

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

THOMAS E. PEREZ,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR)

Plaintiff,)

v.)

ADAM VINOSKEY,
THE ADAM VINOSKEY TRUST,
EVOLVE BANK AND TRUST, MICHAEL NEW,
SENTRY EQUIPMENT ERECTORS, INC., and)
THE SENTRY EQUIPMENT ERECTORS, INC.)
EMPLOYEE STOCK OWNERSHIP AND)
SAVINGS PLAN,)

Defendants.)

Civil Case No. 6:16-cv-00062-NKM

FIRST AMENDED COMPLAINT

Plaintiff Thomas E. Perez, Secretary of Labor, United States Department of Labor, asks this Court to remedy violations of the Employee Retirement Income Security Act of 1974 (“ERISA”) that occurred when the owner of Sentry Equipment Erectors, Inc., Adam Vinoskey, sold his stock to the company’s employee stock ownership plan (“ESOP”) at an inflated price in 2010. The overpayment caused a direct loss to the ESOP and constituted a prohibited transaction. In addition, no protection was provided for existing ESOP participants from the decline in the value of their stock that occurred because of the expenses incurred by Sentry in connection with that prohibited transaction.

JURISDICTION AND VENUE

1. This action arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. § 1001, et seq., and is brought to obtain relief under Sections

409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, in the form of equitable remedies that will redress violations, obtain appropriate equitable relief for breaches of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, and obtain such further equitable relief as may be appropriate to enforce the provisions of Title I of ERISA.

2. This Court has subject matter jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. Venue with respect to this action lies in the Western District of Virginia, Lynchburg Division, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

PARTIES

4. The Secretary is charged with enforcing the provisions of Title I of ERISA. ERISA Sections 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5) vest the Secretary with the authority to bring actions to obtain remedies to redress violations of ERISA and to enforce the provisions of Title I of ERISA by, among other means, filing and prosecuting claims against persons who violate ERISA.

5. The Sentry Equipment Erectors, Inc. Employee Stock Ownership and Savings Plan (“ESOP” or “Plan”) is a pension plan within the meaning of ERISA Section 3(2), 29 U.S.C. § 1002(2), and is named as a defendant in this action for the purpose of ensuring complete relief among the parties under Rule 19 of the Federal Rules of Civil Procedure.

6. The ESOP is sponsored by Sentry Equipment Erectors, Inc. (“Sentry” or “Company”), a Virginia corporation that designs and sells equipment such as conveyors and bottling machines for soft drink manufacturers. Sentry is also the named Plan Administrator of the Plan. Therefore, Sentry is a party in interest with respect to the Plan pursuant to ERISA § 3(14)(C) and a fiduciary pursuant to ERISA § 3(21)(A). Sentry’s principal place of business is

located in Forest, Virginia. Sentry is named as a defendant in this action solely for the purpose of ensuring complete relief among the parties under Rule 19 of the Federal Rules of Civil Procedure.

7. At all times relevant to this lawsuit, Defendant Adam Vinoskey was a trustee to the Plan and the President of Sentry. Therefore, he is a fiduciary with respect to the Plan pursuant to ERISA Section 3(21)(A) and a party in interest pursuant to ERISA Sections 3(14)(A) and (H). On information and belief, the Adam Vinoskey Trust is a party in interest pursuant to ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G), because 50 percent or more of the Adam Vinoskey Trust's beneficial interest was owned directly or indirectly by Adam Vinoskey, who is himself a party in interest pursuant to ERISA §§ 3(14)(A) and (H). Until December 2010, Adam Vinoskey, either personally or through the Adam Vinoskey Trust, owned more than 50% of Sentry. Upon information and belief, Adam Vinoskey was the trustee of the Adam Vinoskey Trust and exercised full control over the assets in that trust.

8. Defendant Evolve Bank and Trust was hired as an independent transaction trustee for the 2010 stock purchase, and as such is a named trustee to the Plan. Therefore, it was a fiduciary with respect to the Plan pursuant to ERISA Section 3(21)(A). Evolve Bank was also a party in interest to the ESOP under ERISA Sections 3(14)(A) and (B).

9. Defendant Michael New, a lawyer employed by Evolve Bank and Trust as its Senior Trust Officer and the current head of Evolve's ESOP division, performed the duties of the independent transaction trustee and as such was a fiduciary with respect to the plan pursuant to ERISA Section 3(21)(A). Specifically, while serving as Senior Trust Officer for Evolve, Michael New exercised discretionary authority or control over the management of the ESOP and its assets when he signed a document dated December 10, 2015 determining that purchasing Vinoskey's

shares at a share price of \$406 was in the best interest of the ESOP. New selected the \$406 per share price and was not required to obtain approval from Evolve's Trust Committee to approve this share price on behalf of Evolve, the independent transaction trustee. New approved this share price relying on Capital Analysts' November 2010 appraisal, information provided by Sentry in response to a "due diligence checklist," and an on-site visit to Sentry's plant. New was also a party in interest to the ESOP under ERISA Sections 3(14)(A) and (B).

FACTUAL ALLEGATIONS

The two-step transaction by which the ESOP bought 100% of Sentry Stock.

Step One: The ESOP purchases 48% ownership of Sentry in 2004.

10. Sentry was founded in 1980 by Adam and Carole Vinoskey, husband and wife, who initially owned 100% of the company's stock.

11. As they approached retirement age, the Vinoskeys established the Sentry Equipment Erectors, Inc. Employee Stock Ownership and Savings Plan, which included both a 401(k) defined-contribution plan and an employee stock ownership feature. As an ESOP, the Plan was designed to invest primarily in employer stock. The ESOP allowed the Vinoskeys to liquidate their ownership interest in Sentry without finding a third-party buyer for the company.

12. In 2004, the Vinoskeys sold 48% of their stock to the ESOP at \$220 per share, for a total sale price of almost \$9 million. To purchase the stock, the ESOP paid \$1.5 million to the Vinoskeys. These funds had been contributed to the ESOP by Sentry. The ESOP then borrowed the remainder of the purchase price from Sentry. In the years that followed, Sentry made contributions to the ESOP that allowed the ESOP to repay the loan that it had received from Sentry. The ESOP's debt to Sentry was fully repaid before 2010. As the debts were repaid, shares of Sentry stock were allocated to individual participant accounts.

13. Under the terms of the ESOP, terminating employees, including retirees, were allowed to sell their shares back to the ESOP at a price approved by the ESOP fiduciaries. For publicly-traded companies, the value of their stock can be determined by the amount that buyers are willing to pay for it in an arms-length transaction. Because Sentry stock had never been publicly traded, its value had to be determined by a different method. Sentry Equipment hired an appraiser to determine the value of its stock on an annual basis after it created the ESOP. Capital Analysts, Inc. performed the analyses each year from 2007 to 2011. The share prices determined by the annual appraisals used to set stock prices paid to terminating employees ranged from \$241 to \$285 per share.

Step Two: The ESOP purchases the remaining 52% of the Sentry stock.

14. In December 2010, Adam Vinoskey and/or the Adam Vinoskey Trust, which held a 52% interest in Sentry, sold this stock to the ESOP at \$406 per share. The ESOP paid \$406 per share for 51,000 shares of Sentry Equipment stock, for a total sale price of \$20,706,000.00. This price greatly exceeded the price offered to terminating participants who had sold their shares back to the ESOP at prices ranging from \$241 to \$285 per share before December 2010. This sudden spike of more than 40% over the stock's previous peak price was based on faulty assumptions rather than an actual increase in the fair market value of the company. Immediately after the purchase of the Vinoskey stock, the price offered to participants dropped below \$285 per share.

15. The \$406 per share price paid to purchase the Vinoskey stock was based upon an appraisal by Capital Analysts that was performed in November 2010 especially for the

transaction. This appraisal contained substantial errors that overstated the value of the company. The \$406 per share price was far above fair market value.

16. For multiple reasons, the Capital Analysts valuation was obviously erroneous, and the amount paid to Vinoskey by the ESOP was excessive. For example:

- a. Sentry's annual income was extremely cyclical, varying depending on when large beverage companies made capital improvements to their plants. The years 2007 to 2009 were peak years for Sentry's earnings, but the years 2004 to 2006 had been much less profitable. When projecting future earnings for the purchase of stock from Adam Vinoskey and/or the Adam Vinoskey Trust, Capital Analysts used only a three-year lookback period, which captured only the peaks of Sentry's business cycle.
- b. Capital Analysts's appraisal understated the risks faced by Sentry. To appraise the stock, Capital Analysts used a "capitalization of earnings" methodology in which they attempted to predict future corporate earnings and discount them for factors such as risk to obtain the current value of those earnings. A key factor in such appraisals is the "discount rate" applied to projected future earnings; a high discount rate will result in a lower corporate value, and vice versa. In the 2009 appraisal performed for participants, Capital Analysts applied a 16.2% discount rate, and in the December 2010 appraisal performed for participants, it applied an 18% discount rate. But in the appraisal performed in November 2010 for the purchase of stock from Adam Vinoskey and/or the Adam Vinoskey Trust, Capital Analysts applied a discount rate of only 12.2%, causing the appraised price to exceed fair market value.

17. Fiduciary Michael New approved the \$406 share price on behalf of Evolve Bank and Trust as being fair to the ESOP and its participants. Adam Vinoskey and/or the Adam Vinoskey Trust accepted the \$406 per share price as the seller of the stock. Given the obvious errors in the valuation and the significant increase in share price from prior valuations, New, Evolve Bank and Vinoskey knew the price was excessive and unfair to the ESOP.

18. To purchase the stock at \$406 per share, the ESOP paid \$8,500,016 in cash and borrowed an additional \$1,900,080 from Sentry. The ESOP paid these funds to Adam Vinoskey and/or the Adam Vinoskey Trust. The ESOP also gave the Vinoskey Trust a note for \$10,305,904 at 4% interest.

19. These debts imposed repayment obligations upon Sentry, as the company became indebted for the amount of the note to Vinoskey, including interest, and assumed the obligation to make contributions to the ESOP to repay the loan from the Company. These debts reduced the value of Sentry and consequently reduced the fair market value of the 48% of its shares that had been allocated to the ESOP after the 2004 stock purchase.

20. ESOP participants who had received stock from the 2004 stock purchase saw the fair market value of those shares drop as a result of the debt that Sentry incurred to finance the 2010 purchase.

21. Before the 2010 stock purchase, the ESOP already owned 48% of Sentry. The debts incurred from the 2010 transaction reduced the fair market value of Sentry, and consequently reduced the fair market value of the shares of Sentry that had been already been allocated to participant accounts before that transaction. No protections were put in place to shield ESOP participants from the corresponding drop in the value of their shares.

COUNT I

By causing the Plan to purchase Company stock for more than adequate consideration, Michael New and Evolve Bank and Trust caused a prohibited sale of property between the Plan and a party in interest in violation of §406(a)(1)(A) and (D).

22. Paragraphs 1 through 20 are incorporated by reference.

23. Defendants Michael New and Evolve Bank and Trust caused the ESOP, of which they were fiduciaries, to acquire stock in the ESOP's corporate sponsor by purchasing the shares from a party in interest, within the meaning of ERISA Section 3(14), 29 U.S.C. § 1002(14).

24. The ESOP's acquisition of stock from a party in interest violated ERISA Sections 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D), which prohibit a fiduciary from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest; or transfer to, or use by or for the benefit of, a party in interest, of any assets of the ESOP.

25. Thus, by approving this party in interest transaction on behalf of the Plan, New and Evolve Bank and Trust caused the Plan, of which they were fiduciaries, to engage in a prohibited transaction.

26. ERISA § 408(e), 29 U.S.C. § 1108(e), provides an exemption to the prohibited transaction requirements by allowing plans to purchase stock from parties in interest as long as the price paid does not exceed adequate consideration. Adequate consideration is defined in ERISA § 3(18), 29 U.S.C. § 1002(18) as the “fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with the regulations promulgated by the Secretary [of Labor].”

27. By causing the ESOP to acquire stock at a price that exceeded “adequate consideration,” and failing to follow a prudent and good faith investigation process in determining the value of the stock, Michael New and Evolve Bank and Trust failed to meet the conditions of any of the exemptions in ERISA § 408, 29 U.S.C. § 1108, including ERISA § 408(e), 29 U.S.C. § 1108(e).

28. As a result of the fiduciary breaches described above, Michael New and Evolve Bank and Trust caused the ESOP, of which they were fiduciaries, to suffer financial losses for which they are personally, jointly, and severally liable pursuant to ERISA Section 409(a), 29 U.S.C. § 1109(a).

COUNT II

By causing the Plan to purchase Company stock for more than adequate consideration, Evolve Bank and Trust and New violated their fiduciary duties of prudence and loyalty to the ESOP in connection with the 2010 ESOP transaction in violation of ERISA Sections 404(A)(1)(A) and (B).

29. Paragraphs 1 through 27 are incorporated by reference.

30. In connection with the transaction described above, Evolve Bank and Trust and New breached their duties to the Plan, of which they were fiduciaries, to act solely in the interests of participants and beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(A) and (B), by, among other things, failing to notice and address the obvious deficiencies in the Capital Analysts’ appraisal justifying a \$406 per share stock price, relying on Capital Analysts’ appraisal even though its price was more than 40% higher than the appraisal it had performed less than one year earlier with no corresponding improvement in Sentry’s business, and approving the \$406 per share price for the 2010 transaction.

COUNT III

Adam Vinoskey is liable under ERISA Sections 405(a)(1) and (3) as co-fiduciary for the fiduciary breaches of New and Evolve Bank and Trust, and Adam Vinoskey, and the Adam Vinoskey Trust are liable as knowing participants in a prohibited transaction under ERISA section 502(a)(5).

31. Paragraphs 1 through 29 are incorporated by reference.

32. As set forth above, Adam Vinoskey (a) participated in the fiduciary breaches of his co-fiduciaries, Evolve Bank and Michael New, and (b) knew of his co-fiduciaries' breaches of fiduciary duty but failed to make reasonable efforts under the circumstances to remedy those breaches of duty. When Evolve Bank and Michael New approved an inflated \$406 per share price for his 52% interest in Sentry, a premium of more than 40% over the previous stock appraisal, Vinoskey failed to take reasonable steps to remedy the fiduciary breaches of Evolve Bank and Michael New. As the selling shareholder, Vinoskey knew about and approved the \$406 per share price. Accordingly, Adam Vinoskey is liable as a co-fiduciary for the losses caused to the Plan by the other fiduciaries. ERISA §§ 405(a)(1) and (3), 29 U.S.C. §§ 1105(a)(1) and (3).

33. As set forth above, Adam Vinoskey failed to exercise reasonable care to prevent his co-trustees from committing a fiduciary breach. Accordingly, Adam Vinoskey is liable under ERISA Section 405(b)(1)(A), 29 U.S.C. § 1105(b)(1)(A) for losses suffered by the Plan.

34. As set forth above, Adam Vinoskey, and the Adam Vinoskey Trust, parties in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14), knowingly participated in the nonexempt prohibited transactions as described herein. They, therefore, may be made subject to such other appropriate equitable relief to redress the violations in which they knowingly participated including disgorgement of their profits arising from their participation in the transaction. ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

COUNT IV

Evolve Bank and Trust and New violated their duties of prudence and loyalty and engaged in a prohibited transaction when they failed to consider and prevent the loss of the stock value for existing participants caused by the transfer of Sentry's assets to fund the 2010 transaction, in violation of ERISA Sections 404(a)(1)(A) and (B) and 406(a)(1)(A) and (D).

35. Paragraphs 1 through 33 are incorporated by reference.

36. In connection with the ESOP Transaction, Evolve Bank and Trust and New breached their duties to the ESOP, of which they were fiduciaries, to act solely in the interests of participants and beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(A) and (B), by, among other things:

- a. Failing to consider how the debt imposed on Sentry to pay for the 2010 ESOP transaction lowered the value of the company and thereby lowered the value of the stock that had already been allocated to ESOP participants after the 2004 stock purchase; and
- b. Doing nothing to protect existing participants from post-transaction drops in the value of their shares.

37. By making no effort to protect existing Plan participants from a post-transaction drop in the value of their shares, New and Evolve caused the Plan to pay more than the fair market value of the shares that were purchased in December 2010.

38. Because the value of the shares already allocated to participant accounts dropped when the second transaction occurred, that drop represented an additional cost to the Plan for the new shares purchased in that second transaction. The failure to protect those existing participants and existing shares therefore caused the Plan to pay more than the fair market value of the

shares, constituting a prohibited transaction in violation of ERISA Section 406(a)(1)(A) and (D) that falls outside the fair market value exemption at ERISA Section 408(e).

39. As a result of the foregoing imprudent and disloyal acts and omissions, Evolve Bank and Trust and New caused losses to the ESOP, of which they were fiduciaries, for which they are jointly, severally, and personally liable pursuant to ERISA Section 409(a), 29 U.S.C. § 1109(a).

PRAYER FOR RELIEF

WHEREFORE, the Secretary of Labor prays that this Court enter an Order:

40. Requiring each of the fiduciary defendants, Evolve Bank and Trust, New, and Adam Vinoskey, jointly and severally, to restore all losses caused to the ESOP as a result of their fiduciary breaches;

41. Requiring fiduciary defendants Evolve Bank and Trust, New, and Adam Vinoskey, to disgorge to the ESOP any and all unjust enrichment they have received as a result of their fiduciary breaches;

42. Requiring party-in-interest defendants Adam Vinoskey, Evolve Bank and Trust, and Michael New to disgorge any and all unjust enrichment they have received as a result of their participation in the prohibited transaction;

43. Requiring Adam Vinoskey and the Adam Vinoskey Trust to disgorge all unjust enrichment they have received as knowing participants in fiduciary breaches;

44. Enjoining Evolve Bank and Trust, Michael New, and Adam Vinoskey from serving as fiduciaries to ERISA plans in the future, or, in the alternative, enjoining these Defendants from violating ERISA in the future; and

45. Granting such other relief as may be equitable, just, and proper.

Date: January 17, 2017

Respectfully submitted,
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s/ Andrea Luby
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