No. 16-17055

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA PACIFIC BANK, ET AL.,
Defendants-Appellants,
v.
R. ALEXANDER ACOSTA,
Secretary, United States Department of Labor,
Plaintiff-Appellee.

On Appeal from the United States District Court for the Central District of California
Case No. 13-cv-03792 JD
The Honorable James Donato

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the court's judgment.

STATEMENT OF THE ISSUES

As restated, the questions presented are:

I. Whether the district court correctly found no genuine dispute of material fact as to whether Defendants breached their fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., when they failed to liquidate their pension plan's assets and distribute cash to its participants upon plan termination, as required by the governing plan document.

II. Whether the court correctly found no genuine dispute of material fact as to whether Defendants improperly diverted plan assets, in the form of a significant portion ($81,407.18) of a $132,506 account receivable, from the plan to a Defendant.

III. Whether the court correctly found Defendants' transfer of $69,745.93 in plan assets from the plan to a Defendant was a transaction prohibited by ERISA.

IV. Whether the court acted within its discretion in awarding prejudgment interest.

V. Whether the court correctly held all Defendants, who all served as ERISA trustees and fiduciaries to the plan, liable for their fiduciary breaches and prohibited transactions.

STATUTORY AUTHORITIES

Authorities not provided in Appellants' Addendum, Dkt. 11-2, appear in the Addendum.

STATEMENT OF THE CASE

I. Factual History

These facts are undisputed. Defendant California Pacific Bank (the "Bank") is a small, privately-held bank. 1 E4[1]; 7 E1298, 1309. The Bank established the California Pacific Bank Employee Stock Ownership Plan (the "Plan"), a pension plan governed by ERISA. 8 E1427; 1 E4. The Bank was a named fiduciary and the Plan Sponsor. 1 E4; 8 E1427; Defs. Br. 12. The Plan was terminated on December 31, 2010. Defs. Br. 12; 1 E5; 8 E1427.

Defendant Richard Chi was the Bank's CEO, a member of its Board of Directors, the Plan Administrator, and a Plan Trustee. 1 E4; 7 E1299, 1310; Defs. Br. 12. Defendants Akila Chen, Kent Chen, and William Mo were the other Plan Trustees and also served as Board members. 1 E4; 7 E1299, 1311; Defs. Br. 12. Defendants were ERISA fiduciaries to the Plan under 29 U.S.C. § 1002(21)(A). 1

[1] "E" refers to Excerpts of Record, preceded by the volume and followed by the page.

E2, 4.

The Secretary filed a complaint alleging that the Bank, Richard Chi, Akila Chen, Kent Chen, and William Mo breached their fiduciary duties and engaged in prohibited transactions in violation of ERISA as detailed in three Counts. 7 E1307.

A. Count One Facts

Section 10.4 of the governing Plan document, entitled "Termination of Plan," states:

> Upon termination . . . of the Plan and Trust. . . each affected Participant shall be 100% vested . . . and payment to such Participant shall be made in cash as soon as practicable after liquidation of the assets of the Trust but not later than one year following the date of termination.

1 E24; 8 E1404. Akila Chen, Kent Chen and William Mo passed a resolution as Plan trustees, resolving that "the Plan be terminated as of December 31, 2010" and "the Administrator of the Plan [i.e., Richard Chi] take all necessary steps to liquidate the assets of the Plan and distribute the Plan assets as required by law." 1 E24-25. On June 24, 2011, the Plan distributed 97,237 Bank shares, not cash, to participants' individual retirement accounts ("IRAs") held at the Bank. 1 E25; 7 E1299; Defs. Br. 26.

The Secretary alleged that Defendants violated their fiduciary duties by not following the Plan document as ERISA requires under section 404(a)(1)(D), 29

U.S.C. § 1104(a)(1)(D), when they distributed the assets of the terminated Plan in the form of Bank shares, not cash. 8 E1319. The Secretary alleged that the distribution violated Defendants' fiduciary duties of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), because Defendants acted in the Bank's, rather than the Plan participants' interests, by choosing to distribute shares and not cash. Id.

B. Count Two Facts

In 2000, the Plan acquired a 13.3261% interest in Seclusion Alcade LLC ("SA LLC"). Defs. Br. 49; 7 E1300, 1313. In 2005, the Plan sold its interest to Seclusion Alcade Management LLC ("SAM LLC") for a $132,506 account receivable. Id.

In 2010, when Defendants decided to terminate the Plan, the Plan's assets still included the account receivable. Defs. Br. 16. At that time, Akila Chen, Kent Chen, and William Mo, as Plan Trustees, demanded payment on the account receivable. 7 E1300, 1314; Defs. Br. 52. SAM LLC made a $132,506 payment in 2011. 7 E1298. However, the $132,506 was only partially delivered to the Plan: the Plan received only $35,060.85, which was distributed to individual Plan participants; SAM LLC retained $16,037.97 as the Plan's final payment on a loan from SAM LLC; and the Bank collected the remaining $81,407.18. Defs. Br. 53; 8 E1429; 7 E1300, 1314.

The Secretary alleged that Defendants committed a transaction prohibited by ERISA when they diverted $81,407.18 in Plan assets to the Bank. See 7 E1320. Defendants violated ERISA's prohibition against transfers of plan assets to certain parties related to the Plan, such as the Bank, under ERISA section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), and ERISA's prohibitions under section 406(b)(1)-(2) against transactions where plan fiduciaries, like Defendants, conduct plan transactions while representing their own interests or an adverse party. 29 U.S.C. §§ 1106(b)(1)-(2). See 7 E1320. The Secretary also alleged Defendants caused the Plan's assets to inure to the employer, the Bank, violating ERISA's anti-inurement provision, section 403(c)(1), 29 U.S.C. § 1103(c)(1), as well as their fiduciary duties of prudence and loyalty, sections 404(a)(1)(A) and (B). 7 E1319-20.

C. Count Three Facts

On September 10, 2012, $69,745.93 was transferred from the Plan Account No. ######6510 ("Account 6510") to the Bank. 7 E1298; 8 E1429; Defs. Br. 56-57.

In Count Three, the Secretary alleged that Defendants committed a transaction prohibited by ERISA when they permitted or authorized the transfer of $69,745.93 in Plan assets to the Bank. See 7 E1321 (citing ERISA sections 406(a)(1)(D), 406(b)(1)-(2)). The Secretary also alleged Defendants illegally caused the Plan's assets to inure to the employer, the Bank, violating ERISA's anti-inurement provision, ERISA section 403(c)(1), and their fiduciary duties of prudence and loyalty, sections 404(a)(1)(A) and (B). 7 E1321-22.

II. Procedural History

Defendants moved for summary judgment on Count One. 6 E880. The Secretary filed cross-motions for summary judgment on all Counts. 5 E806.

The district court issued its order denying Defendants' summary judgment motion, and granting in part and denying in part the Secretary's motion. 5 E591, 1 E21. The court found Defendants liable for Counts One and Two, reserving the amounts of liability for trial. Id. The court reserved Count Three for trial. Id.

Defendants moved for leave to file a motion for reconsideration, which the court denied. 4 E493.

After a one-day trial, the court entered judgment for the Secretary. The court found Defendants jointly and severally liable for violating their fiduciary duties on all three Counts, and for committing prohibited transactions on Counts Two and Three. 1 E2. The court awarded the Plan damages with prejudgment interest. Id.; 2 E35.

A. Summary Judgment Order

1. Count One

The district court explained that Defendants' own submissions established as "undisputed and indisputable" the fact that Section 10.4 of the Plan, entitled "Termination of Plan," required that "Upon termination . . . [e]ach affected Participant shall be 100% vested in his Accounts, and payment to such Participant shall be made in cash as soon as practicable after liquidation of the assets of the Trust but not later than one year following the date of termination;" that the Plan was terminated in December 2010; and that Plan assets were distributed to IRAs in the form of Bank stock, not cash. 1 E24-25. The court noted that "[i]n the face of these undisputed facts, defendants raise two main arguments against liability," but found both "unpersuasive." 1 E25.

First, the court considered Defendants' argument that they should not be held liable "because it was 'impossible' for the Bank to liquidate the plan participants' Bank shares . . . because, [defendants] say, the Federal Deposit Insurance Corporation ("FDIC") 'refused to permit the Bank to repurchase the stock held by the plan participants' for the 'sole reason' of the Secretary's ongoing investigation and subsequent lawsuit." Id. The court found that Defendants' own exhibits undermined this argument as a factual matter. 1 E25.

The court noted that it is undisputed that it was not until March 1, 2011, that Defendants sent their first letter to the FDIC requesting permission to repurchase the shares. Id. The court further noted that on the same date, March 1, 2011, Chi sent a letter to Plan participants informing them that the Plan had been terminated and "[t]he plan assets were rolled over into IRA accounts in the name of each participant in February 2010" in the form of Bank shares. 1 E25, 27. Thus, they received no refusals from the FDIC before they "informed plan participants the distributions would be made (or had already been made) in Bank shares." 1 E25. In short, Defendants decided to distribute the Plan assets in the form of Bank shares before receiving any communications from the FDIC. Id.

The court explained that even though the shares were not distributed to participants until June 2011, as Chi stated in his October 14, 2014 declaration, "[a]s of then, the only communication defendants had received from the FDIC rejected the Bank's application as incomplete." Id. "The FDIC's first refusal to permit any repurchase because of the Bank's ongoing issues with the Department of Labor did not come until October 13, 2011, months after the Bank had already made the distributions in Bank shares rather than cash." 1 E25-26.

Second, the district court considered Defendants' argument "that the Plan does not really require distributions to be made only in cash upon termination, despite its express language saying so." 1 E26. Defendants argued that other parts of the Plan, i.e., Section 7.2, permit distributions to be made in cash or stock at the participant's election. The court found that "[t]his textual interpretation argument is dead on arrival in the face of an express provision entitled 'Termination of the Plan,' which states, 'payment to [each affected] Participant shall be made in cash[.]'" Id. In addition, the court emphasized, "even assuming that Section 7.2 could apply, which the court finds [it] does not, defendants did not give plan participants any opportunity to choose between Bank shares or cash; they simply went ahead and made the distributions in the form of Bank shares." 1 E26.

As a result, the court concluded that "there is no genuine issue of material fact on the issue of whether defendants violated ERISA section 404(a)(1)(D) by failing to act 'in accordance with the documents and instruments governing the plan[.]'" Id. Noting that Defendants' alleged violations of their duties of loyalty and prudence under ERISA sections 404(a)(1)(A) and (B) with respect to Count One require a "slightly different analysis," the court found that the Secretary was "entitled to judgment as a matter of law on those claims as well." Id.

As the court explained, "[u]nder the 'exclusive purpose' rule of section 404(a)(1)(A), fiduciaries have the duty to act with complete and undivided loyalty to the beneficiaries[.]" Id. And "[u]nder the so-called 'prudence' rule of section 404(a)(1)(B), the court inquires whether the trustees, at the time they engaged in the challenged transaction, employed the appropriate methods to investigate and/or structure the investment." 1 E26-27. The court concluded that Defendants failed to meet these standards. 1 E27.

The court found significant the March 1, 2011 letter Defendants sent to Plan participants, which stated:

> The Trustees . . . voted to terminate the Plan effective December 31, 2010. The plan assets were rolled over into IRA accounts in the name of each participant in February 2010. Section 7.6 of the Plan document allows participants the right to request California Pacific Bank (the Bank) repurchase the Bank's stock rolled over to your IRA account at the fair value of the stock for a 60 day period beginning on date of the distribution. After this 60 day period has ended, the Bank will have no further requirement to repurchase stock from your account under the Plan document.

Id. The court stated that this letter is "replete with misinformation" and "on its face communicates to plan participants that they have no right to request the Bank to repurchase their stock at all, since the letter was sent in March 2011, more than a year after the alleged distribution 'in February 2010' and well past the '60 day period beginning on date of the distribution.'" Id. Defendants' letter to participants continued:

> If you wish the Bank to repurchase the stock from your account, please notify the Bank as soon as possible . . . . [R]egulatory agencies require the Bank to apply for permission to repurchase the stock from your account. Any distribution will be delayed until such regulatory approval is obtained. It is possible that regulatory approval will be denied and, if such an[] event were to occur, the Bank would be prohibited from repurchasing the stock from your account.

Id. The court noted that "there is no mention of any further recourse participants might have" in the event that the Bank is "'prohibited from repurchasing the stock from [their] accounts' because regulatory approval is denied.'" Id. The court found that "[k]eeping in mind that the shares are not publicly traded . . . and that the Plan in fact expressly requires distributions to be made in cash upon termination, the letter shows an utter disregard by defendants for the rights and interests of the participants." Id. The court considered Defendants' contention that they made after-the-fact efforts to help Plan participants liquidate their shares but concluded that these contentions pertain solely to relief, not liability, and thus "there is no genuine dispute as to any material fact that defendants violated their duty of loyalty[.]" 1 E28.

Regarding Defendants' duty of prudence, the court emphasized that "Defendants had not so much as requested permission from the FDIC to repurchase the plan participants' Bank shares when they informed participants that distributions would be made as Bank shares rather than cash." Id. The court found "that defendants failed to perform their fiduciary responsibilities 'with the care, skill, prudence, and diligence under the circumstances . . . required by ERISA Section 404(a)(1)(B).'" Id.

2. Count Two

The parties agree that the Plan had a $132,506 account receivable, that payment was made after Akila Chen, Kent Chen, and William Mo, acting as Plan trustees, passed a resolution to demand its payment, and that the Bank, not the Plan, ultimately collected $81,407.18 of the $132,506 payment. 1 E29. The parties disputed below whether this $81,407.18 was a Plan asset and therefore could not be transferred to the Bank. Id. The court concluded that "[a]ll indications are that the $132,506 was a Plan asset." Id.

The court pointed out that the resolution characterizes the $132,506 account receivable as belonging to the Plan. Id. The "resolution states that 'the undersigned Trustees have a right to demand payment of the $132,506 book value of the Plan's membership interest ['] . . . and resolves that, 'prior to the termination of the Plan as of December 31, 2010, the Plan exercise its right . . . to receive payment of the $132,506[.] '" Id. (emphasis added).

The court considered Defendants' argument that the Bank properly took $81,407.18 of the account receivable payment, but found "several problems" with it. 1 E29-31. Defendants rely on Defendant Chi's declaration. 5 E709. Defendants argued below that the Plan's $132,506 account receivable was received by the Plan as a dividend on Bank stock held by the Plan, but, according to Chi, because most of that stock was collateral for outstanding loans to the Plan from the Bank, the stock held in collateral was neither allocated to nor owned by any Plan participants. 1 E29. Chi contended that this unallocated stock held as collateral was later repurchased by the Bank.   1 E30. At that point, Chi argued, the "'portion of the dividend allocated to the repurchased stock followed the shares repurchased by the Bank, while the portion of the dividend allocated to the stock owned by the Plan Participants remained in the Plan and was distributed to the Plan Participants . . . . [so] the Plan participants received dividends on the stock that they owned. They did not receive dividends on the unallocated stock collateralizing the loans because they did not own that stock.'" Id.

The first problem the court found with Chi's explanation is that Defendants "submitted no documents or other evidence relating to the purported repurchase by the Bank of '[t]he unallocated stock collateralizing the loans,' or . . . any agreement between the Bank and the Plan relating to whether that repurchase would encompass any dividends associated with that stock." 1 E30. "Certainly," the court noted, defendants' "resolution makes no mention that part of the $132,506 might in fact properly belong to the Bank and not the Plan because of repurchases by the Bank of unallocated stock held by the Plan." Id.

Next, the court pointed out that "Defendants have also offered no explanation for how the transfer of $81,407 from the Plan to the Bank could be made consistent with the Plan document." Id. The court highlighted a couple of sections, including Section 7.7, Distribution of Dividends, which provides, "the Trustee shall determine whether any or all of the cash dividends received on any Bank stock, if any, by the Plan shall be (i) retained by the Plan . . . (ii) distributed to each Participant, or (iii) used to make payments on an Exempt Loan." Id. (emphasis added).

The court also noted that, according to Chi's declaration "'[t]he Plan retained Richardson & Company to determine the appropriate allocation of the dividend to the stock held in the Plan.'" 1 E31. The court further noted that, according to the same declaration, Chi himself "'consulted with Brian Nash of Richardson & Company, the accounting firm used by the Bank,'" and discussed with him "'the fact that the $132,506 dividend would be allocated to the stock held by the Plan,'" as well as the Bank's repurchase of a portion of the unallocated stock collateralizing loans made to the Plan and the resultant allocation of the dividend. Id. The court emphasized, however, that "defendants have submitted nothing at all from Mr. Nash or Richardson & Company, nor any specific documentation that shows how the calculation for the allocation was made and why it was proper." Id.

"Instead," the court points out, "the only documents that relate to Mr. Nash in the present record before the Court are two documents[.]" Id. In those documents, Nash expressly states, "'We are not ESOP experts, and so we strongly recommend that Bank consult with an ESOP expert to determine the number of shares to allocate for all plan years,'" and "'Although we did not audit the ESOP and had no responsibility for it, we suggested to the Bank that it hire an ESOP administrator[.]'" Id. (citing 5 E682, 684).

With no evidence supporting Defendants' argument that the Bank could properly take $81,407.18 of the Plan's $132,506 account receivable payment, other than Chi's own declaration asserting that argument, the court found that "the explanation offered by defendants is without any evidentiary support and rings hollow" 1 E31 (citation omitted). Finding that Defendants' explanation "is not enough to defeat summary judgment in favor of the Secretary," the court concluded that "defendants diverted to the Bank a significant portion ($81,407.18) of the $132,506 account receivable that belonged to the Plan, and by doing so, defendants violated ERISA[.]" 1 E31.

3. Count Three

The court noted that Defendants did not dispute making the transfer of $69,745.93 in Plan assets from the Plan to the Bank. 1 E32; see also 8 E1429. Rather, Defendants argued that they were entitled to make this transfer because the money represented an "excess contribution" from the Bank and was therefore a "return" of money that belonged to the Bank. 1 E32 (citing 5 E699-700). The Secretary argued below that even if this amount did represent an excess contribution, ERISA prohibited the transfer. 1 E32. ERISA prohibits the return of a contribution to the employer unless the contribution (a) resulted from a "mistake of fact," and (b) is returned within one year after it is made. Id. (citing ERISA section 403(c)(2)(A)(i), 29 U.S.C. § 1103(c)(2)(A)(i)). The Secretary contended that the Bank's last contribution to the Plan was made in 2006 and the transfer occurred in 2012; therefore, ERISA forbade the return of the contribution six years after it was made. Id. The court found that it was unable to determine on summary judgment whether the Bank truly did not make any contributions after 2006, or whether either the Plan's termination or government investigations had any legal effect on the one-year time-limit. Id.

B. Findings Of Fact And Conclusions Of Law

After a one-day trial, the court resolved the remaining questions on losses for Counts One and Two, and on liability and losses for Count Three. 1 E2.

1. Losses For Counts One And Two

The court found that the Plan and individual participants suffered losses because of Defendants' failure to distribute shares as cash to participants. 1 E5-8, 12-13. Defendants do not dispute these findings on appeal, other than to contest their liability generally.[2] The parties agreed that the damages under Count Two was $81,407.18. 1 E8; see also 8 E1429.

2. Count Three

The court noted that there "is no dispute that $69,745 was transferred from the Plan to the Bank . . . and that Chi made the decision[.]" 1 E17. As a result, the court held: "On its face, this is a prohibited transaction under ERISA

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[2] In a footnote, Defendants assert that if the Secretary were to prevail on Count One, "almost the entire $1.2 million would be paid to Richard Chi, Alan Chi and Allen Chiang as they now collectively own approximately 96% of the stock held by the Participants." Defs. Br. 15, n.5. This statement is incorrect. First, the relevant allocation of shares upon which damages must be calculated is the allocation at the time of the Plan's termination, not the current allocation resulting from the breach and the subsequent actions of Chi and others. Moreover, the court's calculations credited Defendants with all payments to participants. 1 E5-7, 13. Defendants failed to contest those calculations on appeal.

§ 406(a)(1)(D)." Id. The court found that Defendants also violated ERISA sections 406(b)(1) and (2), 403(c)(1), and 404(a)(1)(A) and (B). Id.

The court found that "Defendants failed to prove" that the $69,746 transfer was justified as a return of an over-contribution made "by a mistake of fact" under ERISA section 403(c)(2)(A)(i) because the "only evidence defendants offered was their conclusory and self-serving testimony that the account balance 'must have been' an over-contribution." Id. The court also found "no actual credible and specific evidence showing what mistake was made, when, or how." Id. The court concluded that this showing "is plainly insufficient," holding that "[a] true mistake of fact occurs when there is an arithmetic or clerical error in making contributions, . . . and no such error was ever identified here." Id.

3. Prejudgment Interest

The court determined the applicable prejudgment interest. 1 E13-14. The court first found that "there is no rate of return specified by the Plan," noting that the rate in Section 7.6(a) cited by Defendants relates to put options and "has no application" here. 1 E13.

Next, the court explained that "[g]enerally, the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of prejudgment interest unless the trial judge finds, on substantial evidence, that the equities of the particular case require a different rate." 1 E13-14. Noting that "[p]rejudgment interest is an element of compensation, not a penalty," and that "Defendants' conduct was in blatant disregard of the express terms of the Plan document and the defendants' fiduciary duties under ERISA," the court found that, "the equities support an award of prejudgment interest." 1 E14. Further, the court held that "the equities of this case support the imposition of the higher IRC rate advocated by the Secretary rather than the [lower] 28 U.S.C. § 1961 rate advocated by defendants." 1 E14. The court noted that "the IRC rate . . . is the rate the Secretary uses for plan sponsors who self-report and voluntarily correct violations of ERISA," and that voluntary correction "of course, did not happen here." Id. The court therefore held that "to use a significantly lower § 1961 rate in a case like this one would produce an inequitable result, as it would effectively result in a windfall for defendants who have neither self-reported nor voluntarily corrected." Id. The court concluded that it "finds this to be substantial evidence that supports the use of the IRC rate in this case." Id.

4. Joint And Several Liability

The court held that "[t]he facts show ample basis to impose joint and several liability on all four individual fiduciary defendants: Richard Chi, Akila Chen, William Mo and Kent Chen" for all Counts. 1 E15, 16, 17. First, the court noted that Chi committed the acts underlying Count One and was therefore liable for the resulting losses under ERISA section 409(a), 29 U.S.C. § 1109(a). 1 E15. Chi admitted his significant involvement in transferring funds in violation of ERISA under Count Two, and the court found that Chi made the decision to transfer funds in violation of ERISA under Count Three. Defs. Br. 60 (Count Two); 1 E17 (Count Three).

Next, the court rejected Mo's defense that he had resigned as a trustee in October 2010, finding that the "evidence showed only that he had resigned as a board member, not as a trustee of the Plan," that "[h]is resignation letter itself made no mention of the Plan," and that "he continued to act as a trustee, including signing without notation the termination resolution for the Plan as one of its trustees" in December 2010. 1 E15. The court held that "this was inconsistent with the Plan's requirements for resignation as a trustee" and with ERISA's requirement that "a trustee must be held to have continued in a fiduciary status absent a clear resignation." 1 E15-16.

Finally, the court held that "[a]s a trustee, Mo failed in his duties, as did Akila Chen and Kent Chen." 1 E16. The court found that "[t]he testimony of each of these trustees show that they did not understand or appreciate their responsibilities as fiduciaries of the Plan, and they provided little or no oversight of Chi." Id. The court concluded that they were liable for their co-fiduciary Chi's breaches under ERISA section 405(a)(2), 29 U.S.C. § 1105(a)(2) because "[t]hese trustees failed to fulfill their fiduciary responsibilities, and by doing so enabled Chi to commit [his fiduciary breaches]." 1 E16, 18. The court explained that, as a matter of law, under ERISA section 405, "fiduciaries can be liable for breach of their fiduciary duties even if they did not know of another defendant's malfeasance, so long as they could have known about it had they acted 'with the care, skill, prudence and diligence under the circumstances then prevailing. . .'" 1 E16. The court further noted that a "fiduciary cannot avoid liability for another trustee's mismanagement of the Plan by simply doing nothing," and "the law requires more from a fiduciary than blind faith in another fiduciary's integrity." Id. The court also found that "the evidence supports a finding that Defendants William Mo, Akila Chen, and Kent Chen are liable in their own rights under § 409 for the breaches of their own fiduciary duties under §§ 404(a)(1)(A) and (B)" based on the court's extensive factual findings supporting their failure as trustees in managing Plan assets in the transactions underlying these violations. Id. The court concluded that "all defendants should be held liable jointly and severally" for all Counts. 1 E16, 18.

STANDARD OF REVIEW

This Circuit "reviews a district court's grant of summary judgment de novo[.]" Dytrt v. Mountain States Tel. & Tel. Co., 921 F.2d 889, 893 (9th Cir. 1990) (citations omitted).

This Circuit reviews a district court's conclusions of law following a bench trial de novo. Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 843 (9th

Cir. 2004). "Following a bench trial, the judge's findings of fact are reviewed for clear error." Id.

This Circuit reviews "the district court's calculation of prejudgment interest for an abuse of discretion." Grosz-Salomon v. Paul Revere Life Ins., 237 F.3d 1154, 1163-64 (9th Cir. 2001).

SUMMARY OF THE ARGUMENT

Defendants fail to demonstrate that the district court erred in any of its legal conclusions, committed clear error as to any factual finding, or abused its discretion in any manner.

1. Defendants violated their pension plan's governing document and their fiduciary duties of loyalty and prudence when they terminated the Plan and distributed the Plan's assets to its participants in the form of closely-held and illiquid employer stock, instead of cash as the Plan document explicitly required. Defendants also misinformed the Plan participants of the Plan's actions and obligations at that time, consistent with their efforts to limit the participants' right to cash as the Plan document required. Defendants raise two meritless defenses. First, they blame the Government by pointing to communications from the Government that clearly occurred months and years after their violations. Second, they request the Court to ignore the plain text of the Plan document and the misinformation they conveyed to participants by pointing to inapposite Plan provisions in a futile attempt

at obfuscation.

2. Defendants cannot dispute the fact that they permitted the Bank's misappropriation of the Plan's asset in the form of an account receivable. No one disputes that Defendants themselves contemporaneously classified the account receivable as the Plan's asset and that they also permitted the Bank to collect $81,407.18 of the payment on the account receivable. This constitutes a clear case of misappropriation of Plan assets in violation of ERISA's basic protections. Defendants can only muster an unsupported declaration from a defendant outlining a legal theory as to why the Bank could take Plan assets which has no basis in law or record evidence. The district court correctly rejected this defense.

3. The undisputed facts show Defendants also removed $69,745.93 from the Plan's own account and handed the money over to the Bank. Defendants now defend this action based on speculation and a legal theory that the money in the Plan account was actually the Bank's money, again, without basis in law or record evidence. The district court correctly rejected Defendants' argument.

4. Defendants' arguments that the district court abused its discretion in its choice of the prejudgment interest rate are meritless; the court provided a well-reasoned decision which considered long-standing Department of Labor policy as applied to the equities in this case.

5. Finally, Defendants argue that no law or evidence supports the imposition

of liability on three individual trustees, because only the fourth trustee, who was also Plan Administrator, made the pertinent decisions. Defendants ignore the evidence supporting liability for the other trustees, including their failure to fulfill their basic duty to jointly manage Plan assets, and the fact that they permitted their co-fiduciary to misuse those assets to the detriment of Plan participants without oversight.

For these reasons, this Court should affirm the district court's decision.

ARGUMENT

I. Count One: The District Court Correctly Found No Genuine Dispute Of Material Fact As To Whether Defendants Breached Their Fiduciary Duties When They Failed To Liquidate The Shares And Distribute Cash Upon Plan Termination

"The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A court "need not draw all possible inferences in [non-moving party's] favor, but only all reasonable ones." 4 E469. "Only disputes over facts that might affect the outcome of the suit under the governing law" will preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Despite citing the Anderson standard, Defendants failed to produce below or cite any record evidence that controvert summary judgment.

Defendants' own submissions established as "undisputed and indisputable" the following three facts: (1) Section 10.4 of the Plan, entitled "Termination of

Plan," required that "Upon termination . . . [e]ach affected Participant shall be 100% vested in his Accounts, and payment to such Participant shall be made in cash as soon as practicable after liquidation of the assets of the Trust but not later than one year following the date of termination"; (2) the Plan was terminated in December 2010; and (3) Plan assets were distributed to the Plan participants' IRAs on June 24, 2011, in the form of Bank stock, not cash. 1 E24-25. These undisputed facts alone demonstrate a violation of Defendants' duty to comply with the Plan document under ERISA section 404(a)(1)(D). See Carmona v. Carmona, 603 F.3d 1041, 1053 (9th Cir. 2010) (ERISA "established 'a straightforward rule of hewing to the directives of the plan documents,' imposing on plan administrators a 'bright-line requirement to follow plan documents in distributing benefits.'") (citation omitted).

On appeal, Defendants also do not dispute the content of their March 2011 letter and their scheme to distribute the Bank shares instead of cash; the letter is the "significant" basis for the court's conclusion that Defendants violated their duty of loyalty, 29 U.S.C. § 1104(a)(1)(A). 1 E27; see also Defs. Br. 35-36. Nor do Defendants contest the timing of their actions, including their failure to request "permission from the FDIC to repurchase the plan participants' bank shares when they informed participants that distributions would be made as Bank shares rather than cash," facts that supported the district court's conclusion that Defendants violated their duty of prudence, 29 U.S.C. § 1104(a)(1). 1 E28; see also Defs. Brief, at 24-25.

Defendants do not contest these material facts that support liability, but instead raise three legal contentions: (a) the court misinterpreted the Plan document and Defendants' March 1 Letter; (b) the court should have deferred to Defendants' interpretations; and (c) it was "impossible" to comply with ERISA. Defs. Br. 20-21. Defendants raised the first and third issues below, and the district court correctly found their arguments "unpersuasive." 1 E25. The second issue is now raised for the first time, and, in addition to being meritless, is waived. See, e.g., Gribben v. United Parcel Serv., 528 F.3d 1166, 1171 (9th Cir. 2008).

A. The District Court Read The Plan Document Correctly

Defendants first rehash their argument that, as the district court put it, "the Plan does not really require distributions to be made only in cash upon termination, despite its express language saying so." 1 E26; Defs. Br. 30-34. It is undisputed that Plan document Section 10.4 governs the distribution of Plan assets to participants when the Plan is terminated. Section 10.4, entitled "Termination of Plan, "required that "Upon termination . . . [e]ach affected Participant shall be 100% vested in his Accounts, and payment to such Participant shall be made in cash as soon as practicable after liquidation of the assets of the Trust but not later than one year following the date of termination[.]" 8 E1404.

Defendants attempt to ignore Section 10.4's clear mandate by pointing to three inapposite Plan provisions. First, Defendants point out that the Plan was an employee stock ownership plan ("ESOP") whose stated purpose was to enable participants to acquire stock ownership interests in the Bank. Defs. Br. 30. But this general-purpose language for creating the Plan is irrelevant to the winding up of its assets upon the Plan's termination and the specific language governing that situation in Section 10.4. E.g., S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 891 (9th Cir. 2003) (recognizing standard rule that specific, not general, provisions govern).

Next, Defendants focus on Sections 7.2 and 7.6 of the Plan which describe procedures for regular distributions to individual participants from their Plan accounts upon the occurrence of certain life events. Defendants ignore the premise of Section 7, described in Section 7.1. 8 E1388. According to Section 7.1, the individual distributions listed in Sections 7.2 and 7.6 apply only in the case of an individual participant's death, disability, retirement, or other termination of their employment. Id. Section 7.1 does not apply to Plan termination. See id.

Section 7.2 describes participants' ability to "elect" between a distribution in cash versus a distribution in stock upon the occurrence of those life events. Section 7.6 describes the mechanism for selling distributed stock back to the Bank, i.e., "putting" stock back to the Bank, when their employment ends. See Defs. Br. 31-

32.[3] Sections 7.2 and 7.6 did not give Defendants the option of distributing shares when terminating the Plan; those sections clearly refer to different circumstances.[4] Nor do they conflict with Section 10.4, which only covers Plan termination, a situation not covered by Sections 7.2 and 7.6. The fact that participants could (when leaving employment) choose to accept stock under certain circumstances according to Sections 7.2 and 7.6 is irrelevant to Plan termination.

As a matter of textual interpretation, Defendants' argument fails on any reasonable review of the Plan document. Any interpretation of the Plan document should construe every provision of the document to accomplish its intended purpose and to render none superfluous. See Tapley v. Locals 302 & 612 of Int'l Union of Operating Engineers-Employers Const. Indus. Ret. Plan, 728 F.3d 1134, 1140 (9th Cir. 2013); Chaly-Garcia v. U.S., 508 F.3d 1201, 1204 (9th Cir. 2007). Defendants' interpretation – that the Plan document permitted them to distribute shares instead of cash after the Plan was terminated – renders Section 10.4 both superfluous and meaningless. Section 10.4, the only Plan provision entitled "Termination of Plan,"

[3] These provisions are not unique, but a typical requirement due to tax rules and other regulations. See, e.g., In re Green, 967 F.2d 1216, 1217 (8th Cir. 1992).

[4] Defendants assert that the put option continued to apply to Bank stock even if the Plan ceased to be an ESOP. Defs. Br. 32 (citing Section 7.6(c)). Although those repurchase rights may continue to exist if the Plan ceases to be an ESOP as defined by Internal Revenue Code section 4975(e)(7), 26 U.S.C. § 4975(e)(7), Defendants provide no basis to suggest that such rights exist after Plan termination.

which, by its terms, applies when the Plan is terminated, obligated Defendants to have the Plan liquidate participant accounts and dictated that payments of those accounts "shall be made in cash." This interpretation is also consistent with the Trustees' own resolution, requiring the Administrator to "liquidate" the Plan's assets. 6 E962. In setting out a special provision for Plan termination that mandated cash payments, the Plan document intentionally differentiated Plan termination from the "election" mechanism described in Section 7.2. If an election was intended for Plan termination, the Plan document could easily have so stated or cross-referenced Sections 7.2 and 7.6. It clearly did not. See Canseco v. Constr. Laborers Pension Trust for S. Cal., 93 F.3d 600, 607 (9th Cir. 1996) (refusing to imply additional terms from inapposite plan provisions to conflict with the plain and mandatory language of the relevant provision).

Defendants' citation to Section 10.4's context does not help their argument. Defs. Br. 33. Section 10.4 is found in Section X, specifically titled "Amendment and Termination." The very next provision, Section 10.5, concerns the procedures for Plan assets in circumstances of a "Plan Merger or Consolidation;" thus, both Sections 10.4 and 10.5 govern Plan procedures for special situations, to the exclusion of the other more general Plan provisions.[5]

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[5] Requiring a cash payment is reasonable in light of Defendants' own description of the disadvantages of holding company stock: there is "no market for the Bank

Pointing to inapplicable provisions simply cannot erase the clear language of Section 10.4, or its requirement that participants be paid in cash. "The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation." Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999). Defendants' attempt to ignore the clear application of Section 10.4 to Plan termination and thus excuse their failure to comply is not supported by law. See Tapley, 728 F.3d at 1140 (abuse of discretion to construe plan provisions in way that clearly conflicts with plain language or renders other provisions nugatory); Chaly-Garcia, 508 F.3d at 1204. Defendants cite no case law under ERISA that would allow them to simply ignore an express lawful term of the Plan – because none exists. See 29 U.S.C. § 1104(a)(1)(D). The district court correctly found that Defendants' "textual interpretation argument is dead on arrival in the face of an express provision entitled 'Termination of the Plan,' which states, 'payment to [each affected] Participant shall be made in cash[.]'" 1 E26.

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stock" and "very few investors were interested in purchasing shares in privately-held banks . . . investors were not interested in purchasing Bank stock generally[.]" Defs. Br. 43. As the district court noted, requiring payments in cash upon Plan termination protects participants' pensions from arbitrary Bank restrictions imposed on its stock with "utter disregard" for participants' rights. 1 E27.

B. Defendants' Position That The Plan Administrator Had Discretion To Construe The Plan Document In A Way That Eliminates Section 10.4 Is Meritless

Defendants raise for the first time the issue of whether the Plan document gave the Plan Administrator, Defendant Chi, "discretionary authority to construe the terms of the Plan and make decisions regarding the meaning of the Plan's provisions" and whether "[t]he Administrator's determination is entitled to substantial deference" to which they believe "a deferential abuse of discretion standard applies" in fiduciary breach cases such as this one. Defs. Br. 34.[6] Defendants rely on a vacated opinion, Tibble v. Edison Int'l, 729 F.3d 1110, 1130 (9th Cir. 2013), vacated, 135 S. Ct. 1823, (2015), as authority.[7] Defendants argue that the district court erroneously rejected Chi's reading of the Plan document that ignores Section 10.4 and permits Defendants to distribute Bank shares to participants instead of cash upon Plan termination. Defs. Br. 34-35.

"[W]e do not ordinarily consider on appeal issues not raised below." Harik v.

[6] Defendants narrowly raised this deference issue in their post-trial brief with respect to the applicable interest rate. 2 E133; 134-35. In a footnote in that brief, Defendants attempted to belatedly raise this issue with respect to liability on Count One, long after summary judgment on Count One had been entered, and despite the fact that such liability was outside the scope of the post-trial briefing order. 2 E133, n. 4; 2 E148. On appeal, Defendants inappropriately attempt to expand their prior untimely deference argument to apply to Counts One and Two in their entirety.

[7] "[A] decision that has been vacated has no precedential authority whatsoever." Durning v. Citibank, N.A., 950 F.2d 1419, 1424 (9th Cir. 1991) (citation omitted).

Cal. Teachers Ass'n, 326 F.3d 1042, 1052 (9th Cir. 2003). Defendants cannot expect this Court to consider whether the district court should have deferred to Chi's interpretation at this late stage. See Nester v. Allegiance Healthcare Corp., 315 F.3d 610, 612-13 (6th Cir. 2003).

Even if the Court were to consider this issue, Defendants' argument fails. As explained in detail above, Section 10.4 contains no ambiguity requiring interpretation. See supra Section I.A. Chi's reading of the Plan simply ignores Section 10.4; he provides no interpretation. Further, if Chi's reading could somehow be viewed as an interpretation, it would be a clear abuse of his discretion in the face of the plain language of Sections 7 and 10. Id. "The Trustees abuse their discretion where they construe provisions of [a] plan in a way that clearly conflicts with the plain language of the Plan" or "render[s] nugatory other provisions of the Plan." Tapley, 728 F.3d at 1140 (9th Cir. 2013) (citations omitted); see also, e.g., Canseco, 93 F.3d at 606. Cases like Tapley and Canseco dictate the result here; Tibble is inapposite.[8]

[8] Moreover, this Court limited its discussion in Tibble to claims that fiduciaries violated the plan documents under ERISA section 404(a)(1)(D), not claims that fiduciaries violated their other statutory duties, including their duties of loyalty and prudence, as in Count One, or their obligation to override plan provisions if the provisions violate ERISA. See Tibble, 729 F.3d at 1129 & n.17. Even under this now vacated decision, the abuse of discretion standard has no applicability to the loyalty and prudence violations under this Count.

C. Defendants' "Impossibility" Argument Is Meritless

Defendants continue to argue that the FDIC, and the Department of Labor (DOL) through its alleged direction of the FDIC, made it "impossible" for Defendants to liquidate and distribute Plan assets to participants in cash, despite the district court's findings that Defendants' own evidence undermined this argument. 1 E25.[9]

It is undisputed that on June 24, 2011, the Plan distributed 97,237 Bank shares to participant IRA accounts held at the Bank. 1 E25; Defs. Br. 26, 30; 7 E1299. Defendants violated their fiduciary duties when they executed this distribution in Bank shares and not cash. 1 E28. It is also undisputed that "Defendants had not so much as requested permission from the FDIC to repurchase the plan participants' Bank shares when they informed participants that distributions would be made as Bank shares rather than cash." 1 E28. Furthermore, it is undisputed that, as the district court noted, by the time they distributed the shares in June 2011, "the only communication defendants had received from the FDIC [was that it] rejected the Bank's application as incomplete." 1 E25. It is, therefore, undisputed that neither the FDIC nor the DOL forced Defendants to violate their

[9] Defendants also allege that the court denied them due process when it denied their motion to compel the FDIC to produce communications with the DOL. Defs. Br. 9-10, 19, 27. Defendants failed to appeal the court's denial of their motion, failed to identify any errors with the district court's reasoning on appeal, and thus waived this argument. See Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994).

duties by distributing the Plan assets in the form of shares at that time. Defendants have not provided any basis to question these conclusions.

Defendants' reliance on subsequent events does not excuse their decision to violate the Plan document and their duties. 1 E25-26 ("The FDIC's first refusal to permit any repurchase because of the Bank's ongoing issues with the Department of Labor did not come until October 13, 2011, months after the Bank had already made the distributions in Bank shares rather than cash."); cf. Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974, 986 (9th Cir. 2001) (rejecting post-hoc justifications offered in litigation). Defendants' violations under Count One occurred in June 2011, when they transferred the shares out of the Plan and into IRA accounts owned by participants, even though the one-year time limit to liquidate the shares and distribute cash as required by Section 10.4 had not yet expired. 8 E1404. Once that transfer to participants' IRAs was made, it became impossible for the Plan to liquidate and distribute the shares because the shares were no longer in the Plan, placing the onus on the participants and not the fiduciaries to liquidate their shares. Cf. Charles Schwab & Co. v. Debickero, 593 F.3d 916, 919 (9th Cir. 2010). "Receiving illiquid Bank shares rather than cash amounts to a loss for the participants of the Plan." 1 E12-13. Incredibly, Defendants are still arguing that the FDIC's actions in October 2011 could have caused Defendants' own actions four months prior in June 2011. Defendants have failed to demonstrate that they attempted to prudently abide by Section 10.4; instead they admit that they transferred shares to participants in June 2011, six months before the one-year deadline under Section 10.4. Defs. Br. 26; 1 E25; 7 E1299. The district court properly rejected Defendants' "impossibility" argument.

D. The District Court Correctly Found Defendants Conveyed Misinformation In Their March 2011 Letter

Defendants fail to identify any error with the district court's primary basis for liability, namely their failure to follow Section 10.4's plain requirements. Defendants' arguments regarding the court's alternative bases for liability are likewise meritless. The district court ruled that "even assuming that Section 7.2 could apply, which the court finds [it] does not, defendants did not give plan participants any opportunity to choose between Bank shares or cash; they simply went ahead and made the distributions in the form of Bank shares." 1 E26. The court found that Defendants' March 2011 letter informing participants about this unilateral decision was also "replete with misinformation," and supported the court's decision that Defendants violated their duty of loyalty to speak truthfully to participants. 1 E27; see Barker v. Am. Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995) ("A fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance[.]").

Defendants fail to address the district court's basis for its conclusions. Defs.

Br. 36-38. Defendants do not contest the court's reliance on the letter's plain language, which conveyed Defendants' unilateral decision to terminate the Plan by providing shares to participants, instead of cash. Defendants, in fact, concede that the letter conveyed misinformation by referring to a distribution of stock that never occurred in February 2010. Id. at 37. Instead, Defendants focus completely on the immaterial fact that the letter permits the Bank's possible repurchase of that stock subject to several qualifications. Id. at 36. This fact is irrelevant to Defendants' unilateral decision to provide shares, and not cash, in violation of ERISA and the Plan document.

The district court also found Defendants disloyal when forcing participants to hold stock that Defendants admit is almost impossible to sell, see supra note 5, while misinforming participants in the March 2011 letter that the Bank's "requirement to" repurchase the stock ends after 60 days and is subject to governmental approval. See Defs. Br. 36. In fact, the Plan required payment to participants in cash. Defendants never contest the fact that they told participants the Bank was not "required" to repurchase the stock after 60 days, and, instead, Defendants raise an immaterial issue as to whether they ever "refused" to repurchase the stock subsequent to the letter. Defs. Br. 37. This issue is irrelevant to the district court's conclusion that Defendants violated their duties of loyalty when they imposed qualifications on the repurchase of stock in the March 2011 letter, when a cash payment was required under the Plan.

II. Count Two: The District Court Correctly Found No Genuine Issue Of Material Fact Regarding Defendants' Improper Diversion Of Plan's $132,506 Account Receivable

As the district court correctly concluded, the simple undisputed facts regarding Defendants' transfer of $81,407.18 of the Plan's $132,506 account receivable to the Bank clearly satisfy the elements for ERISA violations under section 403 (the anti-inurement provision, requiring that "assets of a plan shall never inure to the benefit of any employer"), section 406(a) (the prohibited transaction provisions, barring certain transactions between a plan and a party in interest), section 406(b) (the prohibition of self-dealing), and section 404 (the duties of prudence and loyalty). 1 E31.

On appeal, Defendants contest only one element: whether the $132,506 was a Plan asset. As the district court recognized, Defendants' own evidence and statements describe the entire $132,506 account receivable as a Plan asset. 1 E29 (citing 5 E735 (Defendants' December 28, 2010 "Resolution to Demand Payment of Book Value Interest in Seclusion Alcalde, LLC")); see also 6 E975 (Audited Financial Statements, note H). As a result, the court correctly concluded that "[a]ll indications are that the $132,506 was a Plan asset." 1 E29.

Defendants present no argument or record evidence that raises a dispute of material fact with respect to this conclusion. Instead, Defendants' brief raises a completely immaterial argument as to whether the $132,506 was "owned by any of the Participants." See Defs. Br. 52, 55. Defendants never challenge on appeal the district court's conclusion and the undisputed evidence that the Plan, not the participants or the Bank, owned the rights to the account receivable in its name. 1 E31 (an "account receivable that belonged to the Plan"). Defendants do not dispute that the account receivable originated from dividends that were owed to the Plan on stock "allocated" to participants' accounts (but owned by the Plan) as well as any unallocated shares owned by the Plan at that time.[10] As the district court recognized, the unallocated shares and control over those shares' dividends are governed by the Plan document, reinforcing the undisputable conclusion that the Plan owns these unallocated shares and its dividends. 1 E30; Defs. Br. 49, 54-55; 8 E1380, 1383, 1392 (Sec. 4.4; 5.3; 7.7). For example, Defendants rely on Section 4.4, Defs. Br. 54, which states that "Bank Stock when initially acquired by the Trustee . . . shall be credited to the Unallocated Stock Account." (emphasis added). While Defendants are correct that such stock is not allocated to individual participants, these assets are still Plan assets, and any dividend on this stock is also a Plan asset. See generally Herman v. NationsBank Trust Co., (Georgia), 126 F.3d 1354, 1367 (11th Cir. 1997).

[10] Defendants contend that the account receivable was "treated as a dividend to the Plan because the land that was the basis for the receivable was recorded as a dividend to shareholders," including the Plan. 5 E599.

There is no basis to jump to Defendants' conclusion that these assets are Bank assets. The district court found that Defendants submitted no evidence in support of their argument, other than Defendant Chi's own declaration. 1 E12; see Defs. Br. 53 (citing Nelson v. City of Davis, 571 F.3d 924, 928-29 (9th Cir. 2009)). But Defendants conflate testimony that serves as evidence of events that transpired, as discussed in Nelson, 571 F.3d at 928-29, with Chi's self-serving testimony that presents arguments for why the events that undisputedly transpired here were not violations of the law. Defendants inaptly criticize the court for "making credibility determinations" with regards to Chi's own opinion regarding why the undisputed events do not constitute violations of ERISA, Defs. Br. 56, when in fact the court was merely rejecting what amounts to an unsupported legal argument that the Bank had legal rights to the dividend. Orr v. Bank of Am., NT & SA, 285 F.3d 764, 783 (9th Cir. 2002) ("To defeat summary judgment, she must respond with more than mere hearsay and legal conclusions.") (internal quotation marks and citation omitted).

The district court did not "disregard" Chi's declaration, as Defendants allege. Defs. Br. 53. Rather, the court found it unsupported by evidence, noting that "the explanation offered by defendants is without any evidentiary support[.] '" 1 E31. For example, Defendants "submitted no documents or other evidence relating to the purported repurchase by the Bank of the unallocated stock collateralizing the loans, or, perhaps more importantly, any agreement between the Bank and the Plan relating to whether that repurchase would encompass any dividends associated with that stock." 1 E30. Finding that Defendants' explanation "is not enough to defeat summary judgment in favor of the Secretary," the court correctly concluded that "defendants diverted to the Bank a significant portion ($81,407.18) of the $132,506 account receivable that belonged to the Plan, and by doing so, defendants violated ERISA[.]" 1 E31. This Court has repeatedly affirmed summary judgment decisions where the parties only offer self-serving and conclusory affidavits in opposition to unrefuted evidence. See, e.g., Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1063 (9th Cir. 2012).

Defendants also contend that the district court should have deferred to Chi's Plan interpretations pertaining to this Count. Defs. Br. 55-56. As with Count One, Defendants raise this issue for the first time in this appeal, so this issue is waived. See supra, note 6. Moreover, Defendants fail to refute the district court's finding that Defendants offered no explanation for how the transfer of $81,407 from the Plan to the Bank could have been properly made in conformity with the Plan document. Rather than explaining why they offered no such explanation, Defendants criticize the court for "fail[ing] to consider all of the provisions of the Plan Document," implying that it was the court's responsibility to provide the explanation, not their own. Defs. Br. 54. The Plan provisions clearly support the district court's conclusion that the account receivable was a Plan asset; Defendants provide no contrary reading. Any argument for deference fails here for the same reasons it failed with respect to Count One. See supra Section I.B.

III. Count Three: The District Court Committed No Clear Error In Finding Defendants' Transfer Of $69,745.93 In Plan Assets From The Plan To The Plan Sponsor Was A Prohibited Transaction

Defendants do not dispute that $69,745.93 was transferred from Plan Account 6510 to the Bank, or that Chi made the transfer decision. 1 E17; Defs. Br. 56-57. Nevertheless, Defendants criticize the district court for concluding that these facts establish a prohibited transaction under ERISA. Defs. Br at 56. The court correctly held, however, that this transaction was per se illegal under ERISA section 406(a)(1)(D). 1 E17. The court also correctly held that Defendants violated other provisions of section 406, which bars certain transactions between a plan and a party in interest, and ERISA section 403(c)(1), which prohibits "assets of the plan" from inuring to the employer's benefit. 1 E17.

To protect the assets of plans, Congress forbade certain types of transactions altogether in ERISA section 406, with the goal to "categorically bar[ ] certain transactions deemed 'likely to injure the pension plan,'" Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242 (2000). ERISA section 406 bars these transactions, e.g., Defendants' transfer of Plan assets to the Bank as Plan Sponsor (Count Three), and Defendants' transfer of the Plan's account receivable payment to the Bank (Count Two), without regard to whether or not they may be otherwise justified. See Cutaiar v. Marshall, 590 F.2d 523, 528-529 (3d Cir. 1979).

Defendants do not and cannot contest the undisputed facts that support all elements of the prohibited transaction here. Defendants do not cite any statutory authority for an exemption. Instead, Defendants repeat their argument below that the $69,745.93 was an overpayment that belonged to the Bank. Below, they relied on ERISA section 403(c)(2)(A)(i), 1 E17, which provides that a purported "overpayment" of employer contributions to the Plan may be returned to the employer "within one year after the payment of the contribution" if a "mistake of fact" is established. Defendants fail, however, to recite this legal authority on appeal or to cite any evidence that satisfies the statutory conditions. See Defs. Br. 56-59. Defendants have the burden to establish an exemption to a prohibited transaction, an exception to the anti-inurement provision, or any other affirmative defense. Chao v. Malkani, 452 F.3d 290, 297 (4th Cir. 2006) (describing section 403(c)(2)(A)(i) as a narrow "exception" to ERISA section 403's anti-inurement provision); cf. Howard v. Shay, 100 F.3d 1484, 1488 (9th Cir. 1996); Allen v. GreatBanc, 835 F.3d 670, 676 (7th Cir. 2016) (discussing defendants' burden to establish ERISA section 408, 29 U.S.C. § 1108, exemptions to prohibited transactions); see generally, e.g., U.S. v. Gravenmeir, 121 F.3d 526, 528 (9th Cir. 1997) (noting the "'well-established rule . . . that a defendant who relies upon an exception to a statute . . . has the burden of establishing and showing that he comes within the exception[.]'") (citation omitted).

In complaining that "the DOL offered no evidence establishing that the $69,746 was anything other than an overpayment," Defs. Br. 59, Defendants forget their burden of proof. Defendants argue that "the only evidence submitted was that the $69,746 represented an overpayment[,]" and therefore the transfer of the $69,746 back to the Bank was justified. Defs. Br. 57. Cf. British Motor Car Distributors v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371, 374-75 (9th Cir. 1989) (rejecting employers' theory that "the fact that the Trust terminated (having paid off all beneficiary claims) with surplus assets . . . proves that the Trust fiduciaries' actual projections were mistaken" and constitutes "mistake of fact"). Defendants allege that "unrefuted evidence" established that Chi "consulted with Mr. Nash regarding the propriety of returning the $69,746 to the Bank," noting that both Chi and Nash "testified that the $69,746 was an overpayment that should be returned[.]" Defs. Br. 57. The court agreed that this was the "only evidence defendants offered," but found that it was "conclusory and self-serving testimony that the account balance 'must have been' an over-contribution." 1 E17 (emphasis added). Defendants merely repeat Chi and Nash's speculation about the origins of the money without any documents or accounting, and years after the last contribution to the Plan was made, ignoring the statutory requirement of ERISA section 403(c)(2)(A)(i) that any return of a contribution made by mistake of fact be returned "within one year after the payment of the contribution." 29 U.S.C. § 1103(c)(2)(A)(i); 8 E1430 ("The last contribution . . . occurred in 2006 or earlier."). The court also found that "there was no actual credible and specific evidence showing what mistake was made, when, or how." 1 E17. As the court rightly concluded, Defendants' showing "is plainly insufficient," because "[a] true mistake of fact occurs when there is an arithmetic or clerical error in making contributions, . . . and no such error was ever identified here." Id. Defendants never offered any evidence that the $69,746 was an "overpayment" or was created by a "mistake" under ERISA section 403(c)(2)(A)(i) apart from conclusory speculation. On appeal, they completely ignore the court's findings that Defendants presented no evidence on the mistake of fact element. Defendants thus waived any challenge to these findings, which alone is a sufficient basis for affirmance on Count Three. Mendoza v. Block, 27 F.3d 1357, 1363 (9th Cir. 1994) (failure to raise an issue in an opening brief results in waiver).

The court correctly held that the $69,745.93 transfer of Plan assets constituted a prohibited transaction, violated ERISA section 403, and that Defendants failed to provide evidence that any exemption from or exception to those prohibitions applied. 1 E17-18.

IV. The District Court Acted Within Its Discretion In Awarding Prejudgment Interest

A district court has discretion to award prejudgment interest in an ERISA case at a rate it deems appropriate. Blankenship v. Liberty Life Assur. Co., 486 F.3d 620, 628 (9th Cir. 2007) (affirming 10% prejudgment interest in an ERISA context). In ERISA cases, this Circuit has held that the "rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of pre-judgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate." Grosz-Salomon, 237 F.3d at 1164. This Circuit reviews "the district court's calculation of prejudgment interest for an abuse of discretion." Id. at 1163-64.

The court granted the Secretary's request for the IRS underpayment rate, 26 U.S.C. § 6621(a)(2) (the "IRC Rate"), which is generally higher than the interest rate under 28 U.S.C. § 1961. 1 E14. The court agreed that using this rate is consistent with the Secretary's long-standing policy of using the IRC rate in cases of voluntary compliance, which would strongly support its use in litigated cases of fiduciary breach. Id. Several circuit courts, including this Court, have endorsed an analogous approach for disgorgement claims in the S.E.C. context. See, e.g., S.E.C. v. Platform Wireless Int'l Corp., 617 F.3d 1072, 1099 (9th Cir. 2010); S.E.C. v. Teo, 746 F.3d 90, 109 (3d Cir. 2014); S.E.C. v. First Jersey Sec., 101 F.3d 1450, 1476

(2d Cir. 1996). Starting in First Jersey Sec., the Second Circuit found no abuse of discretion in awarding the IRC Rate, because that rate was consistent with the S.E.C.'s own regulations when it ordered disgorgement in administrative proceedings.[11] 101 F.3d at 1476. This Court in Platform Wireless agreed and found the agency's reasoning in the parallel administrative context for the IRC rate "persuasive." 617 F.3d at 1099 (citing reasons, including the rate as "a reasonable proxy for the interest rate that would ordinarily be charged."). The Third Circuit also agreed, concluding that "[t]he SEC's request for this rate of interest on disgorged sums was consistent with its own regulation." Teo, 746 F.3d at 109.

Likewise, it is the Department's long-standing policy to use the IRC rate for fiduciaries who self-report and voluntarily correct ERISA violations through its Employee Benefits Security Administration's Voluntary Fiduciary Correction Program. 1 E14; 67 Fed. Reg. 15062, 15066 (Mar. 28, 2002) (policy implemented after notice and comment and justified use of the section 6621 rate); Pension Payback Program, 61 Fed. Reg. 9205 (Mar. 7, 1996) (adopting, in a predecessor program, the section 6621 rate). Like the S.E.C., the Department recognized the IRC rate as the rate participants would ordinarily earn but for the violation. As the

[11] In Price v. Stevedoring Servs. of Am., 697 F.3d 820, 839 & n.12 (9th Cir. 2012) (en banc), this Court granted Skidmore deference to the agency's use of the section 1961 rate in administrative proceedings, but also noted the agency could have used the section 6621 rate.

Department noted in 1996, the section 6621 rate "requires that the earnings be calculated on an account by account basis in order to mirror the earnings the participants would have otherwise accrued . . . [and] is designed to reflect market rates of interest rather than serve as a penalty." 61 Fed. Reg. 9205. The Department noted in 2002 that the section 6621 rate serves to "make the plan whole." 67 Fed. Reg. 15066.[12]

As in Platform Wireless, it would be contrary to the purposes of the Voluntary Fiduciary Correction Program, and contrary to good public policy, to apply a lesser interest rate for recoveries from breaching fiduciaries such as Defendants who have neither self-reported nor voluntarily corrected. See, e.g., Solis v. Sonora Envtl., LLC, No. CV 10-00675, 2012 WL 5269211, at *5 (D. Ariz. Oct. 24, 2012); Harris v. A.D. Vallett & Co., No. 3:13-0105, 2014 WL 1280490, at *4 (M.D. Tenn. Mar. 27, 2014).

Relying on this reasoning, the district court explained, "[p]rejudgment interest is an element of compensation, not a penalty." 1 E14. The court recognized that "[a]lthough a defendant's bad faith conduct may influence whether a court awards

[12] "ERISA, like the Longshore Act, has a remedial purpose, and both schemes provide payments on which recipients are likely to depend, in whole or in part, for their livelihood." Price, 697 F.3d at 836. A section 6621 rate is appropriate when defendants deprive parties of their livelihoods. See E.E.O.C. v. Erie Cty., 751 F.2d 79, 82 (2d Cir. 1984); Taxman v. Bd. of Educ. of Twp. of Piscataway, 91 F.3d 1547, 1566 (3d Cir. 1996) .

prejudgment interest, it should not influence the rate of the interest." Id. The court therefore correctly considered the fact that "Defendants' conduct was in blatant disregard of the express terms of the Plan document and of the defendants' fiduciary duties under ERISA" in determining that "the equities support an award of prejudgment interest." 1 E14.

In determining the rate of the interest, however, the court considered the "equities of [this] particular case" in accordance with this Court's holding in Grosz-Salomon. As explained above, had Defendants self-reported and/or voluntarily corrected their violations through the Department's program, prejudgment interest would have been applied at the IRC rate. For the court to compensate the Plan with a lower rate here would produce an inequitable result. Id. Consequently, the court applied the section 6621 rate. Id. The court did not, as Defendants allege, consider the bad faith conduct itself in setting the interest rate. Defs. Br. 47.

The district court also considered Defendants' argument that the 0.25% interest rate specified in Section 7.6 of the Plan document was an appropriate rate. 1 E13. The court correctly found, however, that "the 'rate of interest' specified in Section 7.6(a) of the Plan . . . relates to put options for participants who received a distribution of Bank stock because they elected that option under Section 7.2 . . . . [and] has no application to the facts of this case, where Plan participants were distributed Bank shares in violation of Section 10.4." Id.

Finally, Defendants repeat their flawed assertion that deference should be accorded to the Plan Administrator's interpretation of the Plan document. Defs. Br. 45-46. Their position fails here for the same reasons previously discussed, see supra Section I.B., as again the Plan document's text does not support Defendants' reading. The district court did not abuse its discretion.

V. The District Court Committed No Clear Error In Holding All Defendants Liable

A. Liability Of Akila Chen, Kent Chen, And William Mo

The district court found Akila Chen, William Mo, and Kent Chen (the "Non-Administrator Trustees") liable as co-fiduciaries under ERISA section 405(a)(2) for the breaches of Chi and the Bank. See also ERISA section 405(a) ("a fiduciary . . . shall be liable for a breach of fiduciary responsibility of another fiduciary. . ."). The court further found that "the evidence supports a finding that they are also liable in their own rights under § 409 for the breaches of their own fiduciary duties under §§ 404(a)(l)(A) and (B)." 1 E16, 18.

Defendants contest the court's finding of liability for these three individuals purely on the theory that there is insufficient evidence to support its finding. Defendants do not contest the legal basis for their liability under ERISA section 405 or 409. Defs. Br. 59-63. They allege that the "only" evidence regarding the Non-Administrator Trustees' conduct consists of the two resolutions terminating the Plan

(6 E962) and requesting payment of the account receivable (5 E735). Defs. Br. 62. This evidentiary assertion is incorrect.

It is undisputed that the Non-Administrator Trustees were Trustees. Defs. Br. 12; 7 E1299, 1311. As Trustees, they had discretionary authority and responsibility over the administration of the entire Plan. See 8 E1397 (Sec. 8.1(c)(2) ("Duties and Responsibilities" of the Trustee include: "Communicating with Participants" and "Investing and controlling the Plan assets.")). Defendants do not dispute that they were ERISA fiduciaries.

The district court correctly ruled that each Non-Administrator Trustee was liable along with the Bank and Chi. 4 E468, 1 E21, 1 E2. The court had sufficient evidence for this ruling. E.g., Defs. Br. 25 (acknowledging, for Count One, that all Defendants knew about the request to repurchase stock from participants and, thus, concurred with payment in stock and not cash); Chi Declaration ¶ 10 (5 E714) (admitting for Count Two that the Plan, not just the Administrator, hired Richardson & Company to allocate the account receivable). As the court noted, Defendants conceded in their motion for leave to file a motion for reconsideration that "they presented [no material fact] that may have defeated summary judgment against these individual trustee defendants." 4 E469.

As the court held, the trial testimony of each Non-Administrator Trustee "showed that they did not understand or appreciate their responsibilities as fiduciaries of the Plan," and demonstrated that "they provided little or no oversight of Chi." 1 E16; see also 1 E10-11. For example, Akila Chen testified that "he believed '[t]he most important job duty for me is watch the bank's security and profit[.]' . . . and he did not believe that he was the 'right power to check' the $69,746 that was transferred from the Plan to the Bank." 1 E11. Kent Chen admitted he did not know the reason for the transfer or if it was right or wrong. 3 E321 (Tr. 168:10-12). He identified no oversight of Chi's activities regarding Plan assets post-termination and testified only that Chi told him that Richardson & Company had been engaged to allocate shares before liquidating Plan assets. 3 E316-17 (Tr. 163:10-164:15). Mo admitted that he did not take any action regarding the Plan after he signed the resolution to terminate it. 3 E326-27 (Tr. 173:25-174:2). The Non-Administrator Trustees' inattention enabled Chi's malfeasance. 1 E16, 18. "These trustees failed to fulfill their fiduciary responsibilities, and by doing so enabled Chi" to commit fiduciary breaches. Id.

As trustees who failed to abide by their fiduciary duties and allowed harm to come to the Plan, the Non-Administrator Trustees are liable for breaching their duties of prudence and loyalty under ERISA sections 404(a)(1)(A) and (B). They are also liable as co-fiduciaries who through their inattention enabled the breaches of Chi and the Bank under ERISA section 405(a)(2), which states: "a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary . . . (2) if, by his failure to comply with section [404](a)(1) . . . in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach." 29 U.S.C. § 1105(a)(2).

The Non-Administrator Trustees' status as fiduciaries derive from their duties as trustees, and ERISA trustees <u>must</u> "jointly manage and control the assets of the plan." 29 U.S.C. § 1105(b)(1)(B); <u>see</u> 29 U.S.C. § 1103(a) ("the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan"). The Plan document clearly states that the duties and responsibilities of the trustees include "[i]nvesting and controlling the Plan assets." 8 E1397 (Sec. 8.1(c)(2)(I)); <u>see</u> 8 E1397 (Sec. 8.1(c)(4) ("[t]he custody of Plan assets shall at all times be retained by the Trustee[.]")). If more than one person is appointed as "the Trustee," the Plan states that "[a]ll decisions required to be made by the Trustee involving the interpretation, application and administration of the Plan shall be resolved by majority vote[.]" 8 E1396-97 (Sec. 8.1(c)(1)). There is no argument that the Trustee requirements in the statute or the Plan did not apply. <u>See</u> 29 U.S.C. § 1105(b)(1)(B) & (c)(1) (non-delegation of trustee obligations); 8 E1398 (Sec. 8.1(c)(3) and App. A, Art. 1.3 (strict requirements for delegation of fiduciary functions)). All Plan trustees therefore retain their joint duty and responsibility to manage and control Plan assets.

Directly contrary to these statutory duties and the Plan requirements, the Non-Administrator Trustees testified to exercising no authority or oversight over Chi's unilateral decisions to deal with the Plan assets for termination (Count One) or his misappropriation of Plan assets for the benefit of the Bank (Counts Two & Three), in violation of the Plan document, their fiduciary duties, and ERISA's anti-inurement and prohibited transaction provisions. Even on appeal, Defendants admit that the Non-Administrator Trustees gave free rein to Chi to deal with Plan assets despite their statutory obligation to "manage and control the assets of the plan," 29 U.S.C. § 1105(b)(1)(B). E.g., Defs. Br. 60 ("The actions taken to effectuate those resolutions were taken by the Administrator and the Bank.").

Once each Non-Administrator Trustee accepted a position as trustee, he "could not avoid liability for [another's] mismanagement of the Plan by simply doing nothing." Free v. Briody, 732 F.2d 1331, 1336 (7th Cir. 1984) (relying on 29 U.S.C. § 1105(a)(2)). Like the trustee in Free, these trustees admitted to "nonfeasance" in their critical trustee roles, thereby permitting the conversion of Plan assets under their dominion. Id.; see also In re First Am. Corp. ERISA Litig., 258 F.R.D. 610, 623 (C.D. Cal. 2009); Russo v. Unger, No. 86 CIV. 9741, 1991 WL 254570, at *7 (S.D.N.Y. Nov. 20, 1991); Springate v. Weighmasters Murphy, Inc. Money Purchase Pension Plan, 217 F. Supp. 2d 1007, 1023-24 (C.D. Cal. 2002). Defendants cite cases concerning ERISA fiduciaries' monitoring duties when they appoint a non-fiduciary to carry out certain fiduciary roles. <u>See</u> Defs. Br. 61. Here, however, the Non-Administrator Trustees undertook their crucial responsibilities as trustees jointly with ultimate control and dominion over Plan assets imposed by both ERISA and the Plan document. These violations do not merely concern the Non-Administrator Trustees' failure to monitor Chi as an appointee. Rather, the violations concern their dereliction of their primary responsibility of overseeing and managing Plan assets—assets that were diverted and converted under their watch by Chi as a co-fiduciary. The court committed no clear error in holding all Defendants jointly and severally liable.

B. <u>William Mo's Alleged Resignation</u>

Finally, the court committed no clear error in rejecting William Mo's defense that he had resigned as a trustee in October 2010. The court found that the "evidence showed only that he had resigned as a board member, not as a trustee of the Plan," that "[h]is resignation letter itself made no mention of the Plan," and that "he continued to act as a trustee, including signing . . . the termination resolution for the Plan as one of its trustees" in December 2010. 1 E15. Moreover, his purported resignation "was inconsistent with the Plan's requirements for resignation as a trustee" under Sections 8.1(c)(1) and 8.6, both of which require that any resignation be submitted to the Bank <u>via written notice</u>, as well as with ERISA's requirement that "a trustee must be held to have continued in a fiduciary status absent a clear resignation." Id.; see generally Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., 93 F.3d 1171, 1184 (3d Cir. 1996); Allison v. Bank One-Denver, 289 F.3d 1223, 1237 (10th Cir. 2002) (refusing to permit fiduciaries to walk away without complying with plan documents).

CONCLUSION

The Secretary respectfully requests this Court affirm the judgment.

STATEMENT OF RELATED CASES

There are no related cases.

DATED: June 23, 2017

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 12,989 words.

DATED: June 23, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 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.

DATED: June 23, 2017

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEF

I, Thomas Tso, certify that this brief is identical to the version submitted electronically on June 23, 2017.

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