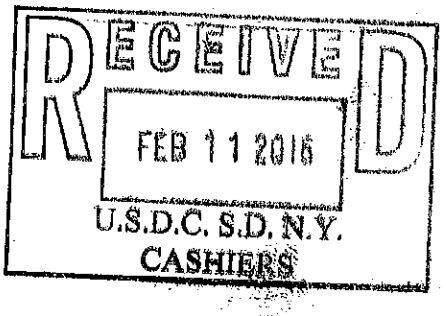
JUDGE NATHAN

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,	:	Civil Action No.
Plaintiff,	:	15 CV 00985
v.	:	**COMPLAINT**
SAMUEL GINSBERG, ROY G. GERONEMUS, and LASER AND SKIN SURGERY CENTER OF NEW YORK EMPLOYEE STOCK OWNERSHIP PLAN,	:	
Defendants.	:	



COMPLAINT

Plaintiff Thomas E. Perez, Secretary of the United States Department of Labor, alleges:

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and is brought by the Secretary of Labor under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132 (a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, and to obtain other appropriate relief to redress violations and enforce the provisions of that Title.

JURISDICTION AND VENUE

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

3. Venue of this action lies in the Southern District of New York pursuant to ERISA

§ 502(e)(2), 29 U.S.C. § 1132(e)(2), where the Laser and Skin Surgery Center of New York Employee Stock Ownership Plan (the "ESOP" or the "Plan") was administered and where the breaches alleged herein took place.

DEFENDANTS

4. The ESOP is a pension plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2). The ESOP is named as a Defendant in this Complaint solely for the purpose of ensuring complete relief among the parties under Rule 19 of the Federal Rules of Civil Procedure. The ESOP is sponsored by the Laser and Skin Surgery Center of New York Management Corp., a New York corporation engaged in the operation of a dermatological surgery center. Dr. R.G. Geronemus, M.D., P.C. d/b/a Laser and Skin Surgery Center of New York is the predecessor to Laser and Skin Surgery Center of New York Management Corp. (collectively, "LSSCNY" or "the Company"). Laser and Skin Surgery Center of New York Management Corp. was established for the purpose of the ESOP transaction and Dr. R.G. Geronemus, M.D., P.C. remains in existence under N.Y. Bus. Corp. Law §§ 1503, 507, 1508 to own and operate the medical practice.

5. The ESOP was adopted on December 31, 2008 with an effective date of January 1, 2008.

6. Laser and Skin Surgery Center of New York Management Corp. was incorporated on or about December 23, 2008 and has its headquarters and principal place of business at 317 East 34th Street, New York, New York 10016.

7. Defendant Samuel Ginsberg was the Trustee of the ESOP (the "ESOP Trustee") and exercised discretionary authority and control over management and disposition of the ESOP's assets and was therefore a fiduciary to the Plan pursuant to ERISA § 3(21), 29 U.S.C. §

1002(21).

8. At all relevant times, Defendant Ginsberg was a certified public accountant and a partner of Harvey Ginsberg &Co., Certified Public Accounts, P.C. At all relevant times, Defendant Ginsberg was the accountant for the Company and for Defendant Roy G. Geronemus personally. At the time of his appointment, Defendant Ginsberg did not have any experience as an ESOP Trustee and did not have any prior knowledge of the duties of an ESOP Trustee.

9. At all relevant times, Defendant Roy G. Geronemus was the President of LSSCNY and, until he sold 50.06% of his stock to the ESOP, the sole shareholder of LSSCNY.

10. At all relevant times, Defendant Geronemus has been the sole owner of Dr. R.G. Geronemus, M.D., P.C. d/b/a Laser and Skin Surgery Center of New York.

11. Defendant Geronemus appointed Defendant Ginsberg as the ESOP Trustee and consequently exercised fiduciary authority and control over management and administration of the ESOP and was therefore a fiduciary to the ESOP pursuant to ERISA §3(21), 29 U.S.C. § 1002(21). As the individual who decided to appoint the ESOP Trustee, Defendant Geronemus had the fiduciary duty to select a competent fiduciary and to monitor Defendant Ginsberg in the performance of his fiduciary obligations in connection with the decision to purchase $24 million of LSSCNY stock.

12. Following the sale of 50.06% of Defendant Geronemus's LSSCNY shares to the ESOP, LSSCNY, through Defendant Geronemus, amended the Laser and Skin Surgery Center of New York Employee Stock Ownership Trust Agreement to name himself as the Trustee, replacing Defendant Ginsberg.

13. At all relevant times, Defendant Geronemus was a party in interest to the ESOP within the meaning of ERISA § 3(14)(A), (E) and (H), 29 U.S.C. § 1002(14)(A), (E) and (H) as

he was a fiduciary to the Plan, was the majority shareholder prior to the sale of stock to the ESOP as well as the President and sole officer of LSSCNY.

FACTUAL ALLEGATIONS

14. In 2008, Defendant Geronemus became interested in establishing an ESOP for his employees and began to investigate the feasibility of doing so.

15. In or about August 2008, Defendant Geronemus received a feasibility analysis from Corporate Solutions Group LLC ("CSG"), which discussed the most common valuation methodology, the Discounted Cash Flow method (DCF), and analyzed the value of LSSCNY, and various sale assumptions. The CSG analysis explicitly noted that reducing officers' salaries and adding them back as part of the valuation creates a higher "EBITDA" (Earnings Before Interest Taxes, Depreciation and Amortization) for the Company, which would lead to a higher valuation.

16. In its sample discounted cash flow analysis, CSG reduced the officer's salaries to $150,000 per year for its projection for the period of 2009-2013. Its "ESOP Sensitivity Analysis Assumptions" also notes that "Shareholder's compensation is kept at $150K between 2009-2012." The CSG valuation also reflected a liability of $5,252,000 as a "loan from shareholders" for the duration of its 2009-2013 projection. Based on the assumptions contained therein, including an officer salary of $150,000, the CSG presentation valued 100% of the Company at $51,917,000.

17. Defendant Geronemus saw CSG's presentation and discussed it with LSSCNY's chief operating officer Joan Agnetti after the second meeting he had with CSG. Defendant Geronemus did not ultimately engage CSG.

18. On or about September 24, 2008, LSSCNY engaged Benefit Concept Systems,

Inc. ("BCS") to conduct a feasibility study and administer the ESOP. Among other work to be performed, the agreement stated that BCS would "Work with company's Chief Financial Officer to produce financial statements including profit and loss, balance sheets and cash flow statements covering 5 years history and a 5 year forecast to present to a valuation firm for a 'back of the envelope valuation' (no charge)." Defendant Geronemus signed the engagement agreement with BCS on behalf of LSSCNY.

19. The ESOP engaged Trenwith Valuation, LLC ("Trenwith") to provide a fairness opinion to the ESOP regarding the fair market value of the Company, adequate consideration, the terms and conditions of the ESOP loan, and the terms and conditions of the sale of securities. David Wimberly, Senior Vice President managed and completed the engagement for Trenwith. The ESOP signed the formal engagement letter with Trenwith on January 16, 2009.

20. Defendant Ginsberg provided Dr. R.G. Geronemus, M.D., P.C.'s historical financial information to CSG, BCS, and Trenwith.

21. The BCS Pre-ESOP study contained historical financial statements for Dr. R.G. Geronemus, M.D., P.C. for the years 2004-2007 and projected financial statements for LSSCNY for the years 2008-2013, as well as adjustments to those statements.

The 10/8/08 Valuation

22. On or about October 10, 2008, Trenwith produced an initial valuation of Dr. R.G. Geronemus, M.D., P.C. to Defendant Ginsberg that it stated was based on the historical and projected financial statements and adjustments contained in the BCS Pre-ESOP study ("10/8/08 Valuation"). The 10/8/08 Valuation analysis employed various methods to analyze the company, including the DCF method and the Guideline Companies method. Under the DCF method, Trenwith projected LSSCNY's future cash flows (both revenues and expenses), and then

discounted them to a present value. In the Guideline Companies method, Trenwith considered multiples of public companies engaged in activities similar to LSSCNY's operations within a comparable time frame.

23. The 10/8/08 Valuation valued 100% of LSSCNY at $47,400,000 (rounded), which was based on weighting the value indicated by the DCF method at 59% and the value indicated by the Guideline Company Price/EBITDA Multiple (high statistic adjusted) at 41%.

24. The 10/8/08 Valuation identified the "compensation of officer" – the compensation for Defendant Geronemus – for 2004-2008 as $2,500,000 and projected it as $300,000 for 2009-2013. That is, it projected that Defendant Geronemus's compensation would be reduced from $2,500,000 to $300,000 after the ESOP. Further, it projected that the management fee that Defendant Geronemus had received and which it identified as $2,500,000 in 2004-2006 and $3,750,000 in 2007 and 2008 would be reduced to zero for the projection period of 2009-2013. These assumptions reduced LSSCNY's projected operating expenses from $22,414,776 in 2008 to $17,596,310 in 2009. The 10/8/08 Valuation then added back these amounts, less $300,000 in projected compensation, to obtain the projected profits after add backs-cash basis. The 10/8/08 valuation also projected a $5,251,510 loan from the shareholder, Defendant Geronemus, as a liability through 2013.

25. The 10/8/08 Valuation identified 12 similar companies to use as comparators for the Guideline Companies method. These companies included Care UK, plc, Corporación Dermoestética, Clínica Baveria, S.A., Optos, plc, and Bastide le Confort Medical, S.A., all of which are based in or operate in Europe.

26. Defendant Geronemus received a copy of the 10/8/08 valuation from Defendant Ginsberg and discussed it with a representative of BCS and attorney Tabitha Croscut.

The BCS Memorandum

27. On or after October 20, 2008, BCS prepared a confidential memorandum (the Memorandum) on behalf of the Company to parties interested in providing financing to the Company for the ESOP. Donald Israel of BCS, and Defendants Geronemus and Ginsberg are listed as contacts for any questions about the Memorandum.

28. In the summary section, the Memorandum notes that Defendant Geronemus "desires to sell approximately 50.6 percent of LSSC [Dr. R.G. Geronemus, M.D., PC DBA Laser & Skin Surgery Center of New York] to an . . . [ESOP] for $24 million. . . . It is anticipated that Dr. Geronemus will be given an employment contract, the terms of which will be determined."

29. The financial information attached to the Memorandum was the same as the 10/08/08 Valuation, including all of the projections regarding the shareholder loan, Defendant Geronemus's compensation, management fee, and the add-backs.

30. Defendant Geronemus was aware of the value conclusion contained in the the Memorandum and the 10/08/08 Valuation and communicated with BCS and Defendant Ginsberg regarding that conclusion. On or about December 21, 2008, Defendant Geronemus sent an email to Defendant Ginsberg and Donald Israel of BCS asking about the formal valuation that would follow the 10/8/08 Valuation and asking whether there is "any concern than [sic] the number will come in lower than 48?" That is, asking whether there is a possibility that a subsequent valuation could value 100% of the Company lower than $48 million.

Defendant Geronemus's Employment Agreement

31. Defendant Ginsberg knew or had reason to know that the projected yearly compensation of $300,000 for Defendant Geronemus in the 10/08/08 Valuation and the Memorandum did not reflect the amounts that Defendant Geronemus would actually receive

from the Company.

32. In an email dated December 10, 2008 to Donald Israel of BCS, copied to Defendant Geronemus, Defendant Ginsberg described the form that the employment agreement for Defendant Geronemus would take as tied to his production of medical services as well as some kind of bonus or management fee. Defendant Ginsberg wrote this would be about $3,000,000 in income from Defendant Geronemus's production of medical services as well as "$1 million in interest income and there should be some money left to give to Roy as a management fee or bonus, etc."

33. For the period 2005-2007 immediately prior to the ESOP Transaction, Defendant Geronemus had gross collections for medical services in excess of $7 million per year.

34. On January 28, 2009, LSSCNY's attorney Tabitha Croscut drafted an employment agreement for Defendant Geronemus that she sent to Defendants Ginsberg and Geronemus. Her email noted explicitly that she would send it to the valuator David Wimberly after Defendants Ginsberg and Geronemus approved its terms.

35. The next day, January 29, 2009, Defendant Ginsberg responded to Croscut's email with a copy to Defendant Geronemus and others, stating that he had gone over the terms with Defendant Geronemus and that they would shortly send a memo with their changes. In the email Defendant Ginsberg also noted that "I will get you the loan figure as well by Friday."

36. On February 11, 2009, Defendant Geronemus signed an employment agreement (the "Employment Agreement"), with a base salary of $300,000 plus compensation based on gross collections. The Employment Agreement provides that Defendant Geronemus shall receive additional compensation of: 45% of his gross medical collections up to $2,500,000; and 50% of gross collections thereafter. The Employment Agreement also provides for a bonus of up to 50%

of free cash flow in accordance with the method projected by Trenwith attached as Exhibit A to the Agreement. Defendant Geronemus signed this Employment Agreement on behalf of himself and also as President of Dr. R.G. Geronemus, M.D., P.C. Under this Agreement, Defendant Geronemus had the ability to earn millions of dollars per year.

37. Defendant Geronemus's compensation post-ESOP, including salary, bonus and management fee, was $2,662,001 in 2009; $1,300,000 in 2010; $2,000,000 in 2011; $1,600,000 in 2012; $1,300,000 in 2013.

38. The amounts that Defendant Geronemus took as salary were less than what he was contractually entitled to as compensation. Pursuant to the terms of the Employment Agreement, he was entitled to receive approximately $3,297,417 in 2009; $4,236,635 in 2010; $4,373,822 in 2011; $4,643,808 in 2012 and $4,605,106 in 2013.

The 2/12/09 Valuation

39. In February 2009, Trenwith produced a valuation dated February 12, 2009 for use as the valuation of LSSCNY for the ESOP transaction (the "2/12/09 Valuation"). As explained in detail below, based on erroneous assumptions and other assumptions, the 2/12/09 Valuation report valued a 100% equity interest in the Company as $48,100,000 (rounded).

40. The 2/12/09 Valuation stated that it relied on the historical and projected financial statements and adjustments contained in the BCS Pre-ESOP study as well as a site visit to the Company's offices. This valuation analysis employed various methods to analyze the company, including the DCF method and the Guideline Companies method.

41. The 2/12/09 Valuation valued 100% of LSSCNY at $48,100,000 (rounded), which was based on weighting the value indicated by the DCF method at 45% and the value indicated by the Guideline Company Price/EBITDA Multiple (high statistic adjusted) at 55%.

42. The 2/12/09 Valuation identified the "compensation of officer," Defendant Geronemus, for 2004-2008 as $2,500,000 and projected it as $3,000,000 for the years 2009-2013. It also projected a management fee of $1,000,000 per year for 2009-2013. It then added back these amounts, less $663,439 yearly salary, to obtain the projected profits after add backs-cash basis. That is, the projection took into account $663,439 in projected compensation for Defendant Geronemus as a cost for the Company going forward, which was significantly less than he was contractually entitled to receive and which he did receive in compensation.

43. The 2/12/09 Valuation identified a $5,251,510 loan from shareholder, Defendant Geronemus, as a liability in 2007 but projected it forward as zero for the years 2008-2013.

44. The 2008 year-end financial statements for Dr. R.G. Geronemus, M.D., P.C dated June 22, 2009, list as a liability $5,434,747 as loans from shareholder.

45. The 2/12/09 Valuation identified 12 similar companies for the Guideline Companies method. These companies included five which are based in or operate in Europe: Care UK, plc; Corporación Dermoestética; Clínica Baveria, S.A.; Optos, plc; and Bastide le Confort Medical, S.A.

46. As a result of the 2/12/09 Valuation's improper add-back of most of Defendant Geronemus's compensation and assumption that it would cost the Company $663,439 per year, its failure to include the shareholder loan as a liability, and its improper use of comparator companies, the 2/12/09 Valuation report's value conclusions of the equity value of the Company, and therefore its ESOP Shares, was millions of dollars higher than its fair market value.

47. On or about February 5, 2009, David Wimberly of Trenwith sent an email to Defendant Ginsberg and his counsel Brian Hector stating: "Closing valuation is completed numbers jumped around some but I am leaving the Concluded value the same - $47,400,000. If

you both would like to schedule a call to go through the valuation process, I am available on Monday." Defendant Ginsberg forwarded this email to Defendant Geronemus with the attached valuation.

The ESOP Transaction

48. On February 12, 2009, based on the 2/12/09 Valuation, Defendant Ginsberg caused the ESOP to enter into a stock purchase agreement with LSSCNY and Defendant Geronemus to purchase 400,480 shares of LSSCNY Class A common stock (50.06% of the stock) from Defendant Geronemus for $24,000,000 or $59.92 per share (the "ESOP Transaction").

49. The ESOP's purchase of LSSCNY shares was made through an employee stock ownership trust ("the Trust").

50. Defendant Geronemus and the Trust also entered into a stock pledge agreement in which Defendant Geronemus agreed to lend the Trust $10,000,000 in exchange for a promissory note. The ESOP and LSSCNY Management Corp. entered into an employee stock ownership trust loan agreement in which LSSCNY agreed to lend the Trust $14,000,000 for the remaining shares in exchange for another promissory note. Defendant Geronemus signed the agreements as President of LSSCNY and Defendant Ginsberg signed as trustee. Accordingly, on the transaction date, Defendant Geronemus received $14,000,000 in cash and a promissory note for $10,000,000.

51. In connection with the ESOP Transaction, Defendant Ginsberg had a duty to make certain that his reliance upon Trenwith's advice was reasonably justified under the circumstances. To this end, Defendant Ginsberg was obligated to read Trenwith's valuation report, understand the report and to identify, question and test Trenwith's underlying

assumptions. In addition, Defendant Ginsberg was obligated to verify that Trenwith's conclusions were consistent with the data provided to Trenwith and that the appraisal was internally consistent. Defendant Ginsberg failed to comply with these duties under ERISA and caused the ESOP to overpay for the stock purchased in the ESOP Transaction.

52. Based on the Employment Agreement and his knowledge of Defendant Geronemus's past compensation, Defendant Ginsberg knew or had reason to know that the 2/12/09 Valuation did not adequately account for the cost of Defendant Geronemus's future compensation and therefore inflated the value of the Company.

53. Based on his knowledge of the Company's finances and financial statements, as well as the contents of the 10/08/08 Valuation and the Memorandum, Defendant Ginsberg knew or had reason to know that the 2/12/09 Valuation did not adequately account for the Company's liability for the shareholder loan and therefore inflated the value of the Company.

54. Based on the 10/08/08 and 2/12/09 Valuations, Defendant Ginsberg knew or had reason to know that the 2/12/09 Valuation's comparison of guideline companies did not use appropriate comparators.

55. As described above, Defendant Ginsberg knew or had reason to know that his reliance on the 2/12/09 Valuation was unreasonable. As a result, Defendant Ginsberg failed to prudently and loyally represent the interests of the ESOP and its participants and beneficiaries, and caused the ESOP to overpay for the LSSCNY stock by an amount millions of dollars above fair market value, and thereby caused a loss to the ESOP in said amount, plus lost opportunity cost.

56. At the time of the ESOP transaction, as the individual empowered to select a Trustee, Defendant Geronemus was obligated to select a qualified trustee who could comply with

the fiduciary duties required by ERISA.

57. At the time of the ESOP transaction, as the individual who personally selected Defendant Ginsberg as Trustee, Defendant Geronemus was obligated to monitor the activities of Defendant Ginsberg and to remove Defendant Ginsberg as Trustee if Defendant Geronemus knew, or should have known, that Defendant Ginsberg was not acting in compliance with its own fiduciary duties under ERISA.

58. Based on the Employment Agreement and his past compensation, as well as the CSG presentation, Defendant Geronemus knew or had reason to know that the 2/12/09 Valuation did not adequately account for the cost of his future compensation and therefore inflated the value of the Company.

59. Based on his knowledge of the Company's finances, as well as the contents of the 10/08/08 Valuation, and the Memorandum, Defendant Geronemus knew or had reason to know that the 2/12/09 Valuation did not adequately account for the Company's liability for the shareholder loan and therefore inflated the value of the Company.

60. Based on the 10/08/08 Valuation, the Memorandum, and the 2/12/09 Valuation, Defendant Geronemus knew or should have known that the 2/12/09 Valuation used improper comparator companies.

61. Defendant Geronemus knew or had reason to know that Defendant Ginsberg had no experience serving as an ESOP trustee or in valuating companies.

62. As described above, Defendant Geronemus knew or had reason to know that Defendant Ginsberg's reliance on the 2/12/09 Valuation was unreasonable and therefore was in violation of his fiduciary duties under ERISA.

63. In connection with the ESOP Transaction, Defendant Geronemus failed to ensure

that Defendant Ginsberg fulfilled his own fiduciary duties and failed to prevent the ESOP's purchase of shares at a price he knew, or should have known, was inflated due to a flawed valuation and to otherwise comply with his own fiduciary duty to act prudently and solely in the interests of the participants and beneficiaries of the ESOP.

VIOLATIONS

FIRST CAUSE OF ACTION
Disloyalty, Imprudence, Failure to Comply With Plan Documents:
ERISA §§ 404(a)(1)(A), (B) & (D)

64. In connection with the ESOP Transaction, Defendant Ginsberg breached his fiduciary duties to the ESOP, of which he was a fiduciary, to act solely in the interest of the 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) & (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), by, among other things:

a. Failing to carry out a meaningful review of Trenwith's valuation;

b. Failing to understand and question Trenwith's findings, assumptions or methodologies;

c. Failing to ensure that Trenwith's valuation was consistent with the employment agreement executed by Defendant Geronemus;

d. Failing to ensure that Trenwith's valuation accounted for the liabilities of the Company;

e. Failing to determine independently that the ESOP was not paying more than fair market value for stock;

f. Approving the ESOP's purchase of stock despite knowing that the valuation upon which it was based, was inflated and fatally flawed; and

g. Causing the ESOP to pay vastly more than fair market value for the stock.

65. As a result of the foregoing imprudent and disloyal acts and omissions, Defendant Ginsberg caused losses to the ESOP for which he is jointly, severally and personally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

66. As set forth above, Defendant Geronemus, as the individual who imprudently appointed Defendant Ginsberg as Trustee and, thereafter, failed to monitor, oversee or remove Defendant Ginsberg and who, instead, participated in and contributed to Defendant Ginsberg's breaches of his fiduciary duty, in violation of Defendant Ginsberg's own duties of loyalty and prudence to the ESOP, ERISA §§ 404(a)(1)(A) & (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B). As a result of these imprudent and disloyal acts and omissions, Defendant Geronemus caused losses to the ESOP for which he is jointly, severally and personally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

67. Defendant Ginsberg violated his fiduciary duty to exercise his responsibilities solely in accordance with the documents and instruments governing the ESOP insofar as such documents and instruments are consistent with Title I of ERISA in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), when he failed to, among other things, prudently invest the ESOP's assets in stock, and failed to prudently determine or verify the fair market value of LSSCNY's stock as of the date of the ESOP Transaction.

68. Accordingly, by the conduct alleged above, Defendants Ginsberg and Geronemus are each liable as co-fiduciaries for the losses caused to the ESOP by their respective co-fiduciary. ERISA §§ 405(a)(1), (2) & (3), 502(a)(2) & (5), 29 U.S.C. §§ 1105(a)(1), (2), & (3),

1132(a)(2) & (5).

SECOND CAUSE OF ACTION
Violations of ERISA §§ 406(a)(1)(A) & (D)
Prohibited Transactions

69. Defendant Ginsberg caused the ESOP to acquire stock in the ESOP Transaction by purchasing the shares from a party in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

70. The ESOP's acquisition of stock from a party in interest violated ERISA §§ 406(a)(1)(A) & (D), 29 U.S.C. §§ 1106(a)(1)(A) & (D), which prohibit a fiduciary from causing a 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 plan.

71. Thus, by approving the ESOP Transaction on behalf of the ESOP, Defendant Ginsberg caused the ESOP to engage in prohibited transactions.

72. Moreover, by allowing the transaction to be executed on its final terms knowing that the ESOP was overpaying for his stock, Defendant Geronemus caused the ESOP to engage in prohibited transactions.

73. 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]."

74. By causing the ESOP to acquire stock at a price that exceeded "adequate consideration," and failing to conduct a prudent and good faith investigation of Trenwith's valuation process and conclusion for the stock acquired by the ESOP, Defendant Ginsberg 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).

75. As a result of the fiduciary breaches described above, Defendant Ginsberg caused the ESOP to suffer financial losses for which Defendant Ginsberg is personally, jointly and severally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

76. As set forth above, Defendant Geronemus is a party in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14), who knowingly participated in the nonexempt prohibited transaction as described herein and profited therefrom. Defendant Geronemus, therefore, is subject to such other appropriate equitable relief to redress the violations in which he knowingly participated including undoing the transaction in which he sold stock to ESOP or returning the amount by which he was overpaid in the ESOP Transaction. ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

PRAYER

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

1. Requiring Defendants Ginsberg and Geronemus to jointly and severally restore all losses caused to the ESOP as a result of their fiduciary breaches;

2. Requiring Defendant Geronemus to disgorge any and all ESOP assets obtained by him and to disgorge any and all profits earned by him from those assets;

3. Requiring the Defendants to correct or undo the prohibited transactions to the extent practicable;

4. Enjoining Defendants Ginsberg and Geronemus from serving as fiduciaries or service providers to ERISA-covered plans in the future; and

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

DATED: February 11, 2015
New York, New York

Respectfully submitted,

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