

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

R. ALEXANDER ACOSTA,
SECRETARY OF LABOR,

Plaintiff,

vs.

MICHAEL SORTINO, et al.,

Defendants.

8:17-CV-160

CONSENT JUDGMENT

The parties in this case have agreed to the entry of a consent judgment. Filing 3. This consent judgment, as set forth below, shall fully settle all claims by and between the parties regarding the R&M Transportation, Inc. Employee Stock Ownership Plan ("Plan").¹ As part of the consent judgment, the defendants waive their rights to a separate notice of assessment of the penalty under section 502(i) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(i), as described in paragraph 7 below, and to contest that assessment. Accordingly,

IT IS ORDERED:

1. Defendants neither admit nor deny the allegations that they violated sections 404 and 406 of the Employee Retirement Income Security Act (ERISA) of 1974, as amended, 29 U.S.C. §§ 1104 and 1106, as set out in Plaintiff's Complaint.
2. Defendants are permanently enjoined and restrained from

¹ The ESOP was joined as a party defendant pursuant to Fed. R. Civ. P. 19(a), solely to assure that complete relief can be granted.

violating the provisions of ERISA sections 404 and 406, 29 U.S.C. §§ 1104 and 1106.

3. Defendants will make payments totaling \$538,511.89 to the Plan for distribution to the individual Plan participants and beneficiaries, which includes lost opportunity cost. Defendants shall turn over the payment to the Independent Fiduciary appointed by the Court in paragraph 4, *infra*, within thirty (30) days of the entry of this Consent Order and Judgment. Within ten (10) days of this payment, Defendants shall provide satisfactory proof of the transaction to the Acting Regional Director of the Kansas City Employee Benefits Security Administration Office, Two Pershing Square, 2300 Main, Suite 1100, Kansas City, Missouri, 64108.
4. Neil Brozen of Ventura ESOP Fiduciary Services, located at 719 W. Minnehaha Parkway, Minneapolis, Minnesota, 55419, is appointed as the independent successor trustee ("Independent Fiduciary") who will assume all fiduciary responsibilities for distribution of the \$538,511.89 to the twenty (20) individuals listed on Appendix A, attached hereto, in the amounts listed opposite their names. Because the ESOP Trust terminated, Mr. Brozen shall create an interest-bearing, special purpose trust in

the name of the Plan. For the services performed pursuant to this Consent Judgment, the Independent Fiduciary shall receive \$5,000 for fees and expenses, which shall be paid by the Defendants.

5. Defendants shall cooperate with the appointed Independent Fiduciary in any way necessary, as determined by the Independent Fiduciary, to assist him in his administration of the Plan and in the disbursement of any Plan assets to eligible participants and beneficiaries.
6. Defendants shall be permanently enjoined from serving or acting as fiduciaries or service providers with respect to any employee benefit plan subject to ERISA.
7. Upon full payment of the amounts set forth in paragraph 3, *supra*, Defendants are hereby assessed a penalty of twenty percent (20%) of the applicable recovery amount (i.e., \$538,511.89) pursuant to ERISA section 502(l), 29 U.S.C. § 1132(l). The Secretary shall accept, as full satisfaction of the assessed penalty, payment by Defendants of a penalty of \$53,851.19 to the United States Department of Labor by forwarding a check or other instrument in the appropriate amount, within ten (10) calendar days of full payment of the

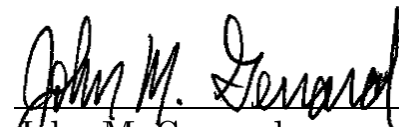
amount set forth in paragraph 3, *supra*, to: U.S. Department of Labor, ERISA Civil Penalty, P.O. Box 70942, Charlotte, North Carolina, 28272-0942. The check or other instrument shall be made payable to the United States Department of Labor and shall reference EBSA Case No. 60-106436.

8. Nothing in this Judgment is binding on any governmental agency other than the United States Department of Labor, Employee Benefits Security Administration.
9. Each party shall bear his or her own attorneys' fees, costs, and other expenses incurred by such party to date in connection with any stage of the above-referenced proceeding including, but not limited to, attorneys' fees, costs, and other expenses that may be available under the Equal Access to Justice Act, as amended.
10. This Consent Judgment represents a full, final, and complete judicial resolution of all claims alleged in the Secretary's Complaint. The parties to this Consent Judgment expressly waive any and all claims of any nature which each may have against the other, or any of their officers, agents, attorneys, employees, or representatives, arising out of or in connection with the allegations contained in Plaintiff's Complaint, or based on the Equal Access to Justice Act, as amended.

11. This Court shall retain jurisdiction over this action and the parties hereto as may be necessary to enforce the provisions of the judgment.

Dated this 12th day of May, 2017.

BY THE COURT:



John M. Gerrard
United States District Judge

APPENDIX A

EMPLOYEE	SHARES as of 12/31/2011	PERCENT of TOTAL SHARES	SHARE of DISTRIBUTION
Bain, Kevin	3545.7239	5.87%	\$31,612.70
Cargill, Rebecca	252.0053	0.42%	\$2,246.81
Devries, Bart	5303.3437	8.78%	\$47,283.16
Hobson, Melissa	3104.8643	5.14%	\$27,682.12
Hoge, Sharon	2018.1850	3.34%	\$17,993.59
Hrubetz, Eugene	589.6212	0.98%	\$5,256.90
Lair, Dawn	2051.0503	3.40%	\$18,286.60
Leist, Michelle	3333.5274	5.52%	\$29,720.82
Novotny, Eric	3639.9578	6.03%	\$32,452.87
Page, Timothy	5179.0756	8.57%	\$46,175.22
Potter, Melissa	2332.3892	3.86%	\$20,794.94
Priest, Virginia	3586.7479	5.94%	\$31,978.46
Rothermund, Terry	1715.5106	2.84%	\$15,295.02
Schneiss, Michelle	3244.7797	5.37%	\$28,929.57
Skudlarek, John	2969.7718	4.92%	\$26,477.67
Slechta, Elizabeth	2302.1999	3.81%	\$20,525.78
Sortino, Salvatore	3533.0084	5.85%	\$31,499.34
Taylor, William	3561.2708	5.90%	\$31,751.32
Turley, Paul	2958.1175	4.90%	\$26,373.77
Williams, Caleb	5179.0756	8.57%	\$46,175.22
			\$538,511.89

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CLOSED,NEBRASKADOCKET,TRIAL-OMAHA,USAPLAINTIFF

U.S. District Court
District of Nebraska (8 Omaha)
CIVIL DOCKET FOR CASE #: 8:17-cv-00160-JMG-CRZ

Acosta v. Sortino et al
Assigned to: Judge John M. Gerrard
Referred to: Magistrate Judge Cheryl R. Zwart
Cause: 29:1104 Recovery of Benefits to Employee

Date Filed: 05/08/2017
Date Terminated: 05/12/2017
Jury Demand: None
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Plaintiff

R. Alexander Acosta
*Secretary of Labor, U.S. Department of
Labor*

represented by **Traci E. Martin**
U.S. DEPARTMENT OF LABOR -
OFFICE OF THE SOLICITOR
2300 Main Street
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(816) 285-7272
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ATTORNEY TO BE NOTICED

V.

Defendant

Michael Sortino

Defendant

Anna Sortino

Defendant

Randy Williams

Defendant

Joan Williams

Defendant

Eugene Cannon

Defendant

Daniel P. Bracht

Defendant**The R&M Transportation, Inc.
Employee Stock Ownership Plan**

Date Filed	#	Docket Text
05/08/2017	1	COMPLAINT against All Defendants, by Attorney Traci E. Martin on behalf of R. Alexander Acosta(Martin, Traci) (Entered: 05/08/2017)
05/09/2017	2	TEXT NOTICE OF JUDGES ASSIGNED: Judge John M. Gerrard and Magistrate Judge Cheryl R. Zwart assigned. (MBM) (Entered: 05/09/2017)
05/10/2017	3	MOTION for Judgment <i>by Consent</i> by Attorney Traci E. Martin on behalf of Plaintiff R. Alexander Acosta. (Attachments: # 1 Exhibit 1, Executed Consent Judgment)(Martin, Traci) (Entered: 05/10/2017)
05/12/2017	4	CONSENT JUDGMENT. Ordered by Judge John M. Gerrard. (LAC) (Entered: 05/12/2017)

PACER Service Center			
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

R. ALEXANDER ACOSTA,)
SECRETARY OF LABOR,)
U.S. DEPARTMENT OF LABOR,)
)
Plaintiff,)

v.)

CIVIL ACTION FILE No. 8:17-cv-160

MICHAEL SORTINO, ANNA SORTINO,)
RANDY WILLIAMS, JOAN WILLIAMS,)
EUGENE CANNON, DANIEL)
BRACHT, and THE R&M)
TRANSPORTATION, INC. EMPLOYEE)
STOCK OWNERSHIP PLAN,)
)
Defendants.)

COMPLAINT
ERISA 29 U.S.C. § 1001 *et seq.*

Plaintiff R. Alexander Acosta, Secretary of the United States Department of Labor (“Secretary”), 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 against the fiduciaries of the R&M Transportation, Inc. Employee Stock Ownership Plan (“ESOP” or “Plan”), sponsored by R&M Transportation, Inc. (the “Company”), and against parties in interest to the ESOP who benefitted at the ESOP’s expense. The ERISA violations alleged herein arise from the ESOP’s imprudent purchase of company stock for more than the stock’s fair market value and without a proper valuation of the stock. The ESOP stock purchase benefitted the sellers at the expense of the ESOP.

2. Prior to the ESOP stock purchase, the Company’s stock was owned by Defendants Michael Sortino, Anna Sortino, Randy Williams, and Joan Williams (each holding

22.5 percent) and Eugene Cannon (3.37 percent) (collectively the “Original Shareholders”).¹ At the time of the ESOP stock purchase, the Original Shareholders were each ESOP fiduciaries, and Defendant Daniel Bracht (“Bracht”) was also an ESOP fiduciary. Defendant Bracht violated his duties of prudence and loyalty by causing or permitting the ESOP to buy the stock for more than its fair market value and without investigating the merits of the transaction. As the individuals who selected and appointed Defendant Bracht, the Original Shareholders failed to monitor, oversee, or remove Defendant Bracht in violation of their duties of loyalty and prudence. Additionally, by his actions, Defendant Bracht caused the ESOP to engage in non-exempt prohibited transactions with the Original Shareholders.

3. The Original Shareholders further violated ERISA by knowingly participating in the violations of ERISA alleged herein and by accepting more than fair market value from the ESOP for Company stock owned by them.

JURISDICTION AND VENUE

4. This action arises under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), to enjoin acts and practices that violated 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.

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

6. Venue of this action lies in the District of Nebraska, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), where the ESOP was administered and where the breaches alleged herein took place.

¹An additional 6.63 percent of the Company stock was held by Reruns R Fun, a non-profit corporation of which Anna Sortino served as president.

DEFENDANTS

7. Defendant Michael Sortino, at all times relevant to this action, was an officer of the Company, and, until he sold his stock to the ESOP, a 22.5 percent shareholder of the Company. The Company was the sponsor of the ESOP. Defendant Michael Sortino selected Defendant Bracht as the ESOP Trustee and, consequently, Defendant Michael Sortino had fiduciary authority over plan management and administration and, in particular, the fiduciary authority over and the obligation to monitor Defendant Bracht in the performance of his fiduciary obligations in connection with the decision to buy all the Company's stock. Thus, at times relevant to this action, Defendant Michael Sortino was a fiduciary of the ESOP pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21), and a party in interest to the ESOP pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H). Defendant Michael Sortino is a Nebraska resident.

8. Defendant Anna Sortino, at all times relevant to this action, was the president of the board of directors of the Company, and, until she sold her stock to the ESOP, a 22.5 percent shareholder of the Company. The Company was the sponsor of the ESOP. Defendant Anna Sortino appointed Defendant Bracht as the ESOP Trustee and, consequently, Defendant Anna Sortino had fiduciary authority over plan management and administration and, in particular, the fiduciary authority over and the obligation to monitor Defendant Bracht in the performance of his fiduciary obligations in connection with the decision to buy all the Company's stock. Thus, at times relevant to this action, Defendant Anna Sortino was a fiduciary of the ESOP pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21), and a party in interest to the ESOP pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H). Defendant Anna Sortino is a Nebraska resident.

9. Defendant Randy Williams, at all times relevant to this action, was an officer of the Company, and, until he sold his stock to the ESOP, a 22.5 percent shareholder of the Company. The Company was the sponsor of the ESOP. Defendant Randy Williams selected Defendant Bracht as the ESOP Trustee and, consequently, Defendant Randy Williams had fiduciary authority over plan management and administration and, in particular, the fiduciary authority over and the obligation to monitor Defendant Bracht in the performance of his fiduciary obligations in connection with the decision to buy all the Company's stock. Thus, at times relevant to this action, Defendant Randy Williams was a fiduciary of the ESOP pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21), and a party in interest to the ESOP pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H). Defendant Randy Williams is a Nebraska resident.

10. Defendant Joan Williams, at all times relevant to this action, was the secretary of the board of directors of the Company, and, until she sold her stock to the ESOP, a 22.5 percent shareholder of the Company. The Company was the sponsor of the ESOP. Defendant Joan Williams appointed Defendant Bracht as the ESOP Trustee and, consequently, Defendant Joan Williams had fiduciary authority over plan management and administration and, in particular, the fiduciary authority over and the obligation to monitor Defendant Bracht in the performance of his fiduciary obligations in connection with the decision to buy all the Company's stock. Thus, at times relevant to this action, Defendant Joan Williams was a fiduciary of the ESOP pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21), and a party in interest to the ESOP pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H). Defendant Joan Williams is a Nebraska resident.

11. Defendant Eugene Cannon, at all times relevant to this action, was a member of the board of directors of the Company, and, until he sold his stock to the ESOP, a 3.37 percent shareholder of the Company. The Company was the sponsor of the ESOP. Defendant Eugene Cannon appointed Defendant Bracht as the ESOP Trustee and, consequently, Defendant Eugene Cannon had fiduciary authority over plan management and administration and, in particular, the fiduciary authority over and the obligation to monitor Defendant Bracht in the performance of his fiduciary obligations in connection with the decision to buy all the Company's stock. Thus, at times relevant to this action, Defendant Eugene Cannon was a fiduciary of the ESOP pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21), and a party in interest to the ESOP pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H). Defendant Eugene Cannon is a Nebraska resident.

12. Defendant Daniel Bracht, at all times relevant to this action, is a Nebraska resident. At all times relevant to this action, Defendant Bracht was the Trustee to the ESOP and exercised discretionary authority and control over management and disposition of the ESOP's assets and, therefore, was a fiduciary of the ESOP pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21), and a party in interest to the ESOP pursuant to ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

13. The ESOP is an employee benefit plan as defined by ERISA § 3(3), 29 U.S.C. § 1002(3), and is subject to ERISA pursuant to ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1). The ESOP was administered in Nebraska and is joined as a party Defendant pursuant to Rule 19(a), Fed. R. Civ. P., solely to assure that complete relief can be granted.

GENERAL ALLEGATIONS

14. R&M was a regional trucking company established on September 18, 2000, in Omaha, Nebraska. In 2008, the Original Shareholders began the process of selling the Company to an ESOP. They engaged Executive Financial Services (“EFS”) to assist in the transaction. In May 2009, the Original Shareholders hired Southard Financial (“Southard”) to perform an appraisal of the Company stock for that purpose. Defendant Michael Sortino signed an engagement letter with Southard on May 4, 2009, on behalf of the Company.

15. Although Southard was retained “to provide valuation and financial advisory services on behalf of the Trustee (to be determined),” Southard did not conduct a full valuation. Rather, it merely conducted a preliminary review without any qualitative analysis. According to Southard, it was told the monetary range in which the Company was to be valued; Southard did not come up with a value independently.

16. Throughout 2009 and into early 2010, Michael Sortino, EFS, Bracht, and Southard had numerous discussions, via telephone conference and by electronic mail, during which the Company’s value was stated to be \$25 million.

17. On January 28, 2010, the same day as the ESOP’s creation, the Company’s board, consisting of Defendants Anna Sortino, Joan Williams, and Eugene Cannon, appointed Bracht as the Plan Trustee.

18. On February 13, 2010, Southard issued a four-page fairness opinion letter, addressed to Bracht. According to the letter, Southard “provided the Trustee with valuation guidance relative to R&M Transportation, Inc. and R&M Realty² as of April 30, 2009.”

²R&M Realty was the entity that owned trailers and leased them back to R&M Transportation. It merged with R&M Transportation on November 30, 2009.

Southard's ultimate opinion was that the \$25 million being paid for R&M stock by the ESOP "was not in excess of fair market value."

19. Bracht admitted he "did not pick apart" Southard's opinion, and Southard claimed it had little to no communication with Bracht regarding the value.

20. On March 16, 2010, the ESOP purchased 1,000,000 common shares of the Company, constituting one-hundred percent of the Company's outstanding shares, from the Original Shareholders and Reruns R Fun (the "ESOP Transaction"). The agreed upon purchase price, which was self-financed, was \$25 million.

21. In August 2012, the Company was sold to Roadrunner Transportation Systems for \$24.4 million. Of this amount, approximately \$11.3 million went to the five Original Shareholders (and Reruns R Fun) as payment for their ESOP notes, while ESOP participants received \$16.01 per share, or \$1.5 million. The ESOP was officially terminated at that time.

ERISA VIOLATIONS

22. No independent valuation was prepared by Southard. While some preliminary analysis had been done, Southard essentially "backed into" the \$25 million value that was decided upon by Defendants.

23. Defendant Bracht violated his fiduciary duties by allowing the ESOP to purchase Company shares for an amount supposedly supported by a severely flawed and unreliable valuation. The valuation was unsound for numerous reasons: the numbers upon which it was based were from April 2009, over ten months before the ESOP Transaction; it ignored the recent downturn in the economy; it relied on projections that far outpaced historical averages and industry standards; and it overall provided no qualitative analysis. ERISA required the ESOP's fiduciary to review the valuation report prudently and solely with the interests of the ESOP's

participants in mind. Defendant Bracht could not have been reasonably justified in allowing the transaction to go forward with such a poorly prepared valuation.

24. By the fiduciary breaches described above and by causing the ESOP to purchase Company shares on March 16, 2010, for more than adequate consideration, Defendant Bracht acted imprudently, disloyally, and caused the ESOP to engage in a non-exempt transaction prohibited by ERISA § 406, 29 U.S.C. § 1106. Defendant Bracht thereby violated ERISA's fiduciary duties of loyalty and prudence contained in ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), and ERISA's prohibited transaction provisions by causing the ESOP to engage in a non-exempt transaction prohibited by ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D).

25. As the only members of the Company's Board of Directors and the only individuals who appointed Defendant Bracht as ESOP Trustee, the Original Shareholders had a duty to monitor Defendant Bracht, the ESOP Trustee, and to remove Defendant Bracht if they knew, or should have known, that Defendant Bracht was not acting in compliance with his own fiduciary duties under ERISA. The Original Shareholders failed to comply with this duty. The Original Shareholders participated in meetings in which the Company's value was set at \$25 million without a qualitative analysis.

26. In connection with the ESOP Transaction, the Original Shareholders failed to ensure that Defendant Bracht fulfilled his own fiduciary duties; failed to prevent the ESOP's purchase of shares at a price they knew, or should have known, was for more than adequate consideration; and failed to otherwise comply with their own fiduciary duties to act prudently and solely in the interest of the participants and beneficiaries of the ESOP.

FIRST CAUSE OF ACTION

Disloyalty and Imprudence, ERISA §§ 404(a)(1)(A) and (B)

27. In connection with the ESOP Transaction, Defendant Bracht breached his fiduciary duties to the ESOP, of which he was a Trustee, 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) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), by, among other things:

- a. Failing to ensure an independent, unflawed valuation was done by Southard;
- b. Failing to independently determine that the ESOP was paying no more than fair market value for stock;
- c. Approving the ESOP's purchase of the stock despite knowing no proper valuation had occurred; and
- d. Paying vastly more than fair market value for the stock.

As a result of the foregoing imprudent and disloyal acts and omissions, Defendant Bracht 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).

28. As set forth above, the Original Shareholders, as the individuals who appointed Defendant Bracht as Trustee, failed to monitor, oversee, or remove Defendant Bracht in violation of their duties of loyalty and prudence, §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B). As a result of the foregoing imprudent and disloyal acts and omissions, the Original

Shareholders caused losses to the ESOP for which they are jointly, severally, and personally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

29. Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, and Eugene Cannon and Defendant Bracht each (i) participated in each of the breaches of duty of their co-fiduciary; (ii) enabled their co-fiduciary to breach their own duties relating to the ESOP Transaction; (iii) knew or should have known of their co-fiduciary's breach of fiduciary duty; and (iv) failed to make reasonable efforts under the circumstances to remedy those breaches of duty. Accordingly, Defendants are liable as co-fiduciaries for the losses caused to the ESOP, pursuant to ERISA §§ 405(a)(1) through (3), 29 U.S.C. §§ 1105(a)(1) through (3), and ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

SECOND CAUSE OF ACTION

Prohibited Transaction, ERISA §§ 406(a)(1)(A) and (D)

30. Defendant Bracht caused the ESOP to acquire stock in the ESOP Transaction by purchasing the shares from parties in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14). The acquisition of stock from parties in interest violated ERISA §§ 406(a)(1)(A) and (D), which prohibit a fiduciary from causing a plan to engage in a transaction if he knows or should have known that such transaction constitutes (i) a direct or indirect sale, exchange, or leasing of any property between the plan and a party in interest, or (ii) a transfer to, or use for the benefit of, a party of interest of any assets of the plan. Thus, by approving the ESOP Transaction on behalf of the ESOP, Defendant Bracht caused the ESOP to engage in prohibited transactions.

31. ERISA § 408(e), 29 U.S.C. § 1108(e), provides an exemption to the prohibited transaction requirement by allowing plans to purchase stock from parties in interest as long as the price paid does not exceed adequate consideration, as defined by ERISA § 3(18), 29 U.S.C. § 1002(18). By causing the ESOP to acquire stock at a price that exceeded adequate

consideration, and by failing to ensure a full, independent valuation was performed, Defendant Bracht failed to meet the condition of any of the exemptions in ERISA § 408, 29 U.S.C. § 1108, including ERISA § 408(e), 29 U.S.C. § 1108(e).

32. As a result of the foregoing fiduciary breaches described above, Defendant Bracht 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).

33. As set forth above, the Original Shareholders are parties in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14), who knowingly participated in the non-exempt prohibited transactions described herein. Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, and Eugene Cannon, therefore, may be made subject to such other appropriate equitable relief to redress the violations in which they knowingly participated, including returning the amount by which they were overpaid in the ESOP Transaction, pursuant to § 502(a)(5), 29 U.S.C. § 1132(a)(5).

34. Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, and Eugene Cannon and Defendant Bracht each (i) participated in each of the breaches of duty of their co-fiduciary; (ii) enabled their co-fiduciary to breach their own duties relating to the ESOP transaction; (iii) knew or should have known of their co-fiduciary's breach of fiduciary duty; and (iv) failed to make reasonable efforts under the circumstances to remedy those breaches of duty. Accordingly, Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, and Eugene Cannon and Defendant Bracht are liable as co-fiduciaries for the losses caused to the ESOP, pursuant to ERISA §§ 405(a)(1) through (3), 29 U.S.C. §§ 1105(a)(1) through (3), and ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

PRAYER FOR RELIEF

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

1. Requiring each of the Defendants jointly and severally to restore all losses caused to the Plan as a result of their fiduciary breaches, plus interest;
2. Requiring Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, and Eugene Cannon to disgorge the profits and financial benefits they received as a result of their fiduciary breaches, plus interest;
3. Requiring Defendants to take such further and other action as necessary to fully undo the transactions prohibited by ERISA § 406, 29 U.S.C. § 1106;
4. Barring permanently Defendants from acting 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: May 8, 2017

Respectfully submitted:

NICHOLAS C. GEALE
Acting Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

H. ALICE JACKS
Associate Solicitor

/s/ Traci Martin
TRACI MARTIN, Trial Attorney

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Attorneys for Plaintiff Secretary of Labor

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

R. ALEXANDER ACOSTA,)
SECRETARY OF LABOR,)
U.S. DEPARTMENT OF LABOR,)
)
Plaintiff,)

v.)

CIVIL ACTION FILE No. 8:17-cv-160

MICHAEL SORTINO, ANNA SORTINO,)
RANDY WILLIAMS, JOAN WILLIAMS,)
EUGENE CANNON, DANIEL)
BRACHT, and THE R&M)
TRANSPORTATION, INC. EMPLOYEE)
STOCK OWNERSHIP PLAN,)
)
Defendants.)

MOTION FOR ENTRY OF CONSENT JUDGMENT

Plaintiff R. Alexander Acosta, Secretary of Labor, United States Department of Labor, respectfully moves the Court to approve and enter Consent Judgment to resolve all issues in this matter. The Secretary of Labor and Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, Eugene Cannon, and Daniel Bracht have agreed to the entry of this Consent Judgment to settle the case. A copy of the Consent Judgment, which contains the signatures of the parties, is attached to this Motion as Exhibit 1 and is being submitted to Judge Gerrard's chambers concurrently.

WHEREFORE, the parties having consented to the entry of judgment, Plaintiff respectfully requests that this Court approve and enter the Consent Judgment being submitted with this Motion.

Respectfully submitted:

Nicholas Geale
Acting Solicitor of Labor

Christine Z. Heri
Regional Solicitor

H. Alice Jacks
Associate Regional Solicitor

/s/ Traci Martin
Traci Martin
Attorney
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Telephone: (816) 285-7260
Fax: (816) 285-7287
E-mail: martin.traci.e@dol.gov

Attorneys for Plaintiff U.S. Secretary of Labor

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Entry of Consent Judgment was filed via the electronic ECF filing system and served by postage prepaid first class mail this 10th day of May, 2017, upon the persons named below:

Christopher T. Horner II
Michael Holzman
Holzman Horner PLLC
1875 Eye Street, N.W., Suite 500
Washington, D.C. 20006

*Attorneys for Defendants Michael Sortino, Anna Sortino,
Randy Williams, Joan Williams, and Eugene Cannon*

Daniel P. Bracht
The Law Offices of Daniel P. Bracht, P.C., L.L.O.
128 N. Main St.
P.O. Box 252
West Point, NE 68788

Pro se Defendant

/s/ Traci Martin

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

R. ALEXANDER ACOSTA,)
SECRETARY OF LABOR,)
U.S. DEPARTMENT OF LABOR,)
)
Plaintiff,)

v.)

CIVIL ACTION FILE No. 8:17-cv-160

MICHAEL SORTINO, ANNA SORTINO,)
RANDY WILLIAMS, JOAN WILLIAMS,)
EUGENE CANNON, DANIEL)
BRACHT, and THE R&M)
TRANSPORTATION, INC. EMPLOYEE)
STOCK OWNERSHIP PLAN,)
)
Defendants.)

CONSENT JUDGMENT

Plaintiff has filed his Complaint, and Defendants Michael Sortino, Anna Sortino, Randy Williams, Joan Williams, Eugene Cannon, and Daniel Bracht have agreed to the entry of this Judgment without contest.

Defendants admit that this Court has jurisdiction over the parties and has jurisdiction of this action pursuant to ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1), and that venue lies with the United States District Court for the District of Nebraska, pursuant to ERISA sections 502(e)(2) and (5), 29 U.S.C. §§ 1132(e)(2) and (5).

The parties have agreed that this Consent Judgment shall fully settle all claims of the Secretary asserted against Defendants in the Complaint related to the R&M Transportation, Inc. Employee Stock Ownership Plan (“Plan”).¹

¹The ESOP was joined as a party Defendant pursuant to Fed. R. Civ. P. 19(a), solely to assure that complete relief can be granted.

Defendants waive their rights to a separate notice of assessment of the penalty under ERISA section 502(l), 29 U.S.C. § 1132(l), described in paragraph 7, *infra*, and to contest that assessment.

The parties have agreed to entry of this Consent Judgment. It is, therefore, upon motion of counsel for Plaintiff, and this Court having jurisdiction over the parties to this Consent Judgment and being empowered to provide the relief described herein, and for cause shown:

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Defendants neither admit nor deny the allegations that they violated sections 404 and 406 of the Employee Retirement Income Security Act (ERISA) of 1974, as amended, 29 U.S.C. §§ 1104 and 1106, as set out in Plaintiff's Complaint.

2. Defendants are permanently enjoined and restrained from violating the provisions of ERISA sections 404 and 406, 29 U.S.C. §§ 1104 and 1106.

3. Defendants will make payments totaling \$538,511.89 to the Plan for distribution to the individual Plan participants and beneficiaries, which includes lost opportunity cost. Defendants shall turn over the payment to the Independent Fiduciary appointed by the Court in paragraph 4, *infra*, within thirty (30) days of the entry of this Consent Order and Judgment. Within ten (10) days of this payment, Defendants shall provide satisfactory proof of the transaction to the Acting Regional Director of the Kansas City Employee Benefits Security Administration Office, Two Pershing Square, 2300 Main, Suite 1100, Kansas City, Missouri, 64108.

4. Neil Brozen of Ventura ESOP Fiduciary Services, located at 719 W. Minnehaha Parkway, Minneapolis, Minnesota, 55419, is appointed as the independent successor trustee ("Independent Fiduciary") who will assume all fiduciary responsibilities for distribution of the

\$538,511.89 to the twenty (20) individuals listed on Appendix A, attached hereto, in the amounts listed opposite their names. Because the ESOP Trust terminated, Mr. Brozen shall create an interest-bearing, special purpose trust in the name of the Plan. For the services performed pursuant to this Consent Judgment, the Independent Fiduciary shall receive \$5,000 for fees and expenses, which shall be paid by the Defendants.

5. Defendants shall cooperate with the appointed Independent Fiduciary in any way necessary, as determined by the Independent Fiduciary, to assist him in his administration of the Plan and in the disbursement of any Plan assets to eligible participants and beneficiaries.

6. Defendants shall be permanently enjoined from serving or acting as fiduciaries or service providers with respect to any employee benefit plan subject to ERISA.

7. Upon full payment of the amounts set forth in paragraph 3, *supra*, Defendants are hereby assessed a penalty of twenty percent (20%) of the applicable recovery amount (i.e., \$538,511.89) pursuant to ERISA section 502(l), 29 U.S.C. § 1132(l). The Secretary shall accept, as full satisfaction of the assessed penalty, payment by Defendants of a penalty of \$53,851.19 to the United States Department of Labor by forwarding a check or other instrument in the appropriate amount, within ten (10) calendar days of full payment of the amount set forth in paragraph 3, *supra*, to: U.S. Department of Labor, ERISA Civil Penalty, P.O. Box 70942, Charlotte, North Carolina, 28272-0942. The check or other instrument shall be made payable to the United States Department of Labor and shall reference EBSA Case No. 60-106436.

8. Nothing in this Judgment is binding on any governmental agency other than the United States Department of Labor, Employee Benefits Security Administration.

9. Each party shall bear his or her own attorneys' fees, costs, and other expenses incurred by such party to date in connection with any stage of the above-referenced proceeding

including, but not limited to, attorneys' fees, costs, and other expenses that may be available under the Equal Access to Justice Act, as amended.

10. This Consent Judgment represents a full, final, and complete judicial resolution of all claims alleged in the Secretary's Complaint. The parties to this Consent Judgment expressly waive any and all claims of any nature which each may have against the other, or any of their officers, agents, attorneys, employees, or representatives, arising out of or in connection with the allegations contained in Plaintiff's Complaint, or based on the Equal Access to Justice Act, as amended.

11. This Court shall retain jurisdiction over this action and the parties hereto as may be necessary to enforce the provisions of the judgment.

12. By signing their names to this Consent Judgment, the parties hereto represent that they are informed and understand the effect and purpose of this Consent Judgment.

The Court directs the entry of this Consent Judgment as a final Order.

Dated this ___ day of _____, 2017.

Judge John M. Gerrard
United States District Judge

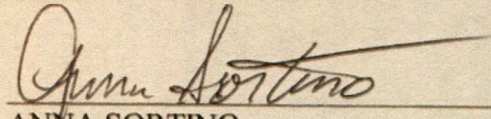
Entry of this judgment is hereby consented to:

For Defendants



MICHAEL SORTINO

Dated: 5-4, 2017



ANNA SORTINO

Dated: 5-4, 2017

RANDY WILLIAMS

Dated: _____, 2017

JOAN WILLIAMS

Dated: _____, 2017

EUGENE CANNON

Dated: _____, 2017

CHRISTOPHER T. HORNER II
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Washington, D.C. 20006
(202) 618-3402
chorner@holzmanhorner.com
mholzman@holzmanhorner.com

Dated: _____, 2017

ALTON L. GWALTNEY, III
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, NC 28202
(704) 331-1008
larrygwaltney@mvalaw.com

DANIEL BRACHT

Dated: _____, 2017

Entry of this judgment is hereby consented to:

For Defendants

MICHAEL SORTINO

Dated: _____, 2017

ANNA SORTINO


Dated: _____, 2017

RANDY WILLIAMS

Dated: _____, 2017

JOAN WILLIAMS

Dated: _____, 2017



EUGENE CANNON

Dated: 5-3, 2017

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DANIEL BRACHT

Dated: _____, 2017

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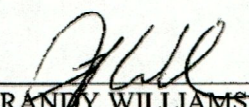
For Defendants

MICHAEL SORTINO

Dated: _____, 2017

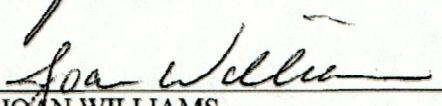
ANNA SORTINO

Dated: _____, 2017



RANDY WILLIAMS

Dated: 5-8, 2017

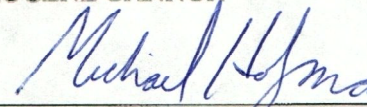


JOAN WILLIAMS

Dated: 5-4, 2017

EUGENE CANNON

Dated: _____, 2017



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Dated: 5/4, 2017

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(704) 331-1008
larrygwaltney@mvalaw.com

DANIEL BRACHT

Dated: _____, 2017

Entry of this judgment is hereby consented to:

For Defendants

MICHAEL SORTINO

Dated: _____, 2017

ANNA SORTINO

Dated: _____, 2017

RANDY WILLIAMS

Dated: _____, 2017

JOAN WILLIAMS

Dated: _____, 2017


EUGENE CANNON

Dated: _____, 2017

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larrygwaltney@mvalaw.com



DANIEL BRACHT

Dated: May 5, 2017

For Plaintiff the Secretary of Labor

NICHOLAS C. GEALE
Acting Solicitor of Labor

CHRISTINE Z. HERI
Regional Solicitor

H. ALICE JACKS
Associate Regional Solicitor



Dated: May 8, 2017

Traci Martin
Office of the Solicitor
Two Pershing Square
2300 Main Street, Suite 1020
Kansas City, MO 64108
(816) 285-7272
martin.traci.e@dol.gov

APPENDIX A

EMPLOYEE	SHARES as of 12/31/2011	PERCENT of TOTAL SHARES	SHARE of DISTRIBUTION
Bain, Kevin	3545.7239	5.87%	\$31,612.70
Cargill, Rebecca	252.0053	0.42%	\$2,246.81
Devries, Bart	5303.3437	8.78%	\$47,283.16
Hobson, Melissa	3104.8643	5.14%	\$27,682.12
Hoge, Sharon	2018.1850	3.34%	\$17,993.59
Hrubetz, Eugene	589.6212	0.98%	\$5,256.90
Lair, Dawn	2051.0503	3.40%	\$18,286.60
Leist, Michelle	3333.5274	5.52%	\$29,720.82
Novotny, Eric	3639.9578	6.03%	\$32,452.87
Page, Timothy	5179.0756	8.57%	\$46,175.22
Potter, Melissa	2332.3892	3.86%	\$20,794.94
Priest, Virginia	3586.7479	5.94%	\$31,978.46
Rothermund, Terry	1715.5106	2.84%	\$15,295.02
Schneiss, Michelle	3244.7797	5.37%	\$28,929.57
Skudlarek, John	2969.7718	4.92%	\$26,477.67
Slechta, Elizabeth	2302.1999	3.81%	\$20,525.78
Sortino, Salvatore	3533.0084	5.85%	\$31,499.34
Taylor, William	3561.2708	5.90%	\$31,751.32
Turley, Paul	2958.1175	4.90%	\$26,373.77
Williams, Caleb	5179.0756	8.57%	\$46,175.22
			\$538,511.89