No. 17-35076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. ALEXANDER ACOSTA, Secretary,
United States Department of Labor,
Plaintiff-Appellee,
v.
MATTHEW D. HUTCHESON,
Defendant-Appellant.

On Appeal from the United States District Court for Idaho
Case No. 1:12-cv-00236-EJL
The Honorable Judge Edward J. Lodge

BRIEF FOR THE SECRETARY OF LABOR

NICHOLAS C. GEALE
Acting Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for
Plan Benefits Security

THOMAS TSO
Counsel for Appellate and Special Litigation

D. MARC SARATA
Trial Attorney
Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. N-4611
Washington, D.C. 20210
(202) 693-5637

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. section 1331. Pursuant to 28 U.S.C. section 1291, this Court has jurisdiction to review the district cour t's final judgment entered on December 15, 2016.

STATEMENT OF THE ISSUES

Appellant Matthew D. Hutcheson is a fiduciary to employee benefit plans covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. He caused the plans to engage in a prohibited transaction in violation of ERISA section 406, 29 U.S.C. § 1106, and breached his fiduciary duties under ERISA by transferring over $3,276,000 in plan assets to benefit a company owned by Mr. Hutcheson. Following a criminal conviction upheld by this Court, the district court granted summary judgment to the Secretary and permanently barred Mr. Hutcheson from serving as a fiduciary to ERISA-covered plans. Mr. Hutcheson now seeks to overturn the permanent bar and the summary judgment for the Secretary.

The questions presented by Mr. Hutcheson, as restated by the Secretary, are:

1. Whether the district court erred by granting the Secretary's motion for summary judgment when the court had stayed discovery due to parallel criminal proceedings but expressly permitted motions practice.

2. Whether the district court erred by finding no genuine issue of material fact existed as to whether Mr. Hutcheson committed a prohibited transaction under ERISA.

3. Whether Mr. Hutcheson raised any issue of material disputed fact or valid legal arguments sufficient for reversal of the district court's grant of summary judgment for the Secretary.

4. Whether this Court should reverse the district court's grant of summary judgment where Mr. Hutcheson argues, for the first time on appeal, that the Secretary's civil action subjected him to double jeopardy.

STATUTORY AUTHORITIES

The statutory authorities relied upon by the Secretary appear in the Secretary's Addendum.

STATEMENT OF THE CASE

The Retirement Security Plan and Trust (the "Trust"), founded in 2003, classified itself as a multiple-employer, defined-contribution pension plan under ERISA. (Hutcheson Excerpt of Record[1] ("ER") 80 ¶ 10; ER114).[2] In reality, the Trust was not itself an ERISA plan, but instead held the plan assets of many

[1] Mr. Hutcheson's Excerpt of Record is titled "Excerpt of Transcript," (ECF No. 18-2 and 18-3), but is referred to herein as Excerpt of Record, abbreviated as "ER." The Secretary's Supplemental Excerpt of Record is abbreviated as "SER."

[2] The name at founding was Pension Liquidity Plan and Trust. The name was changed during 2007. (ER137).

ERISA-covered plans established by the employers participating in the Trust ("Plans"). (ER26 ¶ 17; ER309).

At all times relevant, Mr. Hutcheson acted as the designated trustee for the Trust. (ER79 ¶ 4). Beginning in 2004, Hutcheson Walker Advisors, LLC ("HWA") was designated as both the "plan sponsor" and plan administrator for the Trust. (ER79 ¶ 4; ER141). Mr. Hutcheson directly and indirectly owned 50% of HWA and was a director and vice president of HWA. (ER150 ¶ 3; ER155; ER157). In his various roles, Mr. Hutcheson exercised authority and control over the assets of the ERISA-covered Plans that placed plan assets in the Trust. (ER26 ¶ 17; ER309; ER79 ¶ 4). Accordingly, it is undisputed that Mr. Hutcheson was a fiduciary to these Plans under ERISA. (ER367 ¶ 7; No. 24; ER26 ¶ 17; ER309).

In 2010, Mr. Hutcheson directed the liquidation of over $3 million in the Plans' investments held by the Trust. (ER387-388; ER81-83 ¶¶ 15-19). Mr. Hutcheson then caused $3 million of the Plans' cash assets to be wired to Pacific Continental Bank (the "Bank"), (ER387-388), for the benefit of Green Valley Holdings, LLC ("Green Valley"), a company formed, owned and controlled by Mr. Hutcheson, (ER379; ER121; ER175-6; ER167). Green Valley used the money to purchase a note held by the Bank. (ER365-366 ¶ 2). The debtor on the note was the owner of the Osprey Meadows Golf Course and Lodge (the "Golf Course") and the note was secured by an interest in the Golf Course. (ER365-366 ¶ 2). Mr.

Hutcheson admits that, in return for the $3 million Green Valley used to purchase the note from the Bank, the Trust received a promissory note from Green Valley memorializing a $3 million debt owed by Green Valley to the Trust. (ER366 ¶¶ 3-4). Thus, Mr. Hutcheson used the Plans' assets, held by the Trust, to purchase a secured interest in the Golf Course for his own company.

In October 2011, Mr. Hutcheson filed an annual return (called a "Form 5500") with the Department of Labor on behalf of the Trust, bearing his electronic signature and under penalty of perjury. (ER90-126). Mr. Hutcheson admitted to the transaction in the Form 5500, stating that he, acting as trustee, caused the Trust to transfer over $3 million from the Trust to Green Valley, a company he owned. (ER90-126). Mr. Hutcheson's Answer to the Secretary's Complaint in this case acknowledged his admission on the Form 5500 and admitted that he had engaged in a prohibited transaction under ERISA. (ER309 (admitting allegation contained in ER23 ¶6)).[3]

In April 2012, Mr. Hutcheson was indicted (and later convicted in federal court) on 17 counts of wire fraud, including five that relate to his theft from the Trust, encompassing the acts at issue in this appeal. (ER374-394; ER461-462;

[3] Mr. Hutcheson did not controvert or deny these facts relating to his violations in his opposition to the Secretary's motion for summary judgment or on appeal. E.g., Hutcheson Br. 23-24 (raising only immaterial facts post-dating the ERISA violations).

ER464-469). In May 2012, the Secretary filed his complaint against Mr. Hutcheson and sought a temporary restraining order ("TRO") and a preliminary injunction barring Mr. Hutcheson from exercising any fiduciary authority and control over the Plans' assets and the Trust. (ER21-36; ER46-52). The court granted a TRO in May 2012 and a preliminary injunction in June 2012. (ER268-278; ER279-303). The Court also appointed an independent fiduciary to administer the Trust and the Plans. (ER279-303).

On July 17, 2012, the U.S. Attorney moved the district court for permission for the United States to intervene in the Secretary's civil suit against Mr. Hutcheson to seek a stay of civil discovery but not of any other aspect of the civil case. (ER329-335). Neither the Secretary nor Mr. Hutcheson objected to the motion filed by the United States, and the district court granted permission to intervene and stayed civil discovery on September 7, 2012. (ER338-339).

On April 15, 2013, Mr. Hutcheson was convicted of, inter alia, wire fraud relating to the Trust. (ER461-462). The criminal judgment included a provision that Mr. Hutcheson make restitution of approximately $5.3 million to all the victims of his fraud, including the fraud relating to the Trust. (ER461-462). The Secretary filed his Motion for Summary Judgment in March 2016. The court entered summary judgment and a final order of judgment on December 15, 2016. (ER4-19). Based on Mr. Hutcheson's admissions, the facts underlying Mr.

Hutcheson's criminal convictions, and the entire record in the district court, the court concluded that "it was undisputed" that Mr. Hutcheson committed a prohibited transaction under ERISA section 406, 29 U.S.C. § 1106. The court also concluded that Mr. Hutcheson breached his fiduciary duties to the Plans under ERISA when he committed the prohibited transaction. (ER4-18). The court ordered that Mr. Hutcheson be removed from all positions with the Trust and the Plans and permanently barred from acting as a fiduciary for any ERISA-covered plan. (ER4-18). The court also denied Mr. Hutcheson's cross-motion for declaratory judgment as moot. (ER504-509; ER4-18). The court permanently installed an independent fiduciary to manage the Trust and recover its assets. (ER4-18). Mr. Hutcheson's notice of appeal was docketed on January 20, 2017. (ER20).

SUMMARY OF THE ARGUMENT

The district court correctly granted summary judgment after finding that there was no issue of material fact that Mr. Hutcheson committed a prohibited transaction under ERISA section 406 and breached his fiduciary duties under ERISA when he liquidated over $3 million in assets belonging to employee benefit plans and transferred that money to benefit a company he owned. Consequently, the district court acted properly in removing Mr. Hutcheson from any fiduciary

position with the Trust and the Plans, and permanently barring him from serving as a fiduciary for any ERISA plan.

Mr. Hutcheson raises a variety of challenges to the district court's judgment, all of which are meritless.

1. Mr. Hutcheson argues, for the first time on appeal, that the district court erred in granting the Secretary's summary judgment motion where discovery had been stayed to prevent Mr. Hutcheson from circumventing the narrower discovery process in his criminal case. Mr. Hutcheson identifies no legal authority supporting his argument.

2. Mr. Hutcheson argues that the district court erred in finding that the undisputed material facts established that he committed a prohibited transaction and breached his fiduciary duties under ERISA. To the contrary, the undisputed facts, including Mr. Hutcheson's binding admissions and criminal conviction, demonstrate that the Secretary is entitled to summary judgment on this issue.

3. Mr. Hutcheson argues that the trial court ignored certain facts and legal arguments in granting summary judgment for the Secretary. However, those facts and arguments relate to Mr. Hutcheson's improper attempt to re-litigate his criminal case in this proceeding, are facts and arguments that Mr. Hutcheson did not raise below, or are immaterial facts and arguments concerning events that post-date his ERISA violations. The record below clearly shows that no genuine

dispute as to any material fact exists and that the Secretary is entitled to judgment as a matter of law.

4. Mr. Hutcheson argues, without relevant legal authority, that the Secretary's civil action is so punitive that it violates the Constitution's guarantee against double jeopardy in criminal cases. However, relevant legal authority is unanimous that the Secretary's injunctive relief does not violate the Double Jeopardy Clause.

Mr. Hutcheson simply presents no legal or factual ground to reverse the district court's decision, and this Court should affirm that judgment.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment de novo and, in viewing the evidence in the light most favorable to the non-moving party, must determine whether there are any genuine issues of material fact and whether the trial court correctly applied the applicable substantive law. Leisek v. Brightwood Corp., 278 F.3d 895, 898 (9th Cir. 2002) (citing Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)). The party seeking summary judgment has the burden of demonstrating the absence of a genuine issue of fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on

the pleadings in order to avoid summary judgment, but must instead "set forth specific facts" showing a genuine issue for trial. Id. at 323-24. The mere existence of some alleged factual dispute between the parties is not sufficient to defeat a properly-supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party opposing summary judgment must come forward with evidence concerning a material issue that is more than "merely colorable" and must be "significantly probative" to avoid summary judgment. Id. at 249-250.

II. THE STAY OF DISCOVERY IS IRRELEVANT TO THE PROPRIETY OF THE SUMMARY JUDGMENT DECISION

Mr. Hutcheson argues that the trial court erred by ruling on the Secretary's motion for summary judgment while discovery was stayed due to the parallel criminal proceedings. (Hutcheson Br. 1). Mr. Hutcheson's argument rests on the incorrect premise that the trial court should not have ruled on the Secretary's motion for summary judgment because his criminal case "has not been resolved." (Hutcheson Br. 1). Mr. Hutcheson asserts that the stay below was ordered "because the law and facts of [the case] are almost identical to my criminal action. My criminal action has not been resolved because my Motion under 28 USC § 2255 has not been decided (i.e. my Section § 2255 motion is an extension of my underlying criminal proceeding)." (Hutcheson Br. 1). This argument fails for several reasons.

First, Mr. Hutcheson failed to raise this argument below and, therefore, is barred from making this argument for the first time in this Court.[4] Visendi v. Bank of Am., N.A., 733 F.3d 863, 869 (9th Cir. 2013).

Second, Mr. Hutcheson's argument, that summary judgment is improper because his criminal case was not over, is without any merit.[5] The motion for the stay of discovery, *to which Mr. Hutcheson had no objection*, (ER333), expressly

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[4] In district court, Mr. Hutcheson filed a notice that he intended to respond to the Secretary's motion for summary judgment and requested an extension to respond to the Secretary's motion on the grounds that he did not have his legal files (which he asserted contained the documents he needed to respond to the motion). (ER479-481). After receiving an extension, (ER4), Mr. Hutcheson filed a response to the Secretary's motion, (ER491-503), a motion requesting declaratory relief, (ER504-509), and a motion requesting an evidentiary hearing, (ER517-518). In these numerous filings below, Mr. Hutcheson never raised the argument that the court should lift the stay on discovery before ruling on the Secretary's motion (or Mr. Hutcheson's own motions).

[5] Mr. Hutcheson continues to assert incorrectly that his criminal conviction is not final because of his section 2255 petition and therefore the stay should continue. Not only is Mr. Hutcheson incorrect, as discussed in this section, about the stay affecting in any way the court's ability to rule on summary judgment motions, he is also incorrect on this tangential point. A criminal conviction becomes final when all direct appeals are exhausted. United States v. Frady, 456 U.S. 152, 164 (1982); accord Clay v. United States, 537 U.S. 522, 527 (2003) (in post-conviction context, criminal conviction becomes final when the Supreme Court "affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). A motion under 28 U.S.C. section 2255 is not a direct appeal; it is a collateral attack on the sentence or conviction. Frady, 456 U.S. at 164. Therefore, the finality of that conviction is not affected by the collateral attack on his sentence. Id. The Secretary's motion for summary judgment was filed on March 30, 2016, months after Mr. Hutcheson exhausted all appeals of his criminal conviction. (ER7).

provided that "motion practice, settlement negotiations, and status conferences can proceed on schedule," (ER333-334). Accordingly, the district court, without objection from the parties, permitted motions, including motions for summary judgment, to proceed during the stay.

Mr. Hutcheson identifies no rule or legal basis to suggest that a motion for summary judgment and a decision on summary judgment are improper during a stay of discovery. In fact, Federal Rule of Civil Procedure 56 permits motions for summary judgment to be filed "at any time after . . . 20 days have passed from commencement of the action." Here, the Secretary filed his complaint in May 2012, the stay began four months later in September 2012, and the summary judgment motion was filed around four years after the commencement of the case. Mr. Hutcheson did not seek to lift the stay during this time and should not be able to complain about the stay and its effect for the first time on appeal in conclusory fashion and without identifying any material topics for discovery. Visendi, 733 F.3d at 869; see also Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 (9th Cir. 2001) (affirming summary judgment because "[the non-moving party] merely state[d] in conclusory form that it was deprived of the opportunity to discover additional crucial evidence without ever identifying the content of that evidence").

In the end, even if Mr. Hutcheson believed (incorrectly) that the stay was impeding his ability to defend against summary judgment, Mr. Hutcheson could

have moved to end the stay or respond to the summary judgment motion by stating that he needed discovery in order to be able to respond in full. Fed. R. Civ. P. 56(d). But he did neither.

III. THE UNDISPUTED FACTS SHOW THAT MR. HUTCHESON COMMITTED A PROHIBITED TRANSACTION UNDER ERISA

Mr. Hutcheson's second assignment of error asserts that the district court improperly relied on his conviction for wire fraud for stealing money from the Trust and his two admissions that he had committed a prohibited transaction under ERISA in granting summary judgment for the Secretary. (Hutcheson Br. 21-23). Throughout these proceedings, Mr. Hutcheson never disputed that he twice admitted to committing the prohibited transactions. (ER9; ER364-369; ER121; ER308). In fact, Mr. Hutcheson did not even mention his two admissions of entering into prohibited transactions in any brief until this appeal. Most importantly, Mr. Hutcheson did not dispute his admission of his role in a prohibited transaction under ERISA section 406 in response to the Secretary's motion for summary judgment. (ER491-503).

Specifically, Mr. Hutcheson *never disputed* the Secretary's statement of undisputed facts that he admitted under oath, on a Form 5500 annual return required to be filed with the Department of Labor, that he caused the Trust to enter into a prohibited transaction by transferring money to a company he owned (ER366 ¶¶ 3-4; ER121), and that, in his Answer, Mr. Hutcheson admitted the

allegations in the Secretary's Complaint that Mr. Hutcheson was a fiduciary to the Trust, (ER26 ¶17; ER309), and that he had entered into a "prohibited transaction" under ERISA with the Trust, (ER23 ¶6; ER309). Because he failed to challenge these admissions below, he has waived any challenge and cannot raise it now for the first time on appeal. This Court should affirm on the basis of those binding admissions. Visendi, 733 F.3d at 869.

Instead of directly challenging the admissions, Mr. Hutcheson claims on appeal that he was unable to explain "the entirety of facts/circumstances as to why there are alleged admissions in the 5500 and/or [Hutcheson's answer to] paragraph 6 of the DOL complaint . . ." because he was not able to conduct discovery in the civil case. (Hutcheson Br. 23). What Mr. Hutcheson fails to mention is that discovery would not have aided his collection of facts about this issue—he was the only person who made those statements. Admissions are conclusive, regardless of his vague allegations of evidence to the contrary. "Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). Such admissions have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Id.

Mr. Hutcheson also disputes the district court's reliance on his criminal conviction because he has raised a collateral attack on the criminal sentence in his section 2255 petition. (Hutcheson Br. 21). This argument is without merit and does not call into dispute his admission of his ERISA violations and his criminal conviction for wire fraud based on his removal of funds from the Trust. "It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978) (citing McCarthy v. United States, 394 U.S. 459, 466 (1969)); see also Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978).[6] As this Court observed in confirming Mr. Hutcheson's conviction and sentence, "a rational trier of fact could have found the elements of wire fraud beyond a reasonable doubt. . . . There is abundant evidence in the record to support his convictions on all counts, including not only his personal use of investors' funds to buy or improve his own property, but also a range of conduct from forged

[6] "Collateral estoppel" or issue preclusion applies when: "'(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.'" Paulo v. Holder, 669 F.3d 911, 917 (9th Cir. 2011) (citation omitted); Durkin v. Shea & Gould, 92 F.3d 1510, 1515 (9th Cir. 1996) ("collateral estoppel" is "issue preclusion").

documents and fabricated account balance statements to witness testimony regarding Hutcheson's misleading statements about plan participants' inability to withdraw funds." United States v. Hutcheson, 603 F. App'x 613, 614 (9th Cir. 2015). Therefore, the Court, having previously recognized Mr. Hutcheson's "looting of funds from [ERISA] plans for personal use," id., should affirm summary judgment for the Secretary based on the undisputed facts.

IV. MR. HUTCHESON'S ASSERTED "TRIABLE ISSUES OF FACT" AND LEGAL ARGUMENTS ARE IMMATERIAL AND WITHOUT MERIT

Mr. Hutcheson's second and third assignments of error include rambling and repeated contentions that the district court failed to properly take into account a laundry list of alleged facts and legal arguments, which are either incorrect or immaterial to his ERISA violations. These arguments, grouped here, do not address the underlying elements of his violations; instead, they raise tangential legal and factual arguments in an attempt to confuse the Court with extraneous facts or raise meritless legal defenses to his violations.

The Secretary will address Mr. Hutcheson's arguments below, grouped by whether the arguments sound in fact or law. Regardless of the category, all of Mr. Hutcheson's arguments are immaterial and intended to distract the Court from (1) Mr. Hutcheson's admissions that he committed a transaction prohibited under ERISA by removing over $3 million from the Trust and (2) his conviction for wire fraud for the same underlying theft, among others. Mr. Hutcheson's misdirection

cannot undermine the propriety of the district court's granting summary judgment on the undisputed facts and its denying his motion for declaratory judgment on the same issues as moot.

A. Mr. Hutcheson's Factual Arguments Do Not Raise a Dispute Concerning a Material Fact

1. The Independent Fiduciary's Actions Since Mr. Hutcheson's Fraud Fail To Negate Mr. Hutcheson's ERISA Violations

Mr. Hutcheson seeks to muddy the waters by criticizing (and mischaracterizing) the actions of the successor fiduciary of the Trust in attempting to recover monies for the participants and beneficiaries of the Plans, who collectively lost over $3 million in retirement savings as a result of Mr. Hutcheson's actions. (Hutcheson Br. 35). Again, Mr. Hutcheson seeks to support his theory through the improper use of judicial notice of "facts," as set forth in his request for judicial notice, which the Secretary opposes in a separate filing. (ECF No. 20). Setting aside that those facts were not put before the district court, or the brazenness of finding fault with the actions of the successor fiduciary in relation to a document *forged by Mr. Hutcheson* (e.g., Hutcheson Br. 12), Mr. Hutcheson's arguments do not create a dispute about any material fact. No act of the successor fiduciary changes the undisputed facts that Mr. Hutcheson admitted to committing a prohibited transaction and was convicted for stealing $3 million from the Trust's participating Plans.

2. Mr. Hutcheson's Filing A Form Allegedly Removing and Later Adding Himself As A Member/Manager of Green Valley Does Not Insulate Him From Liability For Transferring Money From ERISA Plans to His Company

Mr. Hutcheson argues, without shame, that he has raised a material issue of fact concerning whether he could have committed the prohibited transaction, *that he repeatedly admitted to committing*, because he removed himself, on a form he filed with the Idaho Secretary of State, as a member of his limited liability company, Green Valley, immediately before executing the loan documents between the Trust and Green Valley as part of the prohibited transaction. (Hutcheson Br. 36). First, Mr. Hutcheson did not raise this issue in the district court and has therefore waived it. Visendi, 733 F.3d at 869. Second, judicial notice of the type of facts requested by Mr. Hutcheson in support of this argument is inappropriate, as set forth in the Secretary's opposition to the request for judicial notice. Third, it is undisputed by Mr. Hutcheson that he later added himself back as a member of his company (ER365-366 ¶2; ER169), and therefore "directly or indirectly" owned and was in control of the company at all relevant times, which is sufficient to render the company, Green Valley, a party in interest under ERISA section 3(14)(G), 29 U.S.C. § 1002(14)(G), and to make the transfer of funds from the Trust to Green Valley a prohibited transaction under ERISA section 406(a)(1)(B) and (D), as well as 406(b)(1), (2), 29 U.S.C. §§ 1106(a)(1)(B) and (D), 1106(b)(1) and (2). He never states that he had divested all direct or indirect

interest in Green Valley at the relevant times. The Court should not reward Mr. Hutcheson's tawdry attempt to circumvent his fiduciary duties under ERISA by belatedly proffering a document he created and filed with the Idaho Secretary of State that is devoid of any facts. That document is no better than a self-serving, conclusory allegation that contradicts his own admissions of ownership at the time of the transaction and the facts underlying his criminal conviction. (ER366 ¶¶ 3-4; ER121). Such a self-serving document, even if relevant, is insufficient to oppose summary judgment. See Ah Quin v. Cty. of Kauai Dep't of Transp., 733 F.3d 267, 289 (9th Cir. 2013) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.") (citation omitted).

3. Mr. Hutcheson's Liability For Committing a Prohibited Transaction Does Not Depend On What Assets Were "Plan Assets" After Mr. Hutcheson Removed $3 Million From the Trust

Mr. Hutcheson contends that he has raised a material issue of disputed fact concerning what "plan assets" belonged to the Plans as a result of the prohibited transaction that he previously admitted. (Hutcheson Br. 37-43, passim). However, what was transferred into the Trust (*in exchange for the $3 million in plan assets*

removed by Mr. Hutcheson to benefit his own company), is irrelevant to whether or not he committed a prohibited transaction by transferring the Plans' $3 million.[7]

It is undisputed that the Trust had over $3 million of the Plans' assets in a bank account prior to the prohibited transaction conducted by Mr. Hutcheson. (ER366 ¶¶ 1-4). It is also undisputed that these funds were held by the Trust as the plan assets of the participating Plans. (ER26 ¶17; ER309). See also U.S. Dep't of Labor, Off. Pension & Welfare Benefit Programs, Adv. Op., 93-14A, 1993 WL 188473, at *4 (May 5, 1993) ("In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest."). It is also undisputed that Mr. Hutcheson was a fiduciary to ERISA Plans participating in the Trust. (ER26 ¶17; ER309). Mr. Hutcheson admits to these facts in his Form 5500 filings. (ER121).

Mr. Hutcheson plainly committed a prohibited transaction by dealing with the assets of the Plans in his own interest (for the benefit of his company, Green Valley), in violation of ERISA section 406(b)(1), 29 U.S.C. § 1106(b)(1), and by acting on both sides of the transaction, on behalf of his own company and as a fiduciary to the Trust's participating Plans, in violation of ERISA section

[7] Mr. Hutcheson requested an evidentiary hearing, (ER517-518), solely on this issue, which he raised in his request for declaratory relief, (ER504-509). The request for declaratory relief was denied as moot by the district court upon granting summary judgment for the Secretary. (ER10).

406(b)(2), 29 U.S.C. § 1106(b)(2). Mr. Hutcheson's defense that the Plans suffered no damages (his conviction for wire fraud notwithstanding) is completely meritless and immaterial; violations of ERISA section 406(b) are per se violations—good faith or the reasonableness of a transaction are immaterial. Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001) (quoting Gilliam v. Edwards, 492 F. Supp. 1255, 1264 (D.N.J. 1980)).

Furthermore, ERISA section 406(a)(1) "categorically" bars a fiduciary from causing a plan to enter into transactions with "parties in interest" to the plan. Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242 (2000); see also 29 U.S.C. § 1106(a). As a fiduciary, Mr. Hutcheson is also automatically a party in interest to the ERISA plans participating in the Trust, as is any company he owns or controls "directly or indirectly." 29 U.S.C. § 1002(14)(A) and (G). Accordingly, Mr. Hutcheson also committed a prohibited transaction by extending credit, with the Plans' assets, between the Trust and a party-in-interest, his company, ERISA section 406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B), and transferring the Plans' assets out of the Trust for the benefit of his company, ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D). In light of the nature of these ERISA violations, what type of real or fictional assets were allegedly later purchased with

the money transferred out of the Trust to his company is utterly immaterial for the facts establishing this violation and Mr. Hutcheson's liability.[8]

B. Mr. Hutcheson's Legal Arguments Are Without Any Merit

As discussed below, Mr. Hutcheson makes several legal arguments for excusing his ERISA violations, which were all rejected by the district court and should be rejected by this Court.

1. Voluntary Dismissal Of The Trust Successor Fiduciary's State Law Claims Against Mr. Hutcheson Has No Effect On This Case

Mr. Hutcheson asserts that the Trust's successor fiduciary, who was appointed by the district court, dismissed all of the Trust's state law claims brought against Mr. Hutcheson for his fiduciary breaches. (Hutcheson Br. 35; Mot. Jud. Not. 14). Mr. Hutcheson has the burden to establish any preclusive effect from this order, but he did not assert any form of preclusion as an affirmative defense below; the issue is thereby waived on appeal. Santos v. Alaska Bar Ass'n, 618 F.2d 575, 577 (9th Cir. 1980); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). Furthermore, while the agreed order of dismissal is in the record, (USDC ECF No. 103-1), the exact claims brought by the successor

[8] Similarly, this Court rejected Mr. Hutcheson's argument, in the appeal of his criminal case, that excluding evidence of the assets that Mr. Hutcheson allegedly gave to the Plans in exchange for over $3 million was improper. Hutcheson, 603 F. App'x at 614. This Court held that the assets were excludable as evidence of intent to repay, which was "irrelevant" to his criminal case. Id.

fiduciary are not in the record and Mr. Hutcheson has therefore not met his burden. Mr. Hutcheson has requested judicial notice be taken of the successor fiduciary's complaint on appeal, but the Secretary opposes that request because Mr. Hutcheson mischaracterizes the "facts" embodied by the complaint, as set forth in more detail in the Secretary's opposition. The motion is pending before this Court. More importantly, whether the actual facts of the successor fiduciary's complaint are noticed or not, Mr. Hutcheson's argument fails for this simple reason: Mr. Hutcheson has provided no reason that the state-law claims asserted by the Trust against Mr. Hutcheson should have preclusive effect on the Secretary's federal ERISA claims, which includes a claim to remedy injury to ERISA Plans, and not just the Trust. He has not only waived the argument but also failed to satisfy his burden.

The Secretary filed his Complaint against Mr. Hutcheson based on ERISA sections 409, 502(a)(2), and 502(a)(5). 29 U.S.C. §§ 1109 and 1132(a)(2), (5). These sections provide that the Secretary has standing, independent of any standing of an ERISA plan participant, beneficiary, or fiduciary, to bring an action seeking to impose liability for a fiduciary breach, enjoin any act violating Title I of ERISA, obtain equitable relief to redress a violation of Title I of ERISA, and obtain equitable relief to enforce any provision of Title I of ERISA. See Sec'y United States Dep't of Labor v. Kwasny, 853 F.3d 87, 95 (3d Cir. 2017) ("we

conclude that in ERISA suits, the Secretary is not in privity with private litigants and is therefore not bound by the results reached by private litigation"); Herman v. S.C. Nat'l Bank, 140 F.3d 1413, 1424 (11th Cir. 1998) (same); Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991) (same); Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 690–94 (7th Cir. 1986) (en banc) (same); Donovan v. Cunningham, 716 F.2d 1455, 1462–63 (5th Cir. 1983) (same); see also Mertens v. Black, 948 F.2d 1105, 1106 (9th Cir. 1991) (applying privity requirement to ERISA claim involving private litigants); California v. IntelliGender, LLC, 771 F.3d 1169, 1177 (9th Cir. 2014) (agreeing with and applying Herman in a non-ERISA case).

In addition, if the Court does consent to take notice of the state law complaint, the successor fiduciary only claimed violations of state law fiduciary obligations to the Trust, and not ERISA obligations to ERISA-covered Plans or the public interest. (Mot. Jud. Not., Ex. 14). Therefore, any dismissal of a claim by the successor fiduciary has no impact on the Secretary's suit against Mr. Hutcheson because the Secretary's standing does not derive from the rights of any other person nor is he in privity with a private litigant. Instead, the Secretary protects the public interest in "prevent[ing] those who have engaged in illegal activity from causing loss to any future ERISA plan participant[s]." Fitzsimmons, 805 F.2d at 696–97 (citation and internal quotation omitted). As the Seventh Circuit observed, "private parties can never be representatives of this clear, specific, and unambiguous

national interest of the Secretary." Id. The Secretary's separate and distinct interest is exemplified by the injunctive relief requested and granted here to bar Mr. Hutcheson from serving as an ERISA fiduciary to any ERISA plan to protect the "public" and "national" interests not served by private litigation. Id. Therefore, Mr. Hutcheson's preclusion argument must fail.

2. Department Of Labor's Interpretative Bulletin 94-1 Did Not Allow Mr. Hutcheson To Breach His Duties Under ERISA Section 406

Mr. Hutcheson argues that the Department of Labor's Interpretive Bulletin 2509.94-1, 59 FR 32606-01, which discusses a fiduciary's duties when investing plan assets in economically targeted investments (ETIs), removed any obligation of fiduciaries to comply with their fiduciary duties under ERISA section 404 or refrain from entering into prohibited transactions under ERISA section 406.[9] Hutcheson Br. 35, 44-45. This is utterly incorrect. The plain text of the Interpretative Bulletin makes it clear that it does not remove the requirements of ERISA sections 404 and 406, which barred Mr. Hutcheson's self-dealing and disloyal conduct; the Bulletin only provides guidance on choosing investments that *do not otherwise violate ERISA*. 59 FR 32606-01 ("The fiduciary standards

[9] The Secretary notes that Interpretative Bulletin 94-1 had been superseded and modified by Interpretative Bulletin 2008-01, 73 FR 61734-01, at the time that Mr. Hutcheson was engaging in the prohibited transactions and conduct leading to his wire fraud conviction. Both bulletins have now been modified and superseded by Interpretive Bulletin 2015-01, 80 FR 65135-01.

applicable to ETIs are no different than the standards applicable to plan investments generally."). The Court should not indulge in Mr. Hutcheson's utterly baseless attempt to excuse his ERISA violations and crimes.

3. Plan Documents Cannot Excuse Prohibited Transactions and Statutory Violations

Mr. Hutcheson argues, for the first time on appeal, that the Trust documents gave him the power to commit all the acts alleged as illegal in the Secretary's complaint: "In every respect, the DOL's complaint against me usurps this given authority and makes improper allegations of wrong-doing that was expressly granted, permitted, and legal [under the plan documents]." (Hutcheson Br. 48).

First, because Mr. Hutcheson raises this issue for the first time on appeal, he has waived this argument. Visendi, 733 F.3d at 869. Second, because the Trust documents were not in the district court's record and are not suitable candidates for judicial notice, Mr. Hutcheson's arguments regarding their content are not properly before the Court.[10] Third, if this Court does take judicial notice of the Trust documents, the Secretary points out that Section 10.04(b), on page 50 of the documents (ECF No. 19-3 p.70), states that "[t]he Trustee shall not engage in any

[10] See the Secretary's opposition to Mr. Hutcheson's requests for judicial notice. (ECF No. 20).

prohibited transaction within the meaning of the Code and ERISA."[11] This is in direct contravention to Mr. Hutcheson's argument that the documents permitted the acts that he admits constituted a prohibited transaction (and resulted in his conviction for wire fraud). Furthermore, ERISA section 404(a)(1)(D) required Hutcheson to follow plan documents only "insofar as such documents and instruments are consistent with the provisions of [title I of ERISA] and title IV." 29 U.S.C. § 1104(a)(1)(D); see also Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468-69 (2014); Central States, Se. & Sw. Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA"). Accordingly, even if a document did grant Mr. Hutcheson the power to enter into a prohibited transaction, he would have violated ERISA by taking advantage of that power improperly granted by the document. On all fronts, this Court should not be persuaded by Mr. Hutcheson's argument that the Trust document allowed him to engage in a prohibited transaction.[12]

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[11] While not an issue on this appeal, the Secretary's position is that the Trust was itself not an ERISA plan because it did not meet the requirements for a single multiple-employer pension plan. Rather it is a trust that holds the assets of, performs services for, and is the vehicle for funding the employee benefit plans established by the approximately 91 employers participating in the Trust. Mr. Hutcheson admitted below that he was a fiduciary to each of the Plans participating in the Trust arrangement. (ER367 ¶7; ER26 ¶17; ER309).

[12] Mr. Hutcheson also obliquely refers to additional arguments that are also plainly wrong, including a suggestion that the Sixth Amendment provides a right to

V. THE DOUBLE JEOPARDY CLAUSE DOES NOT APPLY TO CIVIL RELIEF SOUGHT BY THE SECRETARY UNDER ERISA

Mr. Hutcheson argues that the Double Jeopardy Clause and his conviction for wire fraud prohibit the Secretary from obtaining a permanent injunction preventing him from serving as a fiduciary to ERISA plans. (Hutcheson Br. 53-54). This is fundamentally incorrect.

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. However, the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that might be described as "punishment" in "common parlance." United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (quoting Moore v. People of State of Illinois, 55 U.S. 13, 19 (1852)). The Double Jeopardy Clause protects only against multiple *criminal* punishments for the same offense. Helvering v. Mitchell, 303 U.S. 391, 399 (1938); U.S. ex rel. Marcus, 317 U.S. at 549; Breed v. Jones, 421 U.S. 519, 528 (1975) ("jeopardy describes the risk that is traditionally associated with a criminal prosecution").

Determining whether a particular punishment is criminal or civil begins with statutory construction. Hudson v. United States, 522 U.S. 93, 98 (1997) (citing

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counsel for civil cases, see Hutcheson Br. 4 n.2. "[T]he Sixth Amendment does not govern civil cases." Turner v. Rogers, 564 U.S. 431, 441 (2011).

Helvering, 303 U.S. at 399). The first question to analyze is whether Congress "expressly or impliedly expressed a preference for one label or the other." Ward, 448 U.S. at 248. Here, the Secretary brought his suit against Mr. Hutcheson under ERISA section 502, 29 U.S.C. § 1132, which Congress enacted to provide a "civil action." 29 U.S.C. § 1132(a). The permanent injunction imposed here is a remedy provided by ERISA in such civil actions and that remedy has roots in the law of trusts, not as a form of criminal sanction. 29 U.S.C. §§ 1132(a)(2), 1109(a); see Beck, 947 F.2d at 641 (describing similar injunction as part of ERISA's remedies based in the law of trusts).

Because Congress has clearly indicated its intent that ERISA section 502 provides "civil penalties," the next step is for the Court to analyze "whether the statutory scheme was so punitive, that it transfor[ms] what was clearly intended as a civil remedy into a criminal penalty." Hudson, 522 U.S. at 98–100 (citing Ward, 448 U.S. at 248 and Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)). The Hudson Court outlined seven "useful guideposts" that should be "applied to the face of the relevant statute, with only the clearest proof sufficing to override legislative intent and transform . . . a civil remedy into a criminal penalty." Hudson, 522 U.S. at 100 (internal quotation marks omitted). The "guidepost" factors to be considered are:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically

> been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99-100 (quoting Kennedy v. Mendoza–Martinez, 372 U.S. 144, 168-169 (1963)). The remedy imposed here bars Mr. Hutcheson from serving as an ERISA fiduciary, which is analogous to the occupational debarment upheld in Hudson as a civil penalty. Id. at 104. Courts who have considered this question have held that an ERISA action by the Secretary, following a criminal case, does not constitute double jeopardy. Solis v. The Eichholz Law Firm, P.C., No. 4:10-CV-162, 2011 WL 710993, at *1 (S.D. Ga. Feb. 22, 2011); Martin v. Rutledge, 807 F. Supp. 693, 696-697 (N.D. Ala. 1992).

In a directly analogous case, Chao v. USA Mining, Inc., 1:04-CV-138, 2007 WL 208530, at *1 (E.D. Tenn. Jan. 24, 2007), the trial court applied these Hudson factors to the Secretary's request to bar a defendant from serving as a fiduciary to ERISA plans and held that an ERISA remedy was civil and did not violate the Double Jeopardy Clause. Id. As here, the Chao defendant was criminally convicted for federal crimes (fraud and racketeering) and alleged that the permanent ERISA fiduciary bar sought by the Secretary was double jeopardy for

his crimes. Id. at *5. The Chao court, finding similarities to the injunction at issue in Hudson, which prohibited the Hudson petitioner from working in the banking industry, held that the ERISA fiduciary bar did not satisfy the first factor because it did not involve an affirmative disability or restraint and was nothing like the "infamous punishment" of imprisonment. Id. (quoting Hudson, 522 at 104). The second factor was not satisfied because the ERISA fiduciary bar was similar to the Hudson sanctions, which were not "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." Id.

While the Chao court observed that a fiduciary bar may deter future prospective wrongdoers, it noted that, in Hudson, the mere presence of deterrence is insufficient to render a sanction criminal because deterrence may serve civil goals. Id. The court, again citing to Hudson, held that the fifth factor was not satisfied simply because the criminal conviction and civil penalty arose from the same conduct. Id. Lastly, the court concluded that barring the convicted criminal from acting as an ERISA fiduciary and seeking repayment of the money he stole was rationally related to a legitimate government objective, was connected to the loss incurred, and was not excessive, thereby not satisfying the sixth and seventh factors. Id. Because of the absence of the "clearest proof" necessary to "override legislative intent," the Chao court concluded that the ERISA civil remedies were not criminal punishments and did not implicate the Double Jeopardy Clause. Id.

Here, the civil remedy sought by the Secretary is actually less than in Chao, because the Secretary sought only a bar on acting as an ERISA fiduciary, not a money judgment as well (as in Chao). Accordingly, this case is even further away from having the "clearest proof" that the civil relief is "so punitive" as to be rendered criminal, and Mr. Hutcheson's argument concerning Double Jeopardy fails.

The cases cited by Mr. Hutcheson, Austin v. U.S., 509 U.S. 602 (1993), and U.S. v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994), do not help his cause. Citing to Austin v. U.S., Mr. Hutcheson falsely equates the Secretary's request to bar him from serving as an ERISA fiduciary with a "forfeiture action" because he asserts that the Secretary sought the "forfeiture of [his] right to ever be a professional fiduciary." (Hutcheson Br. 53). However, Austin dealt with sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 881(a)(4) and (a)(7), not ERISA, and whether the civil forfeiture provisions of that law were subject to the Eighth Amendment, not the Double Jeopardy Clause. Austin, 509 U.S. at 604. The case is completely inapplicable to Mr. Hutcheson's appellate argument. The other case cited by Mr. Hutcheson, United States v. $405,089.23, was overturned by the Supreme Court, United States v. Ursery, 518 U.S. 267 (1996), undermining Mr. Hutcheson's argument. Accordingly, the Court should reject Mr. Hutcheson's Double Jeopardy Clause arguments.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's judgment imposing injunctive relief against Mr. Hutcheson, removing him from any fiduciary position in relation to the Trust and the Plans, as well as permanently enjoining him from serving as a fiduciary to any ERISA-covered employee benefit plan in the future.

STATEMENT OF RELATED CASES

Mr. Hutcheson was convicted of seventeen counts of wire fraud in United States v. Hutcheson, 1:12-cr-00093-WFN (D. Idaho). Mr. Hutcheson appealed his conviction to this Court, which affirmed his conviction in United States v. Hutcheson, 603 F. App'x 613, 614 (9th Cir. May 15, 2015). Mr. Hutcheson has also filed a writ, in Hutcheson v. United States, 1:16-cv-442 (D. Idaho), to have his criminal sentence vacated under 28 U.S.C. section 2255, which remains pending. Mr. Hutcheson filed a second notice of appeal in his criminal case, which this Court construed as another petition to have his sentence vacated and dismissed for lack of jurisdiction. United States v. Hutcheson, Case No. 17-35081 (9th Cir.).

DATED: August 17, 2017

Respectfully submitted,

NICHOLAS C. GEALE
Acting Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for
Plan Benefits Security

THOMAS TSO
Counsel for Appellate and Special Litigation

s/ Marc Sarata
MARC SARATA
Trial Attorney
Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. N-4611
Washington, D.C. 20210
(202) 693-5637

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 7757 words.

DATED: August 17, 2017 Respectfully submitted,

s/ Marc Sarata
Marc Sarata
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. N-4611
Washington, D.C. 20210
(202) 693-5637

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF pacer NEXT/GEN System, and I further certify that, on August 17, 2017, I served the foregoing document on the following non-CM/ECF registered participant via first class mail, postage prepaid, and UPS, addressed as follows:

Matthew D. Hutcheson
Register Number: 14620-023
FCI ENGLEWOOD
FEDERAL CORRECTIONAL INSTITUTION
9595 West Quincy Avenue
Littleton, CO 80123

DATED: August 17, 2017 Respectfully submitted,

s/ Marc Sarata

Marc Sarata
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
200 Constitution Ave., N.W., Rm. N-4611
Washington, D.C. 20210
(202) 693-5637