S.C. § 1132(a)(5) 9, 15, 19 n.3, 40

Miscellaneous:

Proposed Regulation Relating to the Definition of Adequate Consideration,
53 Fed. Reg. 17,632, 17,636 (May 17, 1988) 37, 43

Restatement (Second) of Trusts § 297 (Am. Law Inst. 1959) 46 n.14

Black's Law Dictionary (9th ed. 2009) 42

Black's Law Dictionary (5th ed. 1979) 22

STATEMENT OF THE ISSUES PRESENTED

The issues presented by Appellants are:

1. Whether the district court erred in holding Vinoskey liable as a co-fiduciary to Evolve's ERISA violations.

2. Whether the district court erred in holding Vinoskey liable for knowingly participating in Evolve's ERISA violations.

3. Whether the district court erred by not reducing damages to account for Vinoskey's forgiveness of the debt owed him.[1]

STATEMENT OF THE CASE

Like all ERISA retirement plans, the purpose of the Sentry Equipment Erectors, Inc. Employee Stock Ownership Plan ("ESOP") is to "maximize retirement savings for participants." *Fifth-Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2467–68 (2014). To protect employees' retirement savings, ERISA "categorically bar[s] certain transactions deemed 'likely to injure the pension plan.'" *Harris Tr. & Sav. Bk. v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241 (2000) (citation omitted). One such transaction is an ESOP's purchase of employer stock from an owner or officer of the company that sponsors the ESOP, whom ERISA refers to as a "party in interest." *Brundle v. Wilmington Trust, N.A.*,

---

[1] Appellants purport to raise a fourth issue concerning whether the district court "erred in its award of damages to the ESOP." App. Br. 1. But the only issue that Appellants raise in the body of their brief related to damages concerns whether the district court properly refused to offset damages with debt forgiveness–which is fully captured by the third issue presented for review.

919 F.3d 763, 769–70 (4th Cir. 2019). Although sales of closely-held employer stock are "the types of transactions that experience had shown to entail a high potential for abuse," *see Donovan v. Cunningham*, 716 F.2d 1455, 1465 (5th Cir. 1983), a limited exception permits these transactions if the ESOP pays no more than fair market value. *Brundle*, 919 F.3d at 770 & n.2. These transactions thus remain closely examined "[t]o protect employees from losing the value of their earned retirement savings," as happens when ESOPs overpay for employer stock. *See id.* at 770 ("This burden [of avoiding ERISA liability for ESOP stock purchases] is a heavy one.").

In this case, the Secretary alleged that Adam Vinoskey ("Vinoskey") and Evolve Bank and Trust violated ERISA when Vinoskey sold his Sentry stock to the ESOP in 2010 for far above fair market value (the "2010 Transaction"). JA 0024–36. Following a weeklong bench trial, the district court agreed and held Vinoskey and Evolve liable for violating ERISA's fiduciary and prohibited-transaction provisions. JA 2340–41. While the purpose of the Sentry ESOP "was to provide employees 'with an additional means of accumulating funds for retirement as well as a meaningful stake in the Company, with future economic security and ultimately with an additional source of future income,'" Vinoskey, an ESOP fiduciary at all relevant times, did nothing to protect his employees' interests in the 2010 Transaction. JA 2341–42. Instead, he took $6.5 million more from his

employees' retirement savings than he was entitled to, and the district court correctly ordered him to return that money. *Id.* Both parties filed notices of appeal. The Secretary and Evolve subsequently reached a settlement, and this Court dismissed Evolve's appeal on September 16, 2020.

I. Statement of Facts

A. Prompted by Vinoskey's Interest in Selling His Stock to the ESOP, Sentry Hires Evolve to Represent the ESOP.

Vinoskey and his wife, Carole, founded Sentry, which designs and sells equipment for soft drink manufacturers, in 1980. JA 2341. Vinoskey was Sentry's CEO, and Mrs. Vinoskey was Sentry's Treasurer. JA 2342. The Vinoskeys held two of three seats on Sentry's Board of Directors; Vinoskey was Chairman, and Mrs. Vinoskey was the Secretary. JA 2342, 2350. The Vinoskeys also served as two of the three Sentry ESOP trustees. JA 2358. "The Vinoskeys comprised a majority of the ESOP Trustees and Sentry's Board of Directors before and after the 2010 Transaction." JA 2385.

The 2010 Transaction followed an earlier one in 2004, when Vinoskey sold 48% of his Sentry stock to the ESOP for $220.00 per share. *Id.* After the 2004 sale, Sentry retained Capital Analysts, Inc. ("CAI"), a valuation firm founded by Brian Napier, to prepare annual valuations of Sentry's stock. JA 2343. Over the

next five years (through December 2009), Napier appraised Sentry's stock at prices ranging between $215.00 and $285.00 per share. *Id.*

Then in 2010, Vinoskey advised Bill Gust, whom Sentry had hired to provide legal services related to the ESOP, that he intended to sell his remaining shares of Sentry stock to the ESOP. JA 2343–44. On November 9, 2010, Gust emailed Kenneth Lenoir, the head of Evolve's ESOP trustee business, about the prospect of Evolve serving as the ESOP's transactional trustee in connection with the sale of Vinoskey's remaining Sentry stock. JA 2345. Gust stated that "the value of the remaining stock as determined by Brian Napier is approx. $21 million," or about $411.00 per share. *Id.*[2] Three days later, on November 12, 2010, Evolve sent an engagement letter to Sentry in which Evolve agreed to be the transactional trustee and hire Napier's firm, CAI, as its financial adviser. JA 2346. Evolve also agreed to hire Gust's law firm as legal counsel; as a result, Gust concurrently represented Sentry, the ESOP, and Evolve in the 2010 Transaction. JA 2346, 2349. Sentry's Board of Directors, controlled by the Vinoskeys, formally

---

[2] That "estimated [$21 million] value drove many of the discretionary choices underlying Napier's 2010 Transaction appraisal." JA 2346. On November 17, Napier also received an email from Michael Coffey, an outside ESOP advisor hired by Vinoskey and Sentry, with a "'guesstimate' that the transaction was valued at $20,931,963.00." JA 2347, JA 2344. Napier's eventual "draft appraisal" valued Sentry's shares at $20,692,230.00, JA 2356, a price "strikingly close" to Coffey and Gust's values. *Id.*; *see also* JA 2346.

appointed Evolve as ESOP trustee a week later, on November 19, 2010, for the limited purpose of assessing the 2010 Transaction. JA 2347. For all other purposes, the Vinoskeys remained the ESOP's trustees. JA 2385.

B. Vinoskey Meets With Evolve and Asserts His Control.

"Evolve's due diligence for the 2010 Transaction was rushed and cursory . . . due to the parties' agreement to close the deal by the end of the tax year." JA 2347–48. On November 18, 2010, Evolve met with Vinoskey and other Sentry management. JA 2349–50. Vinoskey "participated fully" in the meeting, which provided "critical information bearing on Sentry's fair market value." JA 2385. At that meeting, Michael Connor, the incoming Sentry president, said that "2011 would be a more difficult year than 2010," though Vinoskey disagreed. JA 2385–86. Connor noted the "lack of growth in the soft drink industry" on which Sentry depended. *Id.* He stated that Sentry needed to diversify, but that it could not "achieve that diversification within the next six to seven years 'because of the way [Sentry] [has] postured themselves.'" JA 2351.

Evolve asked for projections of Sentry's future performance and inquired about the composition of Sentry's Board of Directors. JA 2350–51. In response, Vinoskey stated that Sentry had never prepared performance projections. JA 2351–52. Evolve also suggested that Vinoskey stay on as Chairman of the Board post-transaction, which he did. JA 2350. Mrs. Vinoskey remained Secretary of the

Board post-transaction. JA 2358. Evolve and Gust also recommended expanding the Board to five people, including two outside directors, but no such change was included in the transaction documents. JA 2350–51, 2357–58.

Vinoskey "did not intend to fully relinquish control over Sentry," JA 2359, and he "never fully stepped away from Sentry." JA 2383. "Essentially, given the lack of provisions in the transaction documents altering Sentry's corporate structure, reducing the Vinoskeys' leadership roles, or ensuring that the ESOP could control the Board and the ESOP Trustees with relative ease, Adam and Carole Vinoskey stood to retain a tight grip over Sentry after the 2010 Transaction." JA 2359. Accordingly, the Vinoskeys controlled a majority of the Board and the ESOP Trustees both "before and after the 2010 Transaction." JA 2385.

C. Vinoskey Receives, Reviews, and Provides Input Regarding Napier's Appraisals of Sentry Stock.

Vinoskey had experience reading and understanding Napier's appraisals of Sentry stock. JA 2385. Vinoskey "reviewed at the least the stock price in each of Napier's annual appraisals and was aware that from 2004 to 2009, Napier's appraisal ranged from $220.00 to $285.00 per share." *Id.* Vinoskey understood the general approach underlying the appraisals and discussed them with Napier. *Id.* He regularly examined Sentry's financial data, "knew the key numbers"

regarding Sentry's inventory, cash, and receivables, *id.*, and had a keen understanding of Sentry's working capital needs. JA 2415. Indeed, Vinoskey provided input to Napier regarding the appraisals and "had specific discussions [with Napier] about the importance of cash flow and Sentry's earnings to Napier's capitalization of cash flow methodology." JA 2385.

Vinoskey "reviewed Napier's draft appraisal and Sentry's financials before the 2010 Transaction closed." JA 2386. The draft appraisal stated that Sentry's share price had increased by over 40% in the last year, from $285.00 per share to about $405.00. JA 2356, 2385–86. "Evolve failed to engage in any negotiation to lower the price the ESOP would pay for Adam Vinoskey's 51,000 shares." JA 2379. Evolve offered Vinoskey $406.00 per share, for an aggregate price of $20,706,000.00, and Vinoskey "accepted this price on the same day." JA 2378.

II. Decision Below

A. Evolve Entered into a Prohibited Transaction and Violated Its Fiduciary Duties.

Following a weeklong bench trial, the district court entered judgment for the Secretary. The court first concluded that Evolve "failed to show that its reliance on Napier's 2010 Transaction appraisal was 'reasonably justified.'" JA 2390. "Evolve failed to notice, question, or investigate several red flags in Napier's 2010 Transaction appraisal." JA 2392. Evolve's work was "rushed," JA 2401, and

"overlooked indicia strongly suggesting that Napier completed his 2010 Transaction appraisal with an eye toward reaching the predetermined $21 million estimated transaction price." JA 2400. Thus, Evolve engaged in a non-exempt prohibited transaction with Vinoskey. JA 2390–91. This holding is not challenged by Vinoskey.

The district court also held that "Evolve violated its duty of unwavering loyalty to the ESOP." JA 2406. Evolve expressed "divided loyalties between the Sentry ESOP and Adam Vinoskey," failed to speak up on the ESOP's behalf with respect to Napier's appraisal, and "fail[ed] to engage in anything resembling a negotiation with Adam Vinoskey." JA 2407–08. As the court explained, "[t]his case presents many thorny technical questions but whether Evolve lived up to the stringent duty of loyalty ERISA imposes is not among them." JA 2406. Vinoskey does not challenge this holding either.

B. Vinoskey Knew the ESOP Overpaid for His Stock and Thus Violated His Fiduciary Obligations to Remedy Evolve's Breach and Knowingly Entered into a Prohibited Transaction.

The district court next addressed Vinoskey's liability. Vinoskey "was a fiduciary of the ESOP at the time of the transaction," and "a plan fiduciary 'shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . . if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.'" JA

2419 (quoting 29 U.S.C. § 1105(a)(3)). The court concluded that such liability requires actual knowledge that "'the other person is a fiduciary with respect to the plan, . . . that he participated in the act that constituted a breach, and . . . that it was a breach.'" JA 2418 (quoting *Donovan*, 716 F.2d at 1475).

Apart from his liability as a fiduciary, Vinoskey also faced liability under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), as a party in interest who knowingly participated in a prohibited transaction. JA 2412–17. The district court found that a party in interest is liable for engaging in a prohibited transaction if he "actually or constructively kn[e]w (1) [he was] transacting with an ERISA fiduciary; and (2) the factual circumstances underlying the transaction that ma[d]e it a prohibited transaction." JA 2412–13 (citation omitted). For knowing-participant liability, the individual need not "have knowledge of the law, *i.e.*, knowledge that the transaction violated ERISA" and "need not have engaged in any wrongdoing." JA 2413 (citations omitted). Rather, "[i]t is enough if he had knowledge, based on surrounding circumstances, that the fiduciary was engaging in a prohibited transaction." *Id.* (citation omitted).

Based on the evidence presented, the district court found that Vinoskey "had actual knowledge that the $406.00 per share he received for his 51,000 shares exceeded the stock's fair market value." JA 2415. Vinoskey "understood Napier's general methodology" and "had reviewed the stock price in each of Napier's

annual appraisals [and] knew that from 2004 to 2009, Napier's appraised price ranged from $220.00 to $285.00 per share." *Id.* He also "reviewed Sentry's financials on a regular basis, and had a keen understanding of certain fundamentals, such as . . . how much working capital Sentry required to operate and the fact that Sentry's earnings had been lackluster in 2009." *Id.* With that background, Vinoskey "reviewed Brian Napier's appraisal and Sentry's financials before agreeing to the $406.00 per share price." JA 2415. In doing so, he saw that Napier computed a higher purchase price based on the ESOP gaining control over Sentry, JA 2356–57, even though he "knew that he was not really relinquishing control over Sentry by selling his shares to the ESOP." JA 2415. As the court summarized, "knowledge of [a] breach can be inferred from surrounding circumstances raising a reasonable inference of knowledge," and "[t]aken together, the above evidence supports a reasonable inference that Adam Vinoskey knew that the $406.00 per share . . . he received exceeded the fair market value of the stock." JA 2416 (citing *Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988)).

The district court thus held that Vinoskey was liable as a co-fiduciary for Evolve's breach because he "had actual knowledge that Evolve had breached its fiduciary duty by approving the prohibited transaction for more than adequate consideration [and t]here is no evidence that [he] made any efforts to remedy Evolve's breach." JA 2418. Vinoskey was also liable as a knowing participant

because he "had actual knowledge of one of 'the circumstances that rendered the transaction unlawful,'" and "[e]ven if the Secretary had not met his burden with respect to actual knowledge," Vinoskey "certainly . . . had at least constructive knowledge that his stock was not really worth $406.00 per share." JA 2416–17 (quoting *Harris Tr.*, 530 U.S. at 251).

C. The ESOP Overpaid for Sentry Stock by $6.5 million.

The court next determined the extent of the ESOP's overpayment by "subtract[ing] the stock's fair market value, as determined by the court, from the inflated price paid by the ESOP." JA 2419. The Secretary's expert, Dana Messina, prepared two damages calculations. *Id.* Using the discounted cash flow ("DCF") methodology (a methodology Napier did not apply), Messina concluded that the ESOP overpaid by $11,522,000, which the district court reduced to $7,832,500. JA 2419, 2421–28, 2432. Alternatively, by calculating the value of Sentry's stock at the time of the 2010 Transaction "if Napier consistently and correctly used his capitalization of cash flow methodology," Messina found damages of $7,573,500, which the court reduced to $6,502,500. JA 2419, 2433–35. While both are "reasonable methods of calculating damages in this case," the court "credit[ed] Messina's correction of Napier's capitalization of cash flow methodology," held that the ESOP overpaid Vinoskey $6,502,500.00 and found Evolve and Vinoskey jointly and severally liable for that amount. JA 2436, 2439.

Vinoskey argued that these damages should be reduced by the amount of the ESOP's debt that Vinoskey forgave four years after the 2010 Transaction, as part of a broader corporate restructuring following a downturn in the soda industry. The district court refused to so. JA 2383, 2436–37.

STANDARD OF REVIEW

This Court "review[s] a district court's factual findings for clear error and its legal conclusions de novo." *Brundle*, 919 F.3d at 773 (citation omitted). This Court also "review[s] factual findings relating to the calculation of damages for clear error." *Simms v. United States*, 839 F.3d 364, 368 (4th Cir. 2016). Where, as here, "a district court's factual findings turn on assessments of witness credibility or the weighing of conflicting evidence during a bench trial, such findings are entitled to even greater deference." *Helton v. AT & T Inc.*, 709 F.3d 343, 350 (4th Cir. 2013). A factual finding is "clearly erroneous" only if "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made." *HSBC Bank USA v. F & M Bank Northern Va.*, 246 F.3d 335, 338 (4th Cir. 2001) (citations omitted).

SUMMARY OF THE ARGUMENT

In 2010, Vinoskey sold all his remaining Sentry stock to the ESOP that was established for his employees' retirement. After conducting a bench trial, the district court, in a thoughtful and thorough decision, concluded that when

Vinoskey sold his stock to the ESOP, he knew he was offloading it for more than it was worth. Based on that factual finding, the district court found Vinoskey—who was indisputably a fiduciary to the ESOP—liable as a co-fiduciary under ERISA section 405(a)(3), 29 U.S.C. § 1105(a)(3), because he had knowledge of the fiduciary breach committed by Evolve, the ESOP's transactional trustee, and failed to make any effort to remedy it. Alternatively, the court held that Vinoskey was liable as a non-fiduciary "knowing participant" in Evolve's violations. Vinoskey's actions epitomize why prohibited transactions between ERISA plans and insiders to those plans are "deemed 'likely to injure the pension plan,'" *Harris Tr.*, 530 U.S. at 241 (citation omitted), and underscore the importance of this Court's close examination of ESOP transactions involving closely held companies in prior cases. *See Brundle*, 919 F.3d at 770.

1. It is undisputed that Vinoskey's stock sale violated ERISA. If an ERISA fiduciary knows the facts underlying an illegal transaction—here, the fact that the ESOP overpaid for Vinoskey's stock—and does nothing to remedy that breach, he is liable as a co-fiduciary under ERISA section 405(a)(3). 29 U.S.C. § 1105(a)(3). He seeks to avoid that result by asserting that the district court erred in finding he was a fiduciary with respect to the 2010 Transaction. Vinoskey misapprehends the nature of co-fiduciary liability under ERISA. Because Vinoskey was indisputably a named fiduciary at all times, once he knew that

Evolve approved having the ESOP pay more than fair market value for the shares it bought, he was required to make reasonable efforts to remedy the breach. Vinoskey's attempt to cast a blind eye toward Evolve's breach and blame it for the fallout—far from absolving Vinoskey of co-fiduciary liability—is precisely what ERISA section 405(a)(3) prohibits. 29 U.S.C. § 1105(a)(3).

With fiduciary status not in doubt, Vinoskey's defense to liability as a co-fiduciary thus hinges on whether the district court committed clear error in finding that Vinoskey "had actual knowledge that the $406.00 per share he received for his 51,000 shares exceeded the stock's fair market value." JA 2415. It did not. The district court found that Vinoskey was intimately familiar with the company he founded and its financials, and he understood the valuation appraisals that Napier prepared for Sentry. When he received and reviewed the transaction appraisal, Vinoskey saw the significant increase in Sentry's share price and saw that Napier computed the price as if the ESOP were acquiring control of the company—and he knew both points were wrong.

Seeking to evade the clear-error standard, Vinoskey strains to find errors of law where none exists. First, he says the district court could only find he knew something if it was "obvious," but that argument has no legal support and is contrary to authorities concluding that a district court's factual findings are supported by the assemblage of evidence presented in the case. He says that he

could not have known the price was too high because business valuation is a "judgment-laden process," but he ignores that those judgments had nothing to do with the court's findings that he knew Sentry's stock price was too high. He asserts that a 40% increase in Sentry's appraised stock price during the twelve months preceding the 2010 Transaction was not "obviously unreasonable," but Vinoskey knew Sentry better than anyone and knew that there was no basis for the substantial price increase. And he contends that he did not know the ESOP was paying for control even though he admits to reviewing the transaction appraisals before the 2010 Transaction closed, and they repeatedly—including in capital letters on the cover page—stated that the valuation was conducted on a "controlling interest basis."

2. Vinoskey contends that, in order for him to be liable as a non-fiduciary "knowing participant" in Evolve's breach under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), he must have "know[n] that the transaction violated ERISA." In the first place, because Vinoskey is liable as a co-fiduciary under ERISA section 405(a)(3), 29 U.S.C. § 1105(a)(3), this Court need not even reach this argument. Regardless, ERISA provides a cause of action against third parties, including parties-in-interest (like Vinoskey), who participate in a prohibited transaction have liability under ERISA when they know or should have known "the circumstances that rendered the transaction unlawful" even if they are

not fiduciaries. *Harris Tr.*, 530 U.S. at 251. The district court found that Vinoskey knew or should have known that he sold his stock for an inflated price and therefore knew or should have known "the circumstances" that made the 2010 Transaction illegal. Vinoskey's position, that even if he knew or should have known he was selling stock for too high a price, he still did not know the "circumstances" making the sale unlawful, lacks support.

3. Vinoskey last argues that the district court should have offset its loss calculation with debt that he forgave four years after the 2010 Transaction closed for a reason unrelated to curing the ESOP's overpayment. An ESOP suffers immediate harm when it takes on debt to purchase company stock at an inflated price. *Perez v. Bruister*, 823 F.3d 250, 271 (5th Cir. 2016). Thus, every court to consider this issue, including this one, has rejected the type of offset Vinoskey seeks, because debt forgiveness that is totally unrelated to the original ESOP overpayment—and instead was intended to remedy a downturn in Sentry's performance—does not remedy the loss.

ARGUMENT

I. The District Court Correctly Held That Vinoskey Was Liable as a Co-Fiduciary.

The district court held that Vinoskey was liable as a co-fiduciary in Evolve's breach. JA 2415–19. "Section 405(a) [of ERISA] imposes on each trustee an

affirmative duty to prevent every other trustee of the same fund from breaching fiduciary duties, including the duty to act solely on behalf of the beneficiaries." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 333 (1981) (citing 29 U.S.C. § 1105(a)). Specifically, section 405(a)(3) states that "a plan fiduciary 'shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . . if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.'" 29 U.S.C. § 1105(a)(3). By its terms, Vinoskey is liable under section 405(a)(3) if he (i) was a fiduciary with respect to the plan, (ii) gained knowledge of a breach by another fiduciary, and (iii) did not make reasonable efforts to cure the breach. *Id.* The district court correctly found all three of these elements satisfied. JA 2418.

Vinoskey disputes the court's finding only as to the first two elements. He contends that even though he was a named trustee of the ESOP, he was nevertheless not a fiduciary with respect to the 2010 Transaction. In addition, despite correctly acknowledging that "a fiduciary may be liable simply for knowing the facts underlying the transaction" for purposes of co-fiduciary liability, App. Br. 12, he contends he was unaware of those facts here. Both contentions are meritless.

A. Vinoskey Was an ESOP Fiduciary and Failed to Take Any Action to Remedy Evolve's Breach.

There is no dispute that Vinoskey was a named fiduciary of the Sentry ESOP at the time of the 2010 Transaction. He acknowledges as much in his brief, stating that "because [he] was an ESOP trustee, he had no ability at all to act contrary to the ESOP's best interests. Rather, he owed fiduciary duties to the ESOP [and] he could have been sued for breach of fiduciary duty to the ESOP." App. Br. 22–23. Nevertheless, Vinoskey argues that "*for the purpose of the transaction*, he was not a fiduciary," because Evolve was hired "for the specific purpose of determining whether the proposed transaction was fair to the ESOP." App. Br. 32–33 (emphasis added).

Vinoskey misapprehends the nature of co-fiduciary liability under ERISA section 405(a)(3). 29 U.S.C. § 1105(a)(3). If a fiduciary knows of a breach by another fiduciary but does not make reasonable efforts to remedy it, then he is liable for the other fiduciary's breach. *Id.*[3] That the fiduciary did not directly

---

[3] As noted above, the district court concluded that a fiduciary must have "actual knowledge" of a co-fiduciary's breach to be liable under section ERISA section 405(a)(3). JA 2418. While the Secretary concurred with this standard in briefing below, Dkt. 211 at 55, the government subsequently filed a brief in *Intel Corp. Investment Pol'y Cmte. v. Sulyma*, --- U.S., ---, 140 S. Ct. 768, 773 (2019), stating that "ERISA fiduciaries have a duty to remedy breaches by co-fiduciaries . . . when they know *or should know* of a breach or violation." Br. of United States, at 28–29 (citing 29 U.S.C. § 1105(a)(3)) (emphasis added). The Secretary did not appeal the

commit the other fiduciary's underlying breach is no barrier to co-fiduciary liability under section 405(a)(3); rather, it is the very reason the provision exists. 29 U.S.C. § 1105(a)(3); *compare* ERISA § section 405(a)(1), 29 U.SC. § 1105(a)(1). If fiduciaries owed duties only with respect to their own actions—and had no responsibility for breaches committed by their co-fiduciaries performing separate functions, even after learning of them—then section 405(a)(3) would be superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous."). But section 405(a)(3) is not superfluous, as it makes clear that when fiduciaries learn of breaches committed by their co-fiduciaries, they are obligated to make reasonable efforts to remedy them and "may not escape liability by simply casting a blind eye toward the breach." *Willet v. Blue Cross & Blue Shield*, 953 F.2d 1335, 1341 (11th Cir. 1992) (citing 29 U.S.C. § 1105(a)). Vinoskey's failure to do so here is thus the action (or inaction) "subject to complaint." App. Br. 32 (*quoting Pegram v. Herdrich*, 530 U.S. 211

---

decision below as to this specific issue for two reasons: (1) given the finding that Vinoskey knew about Evolve's breach, applying a "should have known" standard would not alter the outcome as to section 405(a)(3) liability; and (2) the alternative finding that Vinoskey should have known about the overpayment still makes him liable as a non-fiduciary knowing participant under section 502(a)(3). This Court should therefore affirm the decision below without determining the knowledge threshold under section 405(a)(3).

(2000)); *see Acosta v. Saakvitne*, 355 F. Supp. 3d 908, 924 (D. Haw. 2019) (allegation that selling shareholder-fiduciaries knew price was too high in ESOP transaction and did not make effort to remedy breach is sufficient for section 405(a)(3) liability).

The result is that Vinoskey is liable under section 405(a)(3), 29 U.S.C. § 1105(a)(3), because he was a fiduciary and learned of Evolve's breach without taking steps to remedy it. Vinoskey concedes that he was a "trustee and named fiduciary of the existing ESOP." App. Br. 32. Though this Court has said that "'being a fiduciary under ERISA is not an all-or-nothing situation,' [it] has never done so in the context of assessing whether a . . . named fiduciary is, in fact, a fiduciary." *Dawson-Murdock v. Nat'l Counseling Group, Inc.*, 931 F.3d 269, 277 (4th Cir. 2019) (citation omitted). "[A]s logic would suggest, a named fiduciary is 'an ERISA fiduciary.'" *Id.* (citation omitted); 29 U.S.C. §§ 1102(a)(1), 1103(a); *see also* 29 U.S.C. § 1002(21) ("Such term includes any person designated under section 1105(c)(1)(B) of this title.").[4] Because Vinoskey's fiduciary status is clear,

[4] Vinoskey argues that he "took the same steps here as the board of directors" in *Neil v. Zell* to remove himself from the 2010 Transaction. App. Br. 33. But *Neil* is distinguishable because the plaintiffs there sought to hold most of the director-defendants liable for approving the ESOP transaction itself, not for co-fiduciary liability. 677 F. Supp. 2d 1010, 1023 (N.D. Ill. 2009). The plaintiffs sought unsuccessfully to impose co-fiduciary liability only on a subset of the director-defendants, but those individuals joined the board *after* the transaction, and the

the court's findings that Vinoskey knew the ESOP was paying more than fair market value for his stock—and that he did nothing about it—make him liable under section 405(a)(3). 29 U.S.C. § 1105(a)(3).

B. Vinoskey Knew He Was Selling His Sentry Stock to the ESOP for More Than Fair Market Value.

The district court detailed its factual finding that Vinoskey knew the ESOP paid more than fair market value for his stock. JA 2415–17. Vinoskey attempts to concoct a legal defect with this finding to avoid clear-error review, contending that the court could establish Vinoskey's actual knowledge only if it was "obvious" to Vinoskey that the price exceeded fair market value. While the district court's factual finding substantiates exactly that, obviousness is not the only way to establish actual knowledge. The district court properly based its finding on reasonable inferences derived from the evidence, and Vinoskey cannot demonstrate that this was clearly erroneous.

---

court simply found there was "no fiduciary duty to remedy the alleged fiduciary breach committed before their tenure on the board." *Id.* Here, in contrast, Vinoskey remained an ESOP trustee (and named fiduciary) during the time of the 2010 Transaction and was well aware of the valuations on which the ESOP relied.

1. The District Court Properly Relied on Reasonable Inferences From the Evidence Presented in Finding Vinoskey Had Actual Knowledge.

The district court found that Vinoskey "had actual knowledge that the $406.00 per share he received for his 51,000 shares exceeded the stock's fair market value." JA 2415. Whether Vinoskey "had the requisite knowledge . . . is a question of fact," *see Farmer v. Brennan*, 511 U.S. 825, 842 (1994), and the court based its finding on an array of evidence that led to the "reasonable inference" that Vinoskey knew the sales price was too high. JA 2416.

A district court's factual findings are entitled to deference "even when the district court's findings [are based on] inferences from other facts." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985); *see also Lewin v. C.I.R.*, 335 F.3d 345, 349 n.4 (4th Cir. 2003) ("'We review the district court's factual findings, including reasonable inferences that may be drawn therefrom, under the clearly erroneous standard'"). Indeed, "[a] common definition of 'finding of fact' is, for example, '[a] conclusion by way of reasonable inference from the evidence." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) (quoting Black's Law Dictionary 569 (5th ed. 1979)). Even in the criminal context, it is the "responsibility of the trier of fact . . . to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Harris*, 720 F.3d 499, 501, 504 (4th Cir.

2013) (upholding district court's "reasonable inference . . . that the gouging and scraping around the serial number [on a gun] was inten[tional]"); *United States v. $79,650.00 Seized from B. of Am. Account Ending in 8247*, 650 F.3d 381, 387 (4th Cir. 2011).

The Supreme Court recently held that a plaintiff's actual knowledge of a fiduciary breach sufficient to trigger ERISA's three-year statute of limitations provision may be established by inference from circumstantial evidence. ERISA "requires plaintiffs with 'actual knowledge' of an alleged fiduciary breach to file suit within three years of gaining that knowledge." *Sulyma*, 140 S. Ct. at 773 (citing 29 U.S.C. § 1113(2)). Thus, "[t]o meet § 1113(2)'s 'actual knowledge' requirement, . . . the plaintiff must in fact have become aware of that information." *Id.* at 777. The Court added that "[n]othing in this opinion forecloses any of the 'usual ways' to prove actual knowledge at any stage in the litigation" and explained that "actual knowledge can be proved through 'inference from circumstantial evidence.'" *Id.* at 778–79 (quoting *Farmer*, 511 U.S. at 842, and *Staples v. United States*, 511 U.S. 600, 615–16 n.11 (1994) ("[K]nowledge can be inferred from circumstantial evidence")). The Sixth Circuit's decision in *Brock*, cited by the district court, likewise held that "knowledge of [a] breach can be

inferred from surrounding circumstances raising a reasonable inference of knowledge." 840 F.2d at 342.[5]

Contrary to Vinoskey's assertions, the circumstances from which knowledge may be inferred need not be "obvious," and the Supreme Court in *Sulyma* did not "recognize[] that the obviousness standard applies to knowledge requirements under ERISA." App. Br. 16–17. In fact, the word "obvious" is missing entirely from the *Sulyma* decision, and—as noted—the decision generally permits proving actual knowledge through inferences from circumstantial evidence. *See* 140 S. Ct. at 778–79. Vinoskey quotes *Farmer*, a case regarding "deliberate indifference" claims under the Eighth Amendment, for the statement that "a trier of fact may infer knowledge from the obvious." App. Br. 16. While obviousness may be one method of establishing actual knowledge, *Farmer* reiterates the general proposition that knowledge may be "demonstrat[ed] in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842; *accord, e.g.*, *Cox v. Quinn*, 828 F.3d 227, 236 (4th Cir. 2016). In this case, there is ample evidence

[5] Vinoskey asserts that *Brock* discusses (and is cited for) "whether a reasonable inference supports knowledge of a given fact generally, and has not applied it specifically to actual knowledge." App. Br. 17. Vinoskey attempts to make a distinction where there is none (and for which there is no support), because regardless of whether the legal standard calls for constructive or actual knowledge, the requisite knowledge threshold can be proven through reasonable inferences.

that Vinoskey knew the price was higher than fair market value. *See United States v. Lawson*, 682 F.2d 480, 483 (4th Cir. 1982).

2. The District Court's Finding That Vinoskey Knew the ESOP Paid More Than Fair Market Value Was Not Clear Error.

The district court found "by a preponderance of the evidence that Adam Vinoskey had actual knowledge that the $406.00 per share he received for his 51,000 shares exceeded the stock's fair market value." JA 2415. Vinoskey knew there was no basis for the single-year 40% spike in stock price in the appraisal that he received, nor for the ESOP to pay a higher "controlling interest" price when it would not in fact gain control of Sentry. The Court made this factual finding based on a reasonable inference from circumstantial evidence, including that Vinoskey admitted to extensive knowledge about the company and its prior valuations. Vinoskey attempts to minimize these findings, stating that they rest on "circumstantial evidence," *see*, *e.g.*, App. Br. 9, but as explained, that is no barrier. "Taken together," the evidence the district court relied on supports its reasonable inference that Vinoskey knew he was selling his shares for too much, and there is no basis for a "definite and firm conviction that a mistake has been made." *HSBC Bank USA*, 246 F.3d at 338.

a. Vinoskey Was Intimately Familiar With the Finances and Valuation of the Company He Founded.

At time of the 2010 Transaction, Vinoskey was the CEO, President, and Chairman of the Board of Sentry, the company he founded and spent 30 years building into a multi-million dollar enterprise. Vinoskey testified that he "had good control over the business. It helped me for 30 years to control the business very well." Supplemental Appendix ("SA") 0004. He "ran the company," including undertaking "most of the . . . innovation and machinery [Sentry] was gonna build." JA 1244. He also "did a little bit of sales work," *id.*, and landed "major corporations as customers, including Coca-Cola, Dr. Pepper, and Snapple." JA 2342. Prior to 2010, Sentry achieved annual sales of about $50 million, JA 1863, and it employed 230 people at its peak. JA 1244–45. In short, Vinoskey was not so much a "layperson," *see, e.g.*, App. Br. 18, as he was a successful businessman who, in his words, "ran the place." JA 1244.

Unsurprisingly then, the district court found that Vinoskey "reviewed Sentry's financials on a regular basis, and had a keen understanding of certain fundamentals." JA 2415. "[F]or instance," Vinoskey understood "how much working capital Sentry required to operate," *id.*, testified "that he 'never tried to let [Sentry] get below probably . . . $15 million,'" and expressed "reticence at the idea that Sentry could operate on only $2.5 million in cash." JA 2370. He "always

knew what [his] next payables was going to be" and, when asked, agreed that he "kept a pretty close eye on the payables from month to month." SA 0005. Vinoskey "regularly examined 'what the cash balance was, what receivables were, what the liabilities were,' as well as 'dump sheets' that included information about the 'profit margin' of jobs currently in progress." JA 2385. He "'knew the key numbers,'" including Sentry's inventory, cash, and receivables. *Id.* He knew "that soft drink companies account for 80 percent of Sentry's business," JA 2342, and testified about "the fact that Sentry's earnings had been lackluster in 2009." JA 2415. The depth of Vinoskey's involvement and understanding aligns with that of someone in his position—founder, CEO, President, Chairman of the Board.

In 2004, the Vinoskeys sold 48% of their Sentry stock to the ESOP for $9 million. JA 0053. Over the ensuing years, Vinoskey "reviewed at the least the stock price in each of Napier's annual appraisals and was aware that from 2004 to 2009, Napier's appraisal ranged from $220.00 to $285.00 per share." JA 2385. Vinoskey understood and discussed the general approach underlying the valuations with Napier. *Id.* He also provided input to Napier regarding the appraisals, and he "had specific discussions about the importance of cash flow and Sentry's earnings

to Napier's capitalization of cash flow methodology." *Id.*[6] In short, Vinoskey knew Napier's valuations of Sentry and how he derived them.

b. Vinoskey Reviewed Napier's 2010 Transaction Appraisal and Knew That the Price Was Too High.

In 2010, Vinoskey "reviewed Brian Napier's appraisal and Sentry's financials before agreeing to the $406.00 per share price." JA 2415.[7] That review is important for two main reasons.

i. Vinoskey Knew the Valuation Showed a 40% Increase in One Year for No Business Reason.

Napier's 2010 valuation stated that Sentry's stock was worth about $406.00 per share, JA 1858, or over 40% more than the prior year's stock price of $285 per share that he had calculated. JA 2415. A 40% increase in stock price in one year

---

[6] Vinoskey states that he focused on the stock price when he looked at Napier's appraisals. App. Br. 28 n.7. As the district court indicated, that Vinoskey looked primarily at the price does not conflict with Napier's testimony that he and Vinoskey discussed the appraisals and Vinoskey understood them. *See* JA 2385, 2415 (citing both witnesses' testimony).

[7] Vinoskey asserts that the district court's finding that he reviewed Napier's appraisal before the 2010 Transaction "was wrong." App. Br. 28 n.7. As the court explained, "Vinoskey stated in his deposition that he reviewed Napier's appraisal and Sentry's financials prior to closing," and he testified at trial that "his memory was 'much better' at the time of the deposition." JA 2386. The court's decision to credit Vinoskey's deposition testimony over his own competing trial testimony was not clear error. *United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984) ("[i]t is axiomatic that it is the role of the factfinder, not the appellate court, to resolve conflicts in testimony").

is undeniably substantial for any company, but what makes it problematic is that there was no business reason for the increase—and Vinoskey knew it.[8] He knew "that Sentry's earnings had been lackluster in 2009," JA 2415, and agreed that the company only "started to bounce back a little bit in 2010." JA 0395. Napier testified that Sentry's size did not change much from 2009 to 2010, SA 0001, that its 2009 and 2010 earnings and cash flow were lower than in 2007 and 2008, SA 0002, and that 2010 was a worse year for Sentry than 2008 and 2009. SA 0003. Connor, the incoming president, explained to Vinoskey and others that "2011 would be a more difficult year than 2010" because of a "lack of growth in the soft drink industry" and Sentry's inability to diversify. JA 2351. Based on this evidence, the court reasonably inferred that Vinoskey knew there was no business reason for the 40% increase in Sentry's stock price in one year. JA 2415.

---

[8] Vinoskey's assertions regarding Apple and the S&P 500, App. Br. 20–21, are irrelevant. The issue is not just the 40% price increase (though that should garner attention), but rather whether it has any basis in Vinoskey's extensive knowledge of the company and past appraisals. Vinoskey knew that the answer was "no." Moreover, the Apple and S&P 500 information and chart are not in the record and have not been verified; neither was examined by witnesses, experts, or the trial court, and "an appellate court normally will not consider facts outside the record on appeal." *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989).

ii. Vinoskey Knew the ESOP Was Paying More for Control But Not Getting It.

1. Vinoskey knew the ESOP was paying for control. Upon receiving Napier's report, Vinoskey learned that the ESOP was paying a controlling interest price for Sentry, even though he knew that the ESOP would not receive control. Vinoskey testified that "a majority of stock . . . seems to hold a little more value than a minority stock," JA 0356, and the cover page of the report he received states, in all-caps, "APPRAISAL OF A CONTROLLING INTEREST IN THE COMMON STOCK OF SENTRY EQUIPMENT ERECTORS, INC." JA 1809. Based on evidence, the court reasonably inferred that Vinoskey "reviewed Napier's 2010 Transaction appraisal." JA 2386. The second page of Napier's report reiterates that "[o]ur appraisal was made for the purpose of expressing an opinion of the fair market value of the common stock, on a controlling-interest basis, as of November 30, 2010." JA 1810. The next page further confirms Napier's "opinion that the fair market value of Sentry Equipment Erectors, Inc. common stock, on a controlling interest basis, be considered in the range of $405.73 to $408.58 per share." JA 1811. Other statements that the ESOP is paying for control abound in Napier's report. JA 1814 ("valuation . . . undertaken on a controlling interest basis"); JA 1820 ("the subject of this appraisal, represents a controlling interest"; "valuation has been undertaken on a controlling-interest basis"); JA 1856

(methodology yields value "on a controlling-interest basis"); JA 1861 (noting "limitations of the marketability of a controlling interest in Sentry").

The foregoing rebuts Vinoskey's argument that "there are no facts in the record" showing that he knew the ESOP was paying for a controlling interest in Sentry. App. Br. 25. Based on the report's repeated conspicuous references, Vinoskey's knowledge, and his review of Napier's appraisal, Vinoskey knew the stock was priced on a controlling interest basis.

Vinoskey also maintains that he could not have known about the ESOP paying a controlling interest price because, unlike the valuation in *Brundle*, Napier's valuation did not contain the phrase "control premium." App. Br. 26. But *Brundle* did not concern whether the selling shareholder had knowledge that the ESOP was paying for control, let alone contend that the term "control premium" was essential to that finding. *Brundle v. Wilmington Trust, N.A.*, 241 F. Supp. 3d 610, 623 (E.D. Va. 2017). In any event, Vinoskey's assertion that only the magic term "control premium" would have conveyed that the ESOP was paying for control is spurious, because that fact was made clear by the report's repeated statements from the outset that it was done on a controlling interest basis. Vinoskey did not need to decode the valuation's technical adjustments to know the ESOP was paying for control, App. Br. 26–28; it was apparent from the very title

of the report. There is no doubt—much the less any basis for finding clear error—that Vinoskey knew the ESOP was paying for control.[9]

2. The ESOP was not actually gaining control of Sentry. The district court found that the ESOP did not stand to gain control of Sentry after the 2010 Transaction and that Vinoskey "knew that he was not really relinquishing control over Sentry by selling his shares to the ESOP." JA 2415. Both findings are robustly supported, not clearly erroneous.

As this Court has explained, "[p]urchasers will generally pay more for 'rights associated with control of the enterprise.'" *Brundle*, 919 F.3d at 777 (quoting *Estate of Godley v. Comm'r*, 286 F.3d 210, 214 (4th Cir. 2002)). "Control" exists when there is "'an interest which allows the shareholder to

[9] Vinoskey's argument that the district court erred in stating that the DCF methodology "is, by default, calculated on a controlling-interest basis," which led the court to "severely undervalue Sentry's stock," is both incorrect and irrelevant. App. Br. 26 n.6. In fact, the court's finding regarding the DCF methodology had no impact on the outcome of this case, because while the court found that Messina's DCF analysis was "reasonable," it ultimately based its damages finding on another valuation method that both Napier and Messina employed—the capitalization of cash flow methodology. Indeed, the court "credit[ed] Messina's correction of Napier's capitalization of cash flow methodology" for purposes of its "Final Damages Calculation." JA 2435–36. In any event, the district court's finding was based on evaluating testimony from both parties' experts, and neither Vinoskey nor amici establish clear error. *United States v. Heyer*, 740 F.3d 284, 292 (4th Cir. 2014) ("the [appellate courts] 'should be especially reluctant to set aside a finding based on the trial court's evaluation of conflicting expert testimony.'") (citation omitted).

unilaterally direct corporate action, select management, decide the amount of distribution, rearrange the corporation's capital structure, and decide whether to liquidate, merge, or sell assets.'" *Id.* (citation omitted). In particular, "the power to appoint a majority of the . . . board [is] a key indicator of control." *Id.* Thus, an ESOP's mere purchase of 100 percent of a company does not confer control where "limited rights [are] provided to the ESOP"—even if that purchase confers "'powers beyond those of an ordinary shareholder.'" *Id.* (citation omitted).

As Vinoskey knew, he and his wife "comprised a majority of the ESOP Trustees and Sentry's Board of Directors before and after the 2010 Transaction." JA 2385. This is significant because "[u]nder the Sentry ESOP plan and Sentry's bylaws, the Board of Directors has the power to appoint and remove ESOP Trustees, and ESOP Trustees in turn have the power to vote the ESOP's shares in all but 'certain limited but important corporate matters.'" JA 2343. Unfortunately for the ESOP, "the election of Directors is not one of those 'limited but important corporate matters'" as to which participants had control. JA 2357.

Vinoskey "knew that he would stay on as Chairman of the Board, and that he and Carole Vinoskey would continue to comprise a majority of the ESOP Trustees after the 2010 Transaction, thus preserving their ability to exert control over [Sentry] without taking instruction from the ESOP participants." JA 2416. For example, Vinoskey insisted "that he would not cut health care expenses after

the transaction, suggesting that he thought he—not the ESOP—would be able to make this decision after the 2010 Transaction." *Id.*; JA 2351 (Vinoskey "unequivocally refused to consider" reducing health expenses). Vinoskey argues that this finding does not support his awareness of his control over Sentry because the health care benefits would continue with or without Vinoskey's intervention. App. Br. 24–25. This argument appears to misunderstand the district court's point: Vinoskey believed *he*—not the ESOP—had the power to determine post-transaction health care benefits. The Vinoskeys signed nothing that would require them to relinquish power, *see* JA 2350–51, 2358, much less give the ESOP control. Vinoskey cannot identify any clear error in the court's finding that he knew he did not relinquish control of the company.

And, as a matter of fact, the ESOP would not gain control, because the Vinoskeys "stood to retain a tight grip over Sentry after the 2010 Transaction." JA 2359. "[T]he Vinoskeys could exert total control over how to vote the ESOP's shares in the vast majority of corporate matters as two out of the three ESOP Trustees [and i]f the ESOP wanted to remove Adam and Carole Vinoskey as Directors, Adam and Carole Vinoskey would have to agree not to reelect themselves as Directors." JA 2358. If the ESOP wanted to remove the Vinoskeys, it would have to petition the Secretary (Mrs. Vinoskey) to call a special meeting of the Board of Directors—a body elected by and consisting of the Vinoskeys—

where the Vinoskeys "would have to agree to fire themselves as trustees." *Id.* In short, "the ESOP essentially had no meaningful ability to remove the Vinsokeys" as either Directors or ESOP Trustees. JA 2393.

Vinoskey mounts three arguments in response to the district court's finding that the ESOP would not acquire control of Sentry. App. Br. 21–24. First, Vinoskey maintains that this case is different from *Brundle*, where the ESOP also did not acquire control, because the transaction document in *Brundle* had what Vinoskey calls "an express provision of the transaction" granting sellers the ability to determine the composition of the company's board. App. 21–22. Vinoskey's argument wholly ignores the express provisions of the ESOP Plan document and Sentry corporate bylaws that were part of the 2010 Transaction and, as the district court detailed, left the Vinoskeys with a "tight grip" on Sentry. JA 2359.[10] In fact, the "lack of provisions in the transaction documents altering Sentry's corporate structure, reducing the Vinoskeys' leadership roles, or ensuring that the ESOP could control the Board and the ESOP Trustees with relative ease," *id.*, ensured that the ESOP was rendered powerless despite its $21 million purchase.

---

[10] If anything, the control that the sellers retained in *Brundle* through the receipt of warrants is less than that retained by the Vinoskeys, because the warrants in *Brundle* had an expiration date, albeit 10 to 15 years in the future. *Brundle*, 241 F. Supp. 3d at 623. The Vinoskeys' power never expired. *See* JA 2359.

Second, Vinoskey argues that, as an ESOP trustee, "he had no ability at all to act contrary to the ESOP's best interests," and the ESOP's ability to sue him for a fiduciary breach gave it control after the transaction. App. Br. 22–23. This Court rejected this exact argument in *Brundle*, calling the ability to "fil[e] a lawsuit . . . the same limited relief available to a *minority* shareholder." 919 F.3d at 777.[11] "Filing a lawsuit" is also noticeably missing from Vinoskey's own list of "generally agreed upon elements of control." App. Br. 25 (quoting *Godley*, 286 F.3d at 215).

Vinoskey's third argument relies on a footnote in the preamble of the Secretary's proposed adequate consideration regulation from 1988. App. Br. 23. "[T]he DOL never enacted the proposed regulations, [so] they are not binding." *Brundle*, 919 F.3d at 780. In any event, Vinoskey argues that the proposed regulation recognizes control when an ESOP gains control "within a reasonable time." App. Br. 23. This cherry-picked language mischaracterizes the proposed

[11] Amicus American Society of Appraisers ("ASA") joins this discredited argument. ASA Br. 14–15. The ASA otherwise asks this Court to ignore the ESOP's lack of meaningful control and instead focus on the handful of rights the ESOP received, which it suggests the district court did not properly take into account. This is a rehash of arguments the ASA made to this Court in *Brundle*, which the Court rejected. ASA Br. in *Brundle* (Dkt. 35-1 at 16–19); ASA Br. 13–15. ASA also misstates the district court opinion as "consider[ing] the issue of control as black or white," when in fact the district court recognized "that the Sentry ESOP did stand to gain some elements of control," JA 2428–29, but concluded these paled in comparison to the absence of control rights. JA 2356–59.

regulation. That sentence says that if an ESOP purchases small amounts of stock with an understanding that it will eventually obtain "a controlling portion of shares to the plan, a control premium would be warranted only to the extent that the understanding with the employer was *actually a binding agreement obligating the employer to pass control* within a reasonable time." 53 Fed. Reg. 17,632-01, 17,636 (May 17, 1988) (emphasis added) (citing *Donovan*, 716 F.2d at 1472–74 (mere intention to transfer control not sufficient)). There was no binding agreement for the Vinoskeys to pass control to the ESOP. JA 2359. The facts that Mrs. Vinoskey passed away and Vinoskey eventually retired, App. Br. 23–24, have no bearing on whether the ESOP acquired control at the time of purchase, as both are post-transaction events, and it is improper to evaluate control using hindsight. *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553, 567 (4th Cir. 2017); *see also DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 424 (4th Cir. 2007).

In the end, the ESOP has never gained control; when this case went to trial, nine years had passed since the 2010 Transaction closed and the ESOP still lacked control of the company it owned. JA 2384 (describing composition of Sentry's board and ESOP trustees). There was no binding mechanism at the time of the 2010 Transaction that would force Vinoskey to relinquish his control. Vinoskey also cannot identify any clear error in the court's finding that the ESOP never gained control.

c. The Judgment Needed to Prepare Business Valuations Does Not Preclude Vinoskey From Knowing the ESOP Overpaid.

Vinoskey argues that he could not have known the ESOP was overpaying for ESOP stock because business valuation is a judgment-laden process that leaves too much room for subjectivity and disagreement. App. Br. 18–19. While Vinoskey is correct that valuing businesses includes making judgments, he wrongly concludes that those judgments rendered him unable to know the Sentry stock price was inflated. As the district court found, Vinoskey had in-depth familiarity with his company and its finances and an understanding of Napier's valuations. More importantly, he knew that the same valuation firm that valued Sentry at $285 per share in 2009 had valued it at around $405 per share a year later, with no uptick in Sentry's business to justify such a dramatic increase.[12]

[12] The fact that the ESOP paid more than fair market value is relevant to whether the "adequate consideration" exemption to ERISA's prohibited-transaction rules was satisfied, *see* 29 U.S.C. § 1108(e), not to whether the transaction on its face violated section 406(a), 29 U.S.C. § 1106(a). That violation is established by the fact that the transaction was one between a plan and party-in-interest. *See* 29 U.S.C. §§ 1106(a)(1)(A), (D). In pointing to Vinoskey's knowledge of the overpayment (as opposed to the transaction itself), the Secretary is not articulating any categorical rule for the knowledge required to trigger co-fiduciary and knowing participation liability with respect to a prohibited transaction. *See Harris Tr.*, 530 U.S. at 252–53 (clarifying that degree of knowledge for knowing participation liability may vary).

Vinoskey's argument also has untenable implications. For example, if valuation judgments make determining a fair market price impossible, then ESOPs would no longer be able to meet the statutory exemption that allows purchases stock in privately held company stock. *See* 29 U.S.C. §§ 1108(e), 1002(18) (ESOPs to pay no more than "fair market value,") Likewise, if the proper price is indeterminable, then ESOP fiduciaries and selling shareholders could never be liable for a stock overpayment; *Brundle* and almost 40 years of ESOP decisions preclude that outcome. 919 F.3d at 781–82 (affirming damages finding); *Bruister*, 823 F.3d at 265 (collecting cases).

Vinoskey cites *Hans v. Tharaldson* on this point, but in that case the non-fiduciary selling shareholders had no access to any information—no documentation, discussions, or meetings—related to the value of the stock they were selling. 2011 WL 7179644, at *16 (D.N.D. Oct. 31, 2011) ("the undisputed evidence is essentially that they signed where they were told to sign."); JA 2417 n.25 (calling *Hans* inapposite). *Hans* does not reject the possibility that a selling shareholder can be aware of an overpayment, much less state that there is no way to determine fair market value.

Vinoskey's argument regarding valuation judgments is contrary to the findings in this case and lacks any supporting authority. Vinoskey clearly knew at the time of the 2010 Transaction that the valuation was out of the range of

reasonable prices given that it was a controlling interest price and that it showed a 40% increase from the year before.

II. The District Court Properly Found That Vinoskey Was Liable as a Party In Interest Who Knowingly Participated in a Prohibited Transaction.

Because Vinoskey is liable as a co-fiduciary, this Court need not even reach the district court's finding that Vinoskey was liable as a party-in-interest for knowingly participating in a prohibited transaction. But if it does, the Court should again reject Vinoskey's assertion that the district court below erred.

A non-fiduciary party, including parties-in-interest, is liable under ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), if he knows or should know that he is entering into a prohibited transaction. *See Harris Tr.*, 530 U.S. at 242; JA 2389–90 ("no dispute that Adam Vinoskey . . . was a party-in-interest"). As the Supreme Court explained in *Harris Trust*, such an individual must "have had actual or constructive knowledge of the circumstances that rendered the transaction unlawful." 530 U.S. at 251. "Those circumstances, in turn, involve a showing that the plan fiduciary, with actual or constructive knowledge of the facts satisfying the elements [of a prohibited transaction], caused the plan to engage in the transaction." *Id*.

The district court, relying on *Harris Trust*, found that if "Vinoskey had actual or constructive knowledge . . . that the $406.00 per share he received for his

51,000 shares exceeded the stock's fair market value," then he was "liable as a knowing participant in a prohibited transaction." JA 2413–14. Concluding that Vinoskey had both actual and constructive knowledge that the sales price was too high, the district court found him liable for knowing participation in a prohibited transaction. JA 2415–17. On appeal, Vinoskey argues that the court's findings about his knowledge of the price were erroneous, and that in any event it was insufficient to hold him liable because he did not know that the 2010 Transaction was unlawful. App. Br. 12–15. Vinoskey is incorrect.[13]

A. The District Court's Finding That Vinoskey Should Have Known the ESOP Was Overpaying for Sentry Stock Was Not Clear Error.

As explained above, the district court correctly found that Vinoskey knew the ESOP paid more than fair market value for his stock. But the district court also found that, even if Vinoskey did not actually know the ESOP overpaid for his stock, "the evidence certainly supports a finding that Adam Vinoskey had at least constructive knowledge that his stock was not really worth $406.00 per share." JA 2416. A party has constructive knowledge of a breach when they "should have known" about "the circumstances that rendered the transfer in breach." *Harris Tr.*, 530 U.S. at 251. Constructive knowledge is "knowledge that one using reasonable

[13] *See supra* at I.B., regarding the court's finding that Vinoskey actually knew the sales price for Sentry stock was too high.

care or diligence should have, and therefore that is attributed by law to a given person." *Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 175 (4th Cir. 2014) (citing Black's Law Dictionary (9th ed. 2009)). The district court found that, "[g]iven the above evidence establishing Adam Vinoskey's review of Napier's 2010 Transaction appraisal, review of Napier's prior appraisals, general understanding of Napier's methodology, familiarity with Sentry's financials, and understanding that he was not truly giving up control of Sentry, . . . at the very least, Adam Vinoskey 'should have known' that the price he received for his shares exceeded fair market value." JA 2417 (quoting *Harris Tr.*, 530 U.S. at 251).

Vinoskey provides no basis for holding that this finding was erroneous. Vinoskey first misstates the district court as holding that various "red flags" should have prompted Vinoskey to conduct an investigation. App. Br. 29–30. In fact, the district court held that Vinoskey "should have known" the price was inflated based on the wealth of evidence regarding what Vinoskey knew—not what he would find upon an investigation. JA 2417. In addition, and contrary to Vinoskey's assertion, appraisers are not the only individuals who can identify that stock is overpriced; to say the least, someone with Vinoskey's business background and intimate knowledge about Sentry was fully capable of knowing and "should have known"

the price per share was too high upon receipt of Napier's 2010 Transaction valuation.

Vinoskey wrongly asserts that "any resource available" supported Evolve's approach to the 2010 Transaction with respect to control price. App. Br. 30. But Vinoskey didn't need a specific "resource" to know that the ESOP was overpaying. He "should have known" the price was too high based on the 40% price increase in one year for no business reason and on the payment of a "controlling interest" when he knew he would not relinquish control. Regardless, the one resource Vinoskey cites—the Secretary's non-binding proposed regulation—does not actually support valuing the ESOP's stock on a controlling-interest basis. Vinoskey quotes the proposed regulation for the proposition that "'a plan would not fail to receive control merely because individuals who were previously officers, directors or shareholders of the corporation continue [in those roles] after the plan has acquired the securities.'" App. Br. 30–31 (citation omitted). But he omits the preceding paragraph, which states that "the Department's position is that the payment of a control premium is unwarranted unless the plan obtains both voting control and control in fact." 53 Fed. Reg. at 17,636. The Sentry ESOP did not obtain such control, rendering Vinoskey's quote beside the point. Vinoskey also incorrectly states that there was no court authority at the time regarding the issue of control; in fact, this Court addressed the elements of control eight years

before the 2010 Transaction closed. *See Godley*, 286 F.3d at 214. The "leading valuation treatise" Vinoskey cites was published in 2007, three years prior to the 2010 Transaction; it lists "Elements of Control," none of which meaningfully resided with the Sentry ESOP. JA 2289. Having failed to establish that any of the district court's findings are "clearly erroneous," the district court's alternative finding stands, and Vinoskey was liable as a knowing participant.

B. Vinoskey Did Not Need Knowledge of the Law to be Liable for Knowingly Participating in Evolve's Fiduciary Breach.

The district court correctly held that Vinoskey was liable when he knew "'the factual circumstances underlying the transaction' that ma[d]e it a prohibited transaction." JA 2412–13 (quoting *Haley v. Teachers Ins. & Annuity Ass'n of Am.*, 377 F. Supp. 3d 250, 264 (S.D.N.Y. 2019)). Vinoskey did not need to "'have knowledge of the law, *i.e.*, knowledge that the transaction violated ERISA.'" JA 2413 (quoting *Haley*, 377 F. Supp. 3d at 264). Vinoskey's argument that he had to have knowledge of the law to be liable under ERISA, App. Br. 12, attempts to add an additional element to a knowing participation claim that is not present in *Harris Trust*.

In order to find a party-in-interest liable for a prohibited transaction, the Supreme Court requires "actual or constructive knowledge *of the circumstances* that rendered the transaction unlawful," *Harris Tr.*, 530 U.S. at 251 (emphasis

added), not "knowledge that the transaction was unlawful." A "circumstance" is a "fact, event, or condition, such as a piece of evidence that indicates the probability of an event." *Gafurova v. Whitaker*, 911 F.3d 321, 332 (6th Cir. 2018) (citations omitted). Thus, Vinoskey need only know the facts that rendered the 2010 Transaction unlawful, not any specific legal interpretation of ERISA. Indeed, the Supreme Court explained that "[t]hose circumstances . . . involve a showing that the plan fiduciary, with actual or constructive knowledge *of the facts*" of the prohibited transaction caused such transaction. *Harris Tr.*, 530 U.S. at 251 (emphasis added); *see also Haley*, 377 F. Supp. 3d at 261. The Supreme Court in *Harris Trust* nowhere mentions knowledge of the law.

District courts have agreed with this interpretation of *Harris Trust*. In *Haley*, the court found that nothing in *Harris Trust* requires a non-fiduciary transferee to have knowledge of the law. 377 F. Supp. 3d at 261. Because "[i]f the Supreme Court intended to require non-fiduciary defendants to have knowledge that the transaction they were engaged in violated ERISA, the Court could have used clear language to do so. But the standard as described in *Harris Trust*—requiring knowledge of only the 'circumstances' or 'facts' of a transaction—does not mandate that level of scienter." *Id.* at 261–62. The district court in *Neil v. Zell* similarly interpreted *Harris Trust* as only requiring "actual or constructive knowledge of the deal's details." 753 F. Supp. 2d 724, 731 (N.D. Ill. 2010). These

readings of *Harris Trust* realize that "the purpose of th[is] action is to recover money or other property for the trust," *Harris Tr.*, 530 U.S. at 252, by recovering losses from any party who improperly benefits from entering into a prohibited transaction. *See Haley*, 377 F. Supp. 3d at 264 (requiring knowledge of law would "impede plan beneficiaries in their efforts to police prohibited transactions.").

In support of his purported legal-knowledge requirement, Vinoskey quotes *Harris Trust*'s statement that the common law of trusts "sets limits on restitution actions against defendants other than the principal 'wrongdoer.'" App. Br. 15. But this quote says nothing about legal knowledge. *Haley*, 377 F. Supp. 3d at 262. In fact, the very next sentence explains that the "limits" in question are merely that "a transferee of ill-gotten trust assets may be held liable [if the transferee] knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust." *Harris Tr.*, 530 U.S. at 251. That is, these limits on restitution actions are the "circumstances" test described above, which do "not insulate [Vinoskey] from liability." *Id.*[14] The legal-knowledge

[14] Vinoskey says that transferees must have been on "notice" of the fiduciary's breach and quotes a definition of "notice" under the Restatement (Second) of Trusts, App. Br. 13, but it is not clear how this helps his argument. Vinoskey recognizes that "'notice' . . . means possessing *facts*"—not law—that give reason to know the transaction is unlawful. To that point, the Restatement explains that "a third person has notice of a breach of trust . . . when he should know of it; that is *when he knows facts which under the circumstances* would lead a reasonably

requirement that Vinoskey touts is simply not present in the common law, the text of ERISA, or *Harris Trust*.

If knowing that he was selling stock to an ESOP at an inflated price is not enough for liability, it is difficult to imagine what *more* Vinoskey believes he needed to know. In Vinoskey's view, even if he knew or should have known that he was selling stock to an ESOP for millions of dollars more than it is worth, he still would not have actual or constructive knowledge of "the circumstances that rendered the transaction unlawful." *Harris Tr.*, 530 U.S. at 251. There is no support for Vinoskey's approach, which would render *Harris Trust* meaningless.[15]

III. The District Court Properly Refused to Offset Damages by Vinoskey's Unrelated Forgiveness of ESOP Debt.

ERISA requires fiduciaries to "'make good to an ESOP any losses' resulting from a given breach of duty." *Brundle*, 919 F.3d at 782 (quoting 29 U.S.C. §

---

intelligent and diligent person to inquire whether the trustee . . . is committing a breach of trust." Restatement (Second) of Trusts § 297, cmt. A; *see also Haley*, 377 F. Supp. 3d at 262 (discussing *Harris Trust*'s reference to "notice").

[15] Even the single authority that Vinoskey cites in support of his argument, *Teets v. Great-W. Life & Annuity Ins. Co.*, 286 F. Supp. 3d 1192 (D. Colo. 2017), does not go as far as Vinoskey asks this Court to go. In *Teets*, the court stated that a "plaintiff must show that the defendant knew or should have known that the transaction violated ERISA," but in that case the "[p]laintiff has not attempted to make this showing." *Id.* at 1209. Under *Teets*, when Vinoskey knew or should have known that he was selling stock to the ESOP at an inflated price, he knew or should have known "that the transaction violated ERISA" and was unlawful. *Id.*

1109(a)). In overpayment cases, courts deduct the fair market value of stock from the amount the ESOP actually paid. *Id.* at 782. In cases where a breaching fiduciary later forgave ESOP debt, courts have uniformly declined to offset the damages amount for overpayment by the amount of the debt forgiven. *Id.*; *see Bruister*, 823 F.3d at 270–71; *Henry v. U.S. Trust Co. of Cal., N.A.*, 569 F.3d 96, 98–100 (2d Cir. 2009); *Chesemore v. All. Holdings, Inc.*, 948 F. Supp. 2d 928, 943–45 (W.D. Wis. 2013); *Neil v. Zell,* 767 F. Supp. 2d 933, 945–46 (N.D. Ill. 2011); *Reich v. Valley Nat. Bank of Ariz.*, 837 F. Supp. 1259, 1274 (S.D.N.Y. 1993).

Under ERISA, the Sentry ESOP was entitled to receive stock that was worth the full amount that it paid. 29 U.S.C. §§ 1108(e), 1002(18). Because the ESOP instead received stock that was worth far less, a fixed loss occurred at the time of the 2010 Transaction. *See Brundle*, 919 F.3d at 783. Accordingly, courts recognize that an ESOP suffers immediate harm when it takes on debt to purchase company stock at an inflated price. *See Bruister*, 823 F.3d at 271; *Henry*, 569 F.3d at 99 n.4. For example, the ESOP's finances become "constrained by the obligation to commit future income streams to repaying the loan," and its "ability to obtain future loans at a low rate decreases, because the borrower is now a greater credit risk." *Henry*, 569 F.3d at 99 n.4. Therefore, post-transaction debt forgiveness should not "be construed as having reduced, *post facto*, the purchase

price in the first transaction, and thus to have reduced any loss for which damages should be awarded." *Id.* at 99.

The district court determined that the ESOP overpaid by $6.5 million in the 2010 Transaction. Four years after that transaction closed, "[i]n 2014, amid a downturn in the soda industry, Adam Vinoskey forgave $4.6 million of the Sentry ESOP's outstanding debt." JA 2383. The district court followed circuit precedent and declined to offset that amount by the $4.6 million of the Sentry ESOP's debt Vinoskey forgave in 2014. JA 2436–37. Yet, Vinoskey still argues that any damages from overpayment should be reduced by the amount of debt he later forgave, App. Br. 36, because harm to an ESOP under such circumstances is "a fiction" since ESOPs would have no investable assets without assuming debt and do not make investments primarily outside of the employer's securities. App. Br. 37–38.[16]

Vinoskey's argument is contrary to this Court's and others' view of harm. *Brundle*, 919 F.3d at 783; *see also Henry*, 569 F.3d at 98, 99 n.4; *Bruister*, 823 F.3d at 271; *Neil*, 767 F. Supp. 2d at 942. The Sentry ESOP's "assumption of

[16] Even if an offset is legally permissible, which it is not, Vinoskey incorrectly suggests that the offset should be dollar-for-dollar $4.6 million. It would be worth significantly less. In 2014, the company's per-share price was much lower than $406.00. JA 1126 ($232.00 per share as of December 31, 2014, on a controlling-interest basis). Thus, forgiving $4.6 million in debt resulted in the release of shares to the ESOP worth much less than $4.6 million.

indebtedness itself" constituted harm. *Henry*, 569 F. 3d at 99 n.4. Had the ESOP not overpaid by $6.5 million, "it would have shouldered . . . millions of dollars less in debt[.]" *Brundle*, 919 F.3d at 783. This constitutes "immediate legal and economic consequences" to the ESOP. *Henry*, 569 F.3d at 98. The debt forgiveness here had "no effect" on the loss due to the overpayment, *id.* at 100, because it did not change the purchase price. *Neil*, 767 F. Supp. 2d at 946.

Vinoskey claims that the cases declining to offset damages by post-transaction debt forgiveness are factually distinguishable because they involved a subsequent sale of the company to a third-party buyer in which the ESOP was disadvantaged by its inflated debt. App. Br. 38–39; *see, e.g.*, *Brundle*, 919 F.3d at 783. Vinoskey argues that these courts rightfully ignored the post-transaction debt forgiveness in order to return the ESOPs to the position they would have been in had they taken out smaller loans to acquire company stock, but that here, the Sentry ESOP is getting a prohibited windfall. App. Br. 39.

This is nonsense. The reason this Court in *Brundle* refused to offset post-transaction loan forgiveness had nothing to with the subsequent sale of the company and everything to do with the fact the debt forgiveness was an "independent act" from the overpayment that "has no bearing on the ESOP's loss." *Brundle*, 919 F.3d at 783. That loss stemmed from the ESOP's overpayment and from the fact that "'the assumption of indebtedness has immediate legal and

economic consequences even before the borrower begins to repay the debt.'" *Id.* at 783–84 (*quoting Henry*, 569 F.3d at 99 n.4); *see also Hugler v. First Bankers Tr. Servs. Inc.*, 2017 WL 1194692, at *20–22 (S.D.N.Y. Mar. 30, 2017); *Valley Nat. Bank,* 837 F. Supp. at 1274. Far from being the reason this Court in *Brundle* refused to offset post-transaction debt forgiveness, the subsequent company sale in that case was invoked by the *defendant* in order to *reduce* overpayment damages, which this Court soundly rejected.

Finally, Vinoskey argues that principles of equity warrant an offset of the damages because his post-transaction debt forgiveness effectively caused the ESOP to gain 100% ownership of Sentry for $9.6 million. App. Br. 40. That is incorrect: the Sentry ESOP immediately owned 100% of Sentry post-transaction. JA 2359. And because the harm here was overpayment, "[p]rinciples of restitution . . . entitle the ESOP and its participants to compensation for the loss from *the overpayment*." *Brundle*, 919 F.3d at 783 (emphasis in original). "Any subsequent gains involving the stock," such as later, unrelated debt forgiveness, "have no bearing on that loss" and do not constitute a prohibited windfall. *Id.*

Although amicus ASA recognizes that "the District Court followed legal precedent when it refused to offset damages due to Vinoskey's $4.6 million loan forgiveness," ASA Br. 17, both amici nonetheless join Vinoskey's offset argument. In doing so, they each rely on inapposite analogies where the purpose of the offset

was to remedy something that affected the value of the asset *at the time of the transaction*. Blaugher Br. 27; ASA Br. 17–18. In contrast, Vinoskey forgave debt four years after the 2010 Transaction closed for reasons completely unrelated to the value of the stock at the time of the overpayment. This distinction is not only borne out by the case law, it is common sense. If an individual sold a fake painting for $10,000, and then four years later gave the same buyer $500 as a wedding present, the seller could not later invoke the wedding present as an offset when sued for civil fraud. So too here: Vinoskey did not forgive $4.6 million in debt in order to remedy the ESOP's overpayment—rather, he did so to assist his company during a downturn. JA 2383.

Unrelated debt forgiveness does not offset the loss caused by a prohibited transaction. *Brundle*, 919 F.3d at 783 (rejecting the argument that the sellers' forgiveness of $30 million of ESOP debt was an effective reduction of the ESOP's overpayment, noting that the debt forgiveness was not meant to—nor could it—remedy the ESOP's overpayment). Vinoskey's 2014 debt forgiveness, driven by a downturn in the soda industry, was "wholly unrelated" to the overpayment and occurred "*prior* to the initiation of any legal proceedings" about the prohibited transaction. *Id.* (emphasis in original). Because it was an "independent act [that] has no bearing on the ESOP's loss," *id.*, the district court was correct in holding damages should not be offset by the amount of debt forgiven in 2014. JA 2437.

CONCLUSION

The Secretary respectfully requests affirmance of the decision below.

REQUEST FOR ORAL ARGUMENT

The Secretary requests oral argument because he believes that discussion of the facts and law will benefit the Court's consideration of this case.

November 17, 2020

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

JEFFREY HAHN
Litigation Counsel

/s/ Stephanie Bitto
STEPHEN SILVERMAN
STEPHANIE BITTO
B.A. SCHAAFF

Attorneys
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
silverman.stephen@dol.gov
bitto.stephanie@dol.gov
(202) 693-5616

Counsel for the Secretary of Labor

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[X] this brief contains [12,947] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii).

1. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*

[ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/ Stephanie Bitto

Counsel for the Secretary of Labor

November 17, 2020

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of November, 2020, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to registered CM/ECF users.

/s/ Stephanie Bitto

Counsel for the Secretary of Labor

November 17, 2020