Nos. 16-6221, -6225, -6226, -6227

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIZABETH A. OSBORN,
Plaintiff-Appellee
and
LINDA G. HOLT, JUDITH E. PREWITT, and CYNTHIA L. ROEDER,
Plaintiffs-Appellees,

v.

JOHN M. GRIFFIN, ESTATE OF DENNIS B. GRIFFIN; DENNIS B. GRIFFIN
REVOCABLE TRUST – 2012, and MARTOM PROPERTIES, LLC,
Defendants-Appellants

On Appeals from United States District Court for the Eastern District of Kentucky,
Nos. 2:11-cv-00089-WOB-REW and 2:13-cv-00032-WOB-REW

CONSOLIDATED BRIEF OF APPELLEES

Janet P. Jakubowicz
Benjamin J. Lewis
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
Louisville, KY 40202
Phone: (502) 589-4200
E-mail: jjakubowicz@bgdlegal.com
E-mail: blewis@bgdlegal.com

Counsel for Plaintiff-Appellee
Elizabeth A. Osborn

Eva Christine Trout
TROUT LAW OFFICE PLLC
P.O. Box 22853
Lexington, KY 40522

Kent Wicker
DRESSMAN BENZINGER LAVELLE PSC
321 W. Main Street, Suite 2100
Louisville, KY 40202

Counsel for Appellees Linda G. Holt, Judith E. Prewitt, and Cynthia L. Roeder

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OFCORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit 16-6221, 16-6225,
Case Number: 16-6226 and 16-6227 Case Name: Osborn et al v. Griffin, et al.

Name of counsel: Kent Wicker and Christine Trout

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Dated: December 29, 2016

/s/Kent Wicker
Kent Wicker

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OFCORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit 16-6221, 16-6225,
Case Number: 16-6226 and 16-6227 Case Name: Osborn et al v. Griffin, et al.

Name of counsel: Kent Wicker and Christine Trout

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Dated: December 29, 2016

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Kent Wicker

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OFCORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit 16-6221, 16-6225,
Case Number: 16-6226 and 16-6227 Case Name: Osborn et al v. Griffin, et al.

Name of counsel: Kent Wicker and Christine Trout

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   No.

Dated: December 29, 2016

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Kent Wicker

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DISCLOSURE OFCORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit 16-6221, 16-6225,
Case Number: 16-6226 and 16-6227 Case Name: Osborn et al v. Griffin, et al.

Name of counsel: Janet Jakubowicz and Benjamin Lewis

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Dated: December 29, 2016

/s/Janet Jakubowicz
Janet Jakubowicz

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The plaintiffs in this case are four sisters who made the mistake of trusting their two oldest brothers. Those brothers were trustees of their father's trust and executors of their parents' wills. Never shown to the sisters, those trusts and wills entitled each sibling to an equal share of stock in the family's company. And unbeknownst to the sisters, their oldest brothers stole that stock and lied about the theft on dozens of occasions for twenty-five years.

The siblings' mother died first, and the brothers wasted no time in seizing stock she had instructed that her children inherit equally. First, the brothers forced their father – a stroke had left him with the IQ of an eight year old[1] – to make themselves executors of their mother's estate. Then, they forced their father to make them co-trustees of his trust. Finally, with power over their parents' assets, they sold to themselves, at a bargain basement discount, the stock of their late mother and debilitated father – all while refusing requests by their sisters to view the estate documents, lying to them about those documents, and threatening anyone who dissented.[2]

---

[1] One brother told a sister, "Don't let dad sign anything because you know he doesn't understand." (Findings, R. 856, ¶23, PageID 32083).

[2] Later events would show that those threats were not idle. One Defendant put tire spikes on the tires of a Plaintiff because he was angry with her trial testimony. While she was driving on the interstate, one of the tires exploded. (R. 843, Emergency Motion, PageID 34673-34699; R. 1090, Order, PageID 37331-32.)

Even after one of the sisters, Betsy, discovered a relatively small inkling of their brothers' fraud and sued them in 1990, the other sisters continued to trust them, not only because the brothers were their sisters' fiduciaries, but because they were their *brothers*. They trusted them when the brothers said the lawsuit did not involve them, and that Betsy's claims had no merit and she was just being greedy. They trusted them three years later when the brothers told them to sign that lawsuit's settlement agreement without allowing them to read it and after grossly misrepresenting its contents, just as Betsy trusted them when they told her that her sisters would receive the same as she was getting in settlement. The sisters all trusted them again two years later, while the brothers secretly pilfered what remained of their then-deceased father's estate. They trusted them until 2010, when questions arose about real estate that should have been in their father's estate, and the accidental mailing of the wrong form to the wrong sibling put into the trusting sisters' hands what the brothers had succeeded for so long in hiding: a list of who owned how much of their late parents' company. That is when they learned that their two oldest brothers had stolen stock worth half a billion dollars.

On appeal, the brothers do not deny that they took their parents' stock, and their father's legacy intended for the sisters. Nor do they deny that they lied – over and over and over again – to their victims (*i.e.* their sisters). Instead, adopting a spaghetti-against-the-wall strategy on appeal, they argue about almost everything

else – jurisdiction; tolling; preclusion; duty; damages; and the equitable nature of disgorgement – while making egregious misstatements and omissions about the record of their racket compiled over eight days of trial and summarized in the district court's exhaustive 101-page Findings of Fact and Conclusions of Law.

First, they assert an unprecedentedly expansive version of a probate exception to federal jurisdiction that the Supreme Court recently went to considerable lengths to reign in. *Marshall v. Marshall*, 547 U.S. 293 (2006). The doctrine covers only "the probate … of a will" (which, in each parent's case, was finished decades ago); the "annulment of a will" (which no one seeks); or the disposition of "property that is in the custody of the state probate court" (which has, for two decades, had no custody of either parent's property). *Id.* at 312. Moreover, the majority of most sisters' awards disgorges profits from trust assets transferred while the trust maker was still living, which categorically "removes them from the limited scope of the probate exception." *Wisecarver v. Moore*, 489 F.3d 747, 751 (6th Cir. 2007).

Second, while tacitly conceding that the sisters didn't actually learn of the fraud until shortly before this lawsuit, the brothers argue that constructive knowledge triggers the statute of limitations and that the sisters had constructive knowledge of the fraud. The first claim errs as a matter of law; when a fiduciary defrauds a beneficiary in Kentucky, the "statute of limitations does not begin to run until actual discovery of the fraud." *Boone v. Gonzalez*, 550 S.W.2d 571, 574 (Ky. App. 1977).

Moreover, and in the alternative, the second claim errs as a matter of fact; the sisters exercised due diligence by trusting the brothers they had been raised not only to trust, but to revere.

Third, the brothers attempt to use a lone derivative claim filed by Betsy as part of her lawsuit in 1990, to preclude this suit because the other sisters were nominal plaintiffs in the earlier suit. But that argument depends on a finding that Betsy was an adequate class representative – a proposition that the district court did not decide before the settlement of the suit (contrary to the brothers' assertion here); a proposition the brothers argued *against* in 1991; and a proposition that the district court rejected in this suit, in part because the would-be "adequate class representative" was not even on speaking terms with her sisters during the litigation in which the brothers had her ostracized from the family, in part because the brothers secretly made a different deal for Betsy than for the other sisters, and in part because her sisters were never even informed they were parties to the suit. (In fact, their brothers misinformed them to the contrary.)

The brothers also argue that the 1993 settlement of that suit precludes this suit, even though Betsy's brothers forced their sisters to sign the settlement agreement without allowing them to read it, while lying to them about its contents and what Betsy *actually* received in a confidential, and much larger, settlement of Betsy's *personal* claims. Par for the course, the brothers cite no precedent for their argument

that fiduciary duties dissolve when those who trust them are nominal plaintiffs in a lawsuit that the fiduciaries tell them has nothing to do with them.

Fourth, while not actually disputing any of the district court's material findings about what they *did*, the brothers argue they owed no fiduciary duty to their sisters that they breached. As the District Court held, that is wrong. Their mother's will said that if the other parent pre-deceased or disclaimed the estate, the siblings should ultimately receive equal shares of it, and their father's trust likewise treated each sibling equally. But as executors and trustees, the brothers sold their parents' stock and real estate to themselves. Those sales would have violated the prohibition against fiduciaries' self-dealing, even if the sales had not been at the steeply discounted prices the brothers prescribed for themselves. *See e.g.*, *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 464 (Ky. 1954).

Fifth, without having produced any damages expert of their own and while making no challenge to the accuracy of any of the calculations of the sisters' damages expert, the brothers make a host of arguments against the disgorgement award. They begin by arguing the sisters cannot disgorge profits that went to a third party, even though the U.S. Supreme Court has held that "beneficiaries may … maintain an action for ... disgorgement of the third person's profits." *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250-51 (2000). They next argue the award should be offset by the taxes they paid on their ill-gotten gains,

even though (1) they produced no evidence of any taxes paid on those gains (and even refused to disclose their tax returns); (2) no legal precedent so much as hints at the propriety of their proposed offset; and (3) upon an only slightly closer inspection than made by their back-of-the-napkin-mathematics lesson, the tax windfall they assert is nonexistent, if only because their theory treats each tax year as an island, rather than considering each year's tax implications on the brothers' twenty-four other years of fraud. They conclude by arguing against "incorrect assumptions" by the sisters' expert, even though the only "assumptions" they dispute are sound legal conclusions reached by the District Court that do not change the expert's undisputed computation that the profits generated by stock the brothers sold to themselves totaled $908 million.

Sixth, and finally, the brothers argue for a jury trial, even though "disgorgement" is "part of a court's traditional equitable authority." *United States v. Universal Mgmt. Servs. Inc.*, 191 F.3d 750, 760 (6th Cir. 1999). That argument would require this Court to reject what this Court and Kentucky courts have held – that "the issue regarding the equitable tolling of the statute of limitations" is "a matter of law" to be decided by a judge, not a jury. *Commonwealth v. Hasken*, 265 S.W.3d 215, 226 (Ky. App. 2007); *see also Bonner Farms, Ltd. v. Fritz*, 355 Fed Appx. 10, 18 (6th Cir. 2009).

To sum up, the brothers stole half a billion dollars from their sisters, then lied about it, and now fault the sisters for believing their lies – while invoking a probate exception for matters that were never probated, proposing a novel offset of damages for taxes they never showed they paid, and demanding that jurors decide what this Court and Kentucky courts have called a matter of law. Because the District Court properly rejected each of their arguments, its judgment should be affirmed.

STATEMENT OF THE ISSUES

Should a District Court exercise jurisdiction when the dispute does not seek to affect property in the control of a probate court or to annul a will?

Should claims by beneficiaries against their fiduciaries go forward when the fiduciaries hid their wrongdoing for decades?

Should the settlement of a derivative claim bar separate personal claims when the Holt plaintiffs were not adequately represented?

Does a fiduciary breach his duties by self-dealing in the assets for his own benefit?

Does the disgorgement remedy against a fiduciary include amounts the fiduciary caused to go to third parties?

Are equitable claims properly decided by the District Court without a jury?

THE DISTRICT COURT'S FINDINGS AT TRIAL

A. Background

John L. Griffin ("Mr. Griffin") and his wife, Rosellen Griffin ("Mrs. Griffin"), founded a rendering company in 1943 that became known as Griffin Industries, Inc. (the "Company" or "Griffin Industries"). "Rendering" is the business of making useful products from dead animals. Mr. and Mrs. Griffin had twelve children, eleven of whom were living at the times relevant to this lawsuit. The surviving eleven children, oldest to youngest, were Dennis, John M. ("Griffy"), Linda, James ("Jim"), Judy, Janet, Robert ("Bobby"), Betsy, Cyndi, Martin ("Marty"), and Thomas ("Tommy"). (Findings, R. 856, ¶¶1-3, PageID 35076-35077)[3].

The Company grew into a multi-million dollar business, but remained family-owned until its merger with Darling International, Inc., in 2010. (*Id.*, ¶¶1, 164, PageID 35070, 35131). After Mr. Griffin, Dennis became President of Griffin Industries, followed by next oldest brother Griffy, and then Bobby. All of the Griffin brothers were also members of the Company Board of Directors at all relevant times. (*Id.*, ¶¶131, 136, PageID 35121, 35123; Roeder Testimony, R. 809-57, 69, PageID 32849, 32861).

[3] Plaintiffs-Appellees Linda, Judy and Cyndi are collectively known herein as the "Holt Plaintiffs."

All the Griffin children worked in the family business after school and during the summers. The girls worked in the Company until they got married, and the boys worked in the Company until they either retired or the Company was sold in 2010. (Findings, R. 856, PageID 35077). As part of this age-old family dynamic, the District Court found that "the sisters were not groomed to participate in the company's management, nor did their brothers wish them to participate in any such way." (*Id.*, PageID 35072).

The Griffin children undisputedly were brought up to trust and respect their older siblings. (*Id.*, ¶4, PageID 35077). As Cyndi testified,

> We were taught that the older ones always watched the younger ones. We had to have respect like for the older ones. They were left in charge, you know. . . . If mom got home and found out, that was not good. So we usually had a general respect for our brothers and sisters that were watching us.

(Roeder Testimony, R. 809-54-55, PageID 32846-47). *See also* Prewitt Testimony, R. 813-53-54, PageID 33032-33 (accord); Holt Testimony, R. 816-45-46, Page ID 33339-40 (same).

Mr. and Mrs. Griffin loved all of their children the same, and they wanted equal treatment after their death. (Findings, R. 856, PageID 35072). Each child received about 1% of Company stock as gifts from their parents in the 1960s or 1970s. Although the older brothers received a small amount more than their sisters and younger brothers in the late 1960s or early 1970s in connection with a company

plant transaction, Mrs. Griffin later told the girls that all of the children would be treated equally. (*Id.*, ¶6, PageID 35077-78).

B. The Parents' Estate Plans

Mrs. Griffin's estate plan divided her stock in the Company equally between her children. She executed a Last Will and Testament in 1967, naming Mr. Griffin as Executor. She also created a revocable trust, to which the residuary of her estate was to pass. She made small changes over the years, but under the terms of Mrs. Griffin's estate plan from 1981 until her death, her shares of Griffin Industries stock and other property were to pass to Mr. Griffin. If he was deceased or if he disclaimed his interest, the stock and other property would pass with the residuary estate to her Trust, where it would be divided equally among all eleven children. She named First National Bank of Cincinnati, later known as Star Bank ("Star Bank") as Trustee. (*Id.*, ¶10, PageID 35079).

Mr. Griffin also executed a Last Will and Testament in 1967, which provided that all of his stock would pass to his wife, and if she pre-deceased him, to his eleven children in equal amounts. Mr. Griffin created a trust at the same time, known as the "1967 Trust," and he also named Star Bank as trustee. He modified his will and the 1967 Trust several times between 1967 and 1975, ultimately providing that his stock would go to his wife on his death, except for any portion purchased by Griffin Industries. If she predeceased him, the stock was to be converted to non-voting

stock, then distributed equally between all his children. The contents of his trust would be divided into seven equal shares and given to the seven "non-working" children—Linda, Judy, Janet, Betsy, Cyndi, Marty, and Tommy—and distributed when each child turned 30. (*Id.*, ¶¶11-12, PageID 35079-80).

From the time they began working on their estate plans in 1967 until Mother's death in 1985, the parents' estate plans always provided that their stock in the Company would be divided equally between their children. Until the Defendants' breach, the Griffin parents had never sold this stock to anyone, including their sons. (*Id.*, ¶¶15, 29, PageID 35081, 35084).

Mr. Griffin periodically asked his lawyers to consider changes to his estate documents or to advise him on making gifts to his children. In February 1982, his lawyers wrote memoranda about Mr. Griffin's concern that his oldest sons had disproportionately too much stock, compared to his daughters and younger sons. He wanted to give his younger children gifts of stock to remedy the imbalance. (*Id.*, ¶¶ 13-14, PageID 32083).

Before he could make the gifts, however, Mr. Griffin suffered a massive stroke. He was unable to walk, speak, or care for himself. His logic, reasoning and other cognitive functions were compromised as well, and he never returned to work at the Company. (*Id.*, ¶¶21, 22, PageID 35082-35083). It was apparent to both the brothers and the sisters that Mr. Griffin could not handle financial or business

matters. Dennis told Linda repeatedly, "don't let dad sign anything because you know he doesn't understand." (*Id.*, ¶23, PageID 32083).

Mrs. Griffin also was ill, suffering from Parkinson's Disease since the 1970s. The Griffin daughters were responsible for her care, especially Linda and Cyndi. As the District Court found, "the sons — Dennis B. Griffin and John M. Griffin in particular — occupied positions of authority vis à vis their sisters, and no more so than when their parents' health failed and responsibility for the company and the family fell to the next generation." (*Id.* at p. 5, PageID 35072). Mrs. Griffin's mind was sound, however, and Dennis and Griffy took no actions to alter the estate plans while she was alive and able to protest.

C. <u>The Defendants' Self-Dealing Scheme.</u>

When Mrs. Griffin died in 1985, however, Dennis and Griffy developed and executed a plan to transfer all of their parents' interest in the company to themselves and their brothers.

First, they took control:

* On September 4, 1985, Dennis and Griffy petitioned the Campbell Probate Court to remove Mr. Griffin as Executor of Mrs. Griffin's will on the grounds that he "is unable to act as such executor by reason of a recent stroke and current paralysis which have rendered him unable to appear before the Court," and to make them the Executors in his place. Mr. Griffin did not sign the document, and Dennis and Griffy stated he was unable to do so. (*Id.*, ¶30, PageID 35084).

* On November 14, 1985, Dennis and Griffy caused Mr. Griffin to remove Star Bank and make themselves the Co-Trustees of Mr. Griffin's 1967 Trust.

* Four days later, on November 18, 1985, Dennis and Griffy caused Mr. Griffin to transfer every share he owned in Griffin Industries to the 1967 Trust, for which they were now its sole Trustees. (*Id.*, ¶32, PageID 35085).

Next, they eliminated any possibility of dissent. On November 29, 1985, Dennis and Griffy called a family meeting at the Drawbridge Inn located in Fort Mitchell, Kentucky. At this meeting and a later meeting at his home, Dennis lied to his sisters, telling them that their parents' wills were a "mess" because their parents' estate plans had not prepared for the possibility that Mrs. Griffin would predecease Mr. Griffin. Dennis and Griffy claimed this estate planning error was causing a huge financial strain on the Company, and the circumstances were so dire that the Company could go bankrupt. (*Id.*, ¶¶39, 51, PageID 35087, 35090).

Plaintiffs believed the Company was in a dire situation. Judy testified:

> I was just sickened. I couldn't understand how all this happened. I knew my parents had done estate planning. I just couldn't figure out how this slip-up happened, but it had happened, and that we were going to have to deal with it; that we were going to have to come up with a plan. I was just devastated.

(Prewitt Testimony, R. 813-59, PageID 33038).

Third, Dennis and Griffy withheld material information from their sisters. They did not tell the family about the actual terms of their parents' wills, or about

their parents' trusts. They did not provide the estate documents or any other documents to the family. When Linda asked for a copy of the will, Dennis and Griffy refused to provide it to her. Dennis told the group that the executors had only the original wills, created in 1967, and there were no amendments (codicils). They need not expect Probate Court filings, Dennis said, because Mrs. Griffin's will would not be probated. The Holt Plaintiffs were not aware that Mrs. Griffin ever created a trust, and they were not aware that her will had been probated. (Findings, R. 856, ¶¶41-43, 65, PageID 35088, 35096). Dennis and Griffy did not tell Plaintiffs that they had already transferred Mr. Griffin's stock to his 1967 Trust weeks earlier. (Roeder Testimony, R. 809-87, PageID 32879; Holt Testimony, R. 814-24, PageID 33113). No one suggested the sisters should get an attorney. (Findings, R. 856, ¶44, PageID 35088).

The District Court found that the statements of Dennis and Griffy were false, and that they had intentionally misled their sisters. In fact, the parents' lawyers had given close attention to how the parents' estate plans would be affected by their order of death. Mrs. Griffin's will did not call for her stock to go to the boys, but to Mr. Griffin, and if he disclaimed the bequest, then to all the children equally. Mr. Griffin's estate plan likewise called for his stock to go equally to the children in the event the Company did not purchase those shares. The representations about the Company's financial situation were equally false. Griffin Industries was not on the

verge of bankruptcy, but rather it was profitable in 1985, as well as the years before and after. (Findings, R. 856, ¶¶27, 46-49. PageID 35084, 35089). In fact, the Company books showed substantial net worth, adequate cash reserves, and was generating net income. Indeed, the Griffin Industries' board of directors, including Dennis and Griffy, had just given the officers salary increases at the prior board meeting, and bought a jet airplane. (PX 33, App. 357; J. Griffin Testimony, R. 816-145, PageID 33439).

Plaintiffs were not asked to approve Dennis and Griffy's "plan." The Holt Plaintiffs understood only that certain grandchildren were going to buy stock from Mr. Griffin, which they were led to believe would generate income for the Company and help ward off bankruptcy. They were not told and did not know their brothers were buying their parents' stock, and taking a controlling interest in the Company. (Findings, R. 856, ¶52, PageID 35090). Plaintiffs believed that the plan that Dennis and Griffy were espousing would be in accordance with their Mother's will. (Roeder Testimony, R. 809-81, PageID 32873; Holt Testimony, R. 816-19-20, PageID 33313-14; Prewitt Testimony, R. 813-65, PageID 33044).

Although Defendants did not ask for approval, they did not tolerate dissent. Dennis threatened that if anyone objected to what they wanted to do, the brothers would buy them out "right here, right now." (Findings, R. 856, ¶51, PageID 35090).

D. The Secret Transfers of Stock

Nearly two weeks *before* the Drawbridge Inn meeting, Dennis and Griffy had already caused Mr. Griffin to transfer his stock in Griffin Industries to the 1967 Trust, of which Dennis and Griffy were the Trustees, having replaced Star Bank four days earlier. (Findings, R. 856, ¶32, PageID 35085). On December 2, 1985, Dennis and Griffy caused Mr. Griffin to disclaim all the Company stock left to him by Mrs. Griffin in her will. On December 19, 1985, Dennis and Griffy caused feeble Mr. Griffin to disclaim 62% of his beneficial interest in Mrs. Griffin's Trust. (R. 856, Findings, ¶¶55 and 56, PageID 35092-93). His signature appeared on all these documents, although Dennis and Griffy had represented to the Probate Court that Mr. Griffin could not sign his name.

The disclaimers should have caused the stock to revert to Mrs. Griffin's Estate, then poured over into her Trust to be distributed to all her children equally. (R. 590, Memorandum Opinion and Order, PageID 27455). Dennis and Griffy prevented the stock from being transferred to Mrs. Griffin's Trust, in order to keep their scheme from being revealed to then-Trustee Star Bank, which would have presumably exercised its fiduciary duties. (*See* J. Griffin Testimony, R. 816-126, PageID 33420). In this way, no one could do anything to thwart their scheme.

Instead, Dennis and Griffy, acting as Executors of Mrs. Griffin's Estate, sold her 15,291 shares in the Company, 13.6% of the outstanding stock, to themselves

and their four brothers for approximately $1.2 million. (Findings, R. 856, ¶55, PageID 35092-93). The distributions from Mrs. Griffin's stock were more than sufficient to pay for the stock, so the brothers actually paid nothing for the stock. (M. Griffin Testimony, R. 814-165-166, PageID 33254-55).

On January 7, 1986, Dennis and Griffy caused the 1967 Trust to sell the 55,163 shares in Griffin Industries that they had caused Mr. Griffin to transfer to his Trust to themselves and to their brothers Jim and Bobby. While serving as Co-Trustees, they paid approximately $6.9 million for the stock, signing an installment note to pay $1.6 million each for their portion. (Findings, R. 856, ¶58, PageID 35093). Dennis and Griffy secured a lower price for the stock they purchased by causing feeble Mr. Griffin to sell 4% of his Company stock to his grandchildren's trusts, thereby reducing his holding to a "minority" share, below 50%. (Stipulations, R. 748, ¶23, PageID 30754).

Dennis and Griffy convinced the family that these small purchases were necessary to save the Company from bankruptcy, while in the background it was actually part of a secret scheme for the four oldest brothers to purchase the larger, remaining block of their enfeebled father's stock at a "minority discount." (Holt Testimony, R. 816-21, PageID 33315; Stipulations, R. 748, ¶23, PageID 30754). Dianne Medley, a certified public accountant and expert in corporate valuations, testified that the appraisal of the value of Griffin Industries stock on which they

relied to lower the price they paid was improperly performed. The combination of these errors caused the stock to be substantially undervalued. (PX 82, App. 744; Medley Testimony, R. 821-46, 47, 51-57, PageID 33522-23, 33527-33). Defendants offered no contrary testimony.

This series of transactions moved 66.6% of Griffin Industries stock to the six brothers, leaving four of them, Dennis, Griffy, Bobby, and Jim, holding 87.6% of the Company's stock. (Findings, R. 856, ¶59, PageID 35094). Mr. Griffin did not participate in the formulation of the 1985 redistribution plan, or approve the plan in any meaningful way. Griffy testified that enfeebled Mr. Griffin was never presented with an option that would cause stock to go to his daughters, in a meeting outside of Plaintiffs' presence. (J. Griffin, R. 821-11, PageID 33487). It was a "plan" secretly orchestrated and executed by Dennis and Griffy all along. (R. 856, Findings, ¶33, PageID 35085-86; Stipulations, R. 748, ¶26, PageID 30755).

Dennis and Griffy kept Plaintiffs in the dark. The Holt Plaintiffs did not see Mrs. Griffin's will or Trust until this litigation began, and they had no involvement in the administration of their mother's estate. (R. 856, ¶43, PageID 35088). The younger brothers, Marty and Tommy, likewise had no information regarding their parents' estate documents. (R. 856, ¶¶41, 43, PageID 35088). Further, Janet Means, the remaining sister, also never saw her mother's will or trust, and she did not even know that Mr. Griffin had a trust. Dennis and Griffy never provided Plaintiffs with

any accounting from Mrs. Griffin's estate or trust. (Findings, R. 856, ¶65, PageID 35096). Nor did they receive any notices from the Probate Court about Mrs. Griffin's Estate. Although they signed, under false pretenses, a few documents relating to their children's purchase of Mr. Griffin's stock, the Holt Plaintiffs saw only the documents they signed, relating to their children's purchase of stock. (Roeder Testimony, R. 809-88, PageID 32880).

Thus, the District Court concluded that "[P]laintiffs proved by a preponderance of the evidence that Dennis and Griffy failed in their duty to disclose to their sisters all material facts pertaining to the 1985-86 stock transactions..." (Findings, R. 856, ¶211, PageID 35150). Defendants do not contest, and offer no basis to overturn, this factual finding by the District Court.

E. Betsy's 1990 Lawsuit

In about 1989, Dennis announced that he intended to transfer some of his stock to his children. Because Betsy's parents had previously told her that Company stock was never to be transferred to the next generation, she inquired about her parents' estate plans. (Osborn Testimony, R. 814-9, PageID 33098). The Holt Plaintiffs were unaware of the discussions. (*See* Findings, R. 856, ¶¶ 53, 67-69, PageID 35091, 35097-98). Dennis and Griffy refused to answer Betsy's questions, and told Betsy that if she did not like what they did, she should sue them. (*Id.*, ¶67, PageID

35096). Betsy did so, filing suit in federal court on December 7, 1990 against Dennis, Griffy, and others (the "1990 Lawsuit").

The first six counts of Betsy's 1990 Lawsuit were her personal claims, in which Betsy alleged that the transfers of stock from Mrs. Griffin's Estate and Mr. Griffin's 1967 Trust breached fiduciary duties owed to Betsy. Count VII, pleaded in the alternative, was a derivative claim against Dennis and Griffy for failing to cause the Company to purchase Mrs. Griffin's stock at her death, and instead, purchasing such stock for themselves. (*Id.*, ¶76, PageID 35100).

The Holt Plaintiffs were not parties to the personal claims, and only unknowingly nominal parties to the derivative claim because they were shareholders of the Company. In fact, they were told by Dennis that the lawsuit "did not concern" them. (*Id.*, ¶ 196, PageID 35144). The Holt Plaintiffs were never served with the Complaint, they were not made aware of its specific allegations and they were not aware that they were parties in any capacity. (*Id.*, ¶77, PageID 35100).

Less than two weeks after Betsy filed the 1990 Lawsuit, the Griffin family gathered for a meeting at the Company's Cold Spring headquarters, on December 16, 1990. (Findings, R. 856, ¶78, PageID 35101). In an attempt to intimidate Betsy, Dennis led the meeting and berated Betsy in front of her siblings for filing a meritless lawsuit. He told the Holt Plaintiffs and their siblings that Betsy and her husband Bill

were "greedy." He did not discuss what the case was about, but said the case was meritless and would tear the family apart. (Findings, R. 856, ¶78, PageID 35101).

Defendants told the Holt Plaintiffs that Betsy's suit did not involve them, just Denny, Griffy and Betsy. The other Griffin siblings were equally in the dark about the litigation. Janet did not read Betsy's complaint, and she did not know what Betsy was suing over. (Means Testimony, R. 823-122, PageID 33755). The same was true for Marty and Tommy. (*Id.*, ¶79, PageID 35101).

When Betsy continued with her lawsuit, Dennis and Griffy ordered that her sisters stop talking to her, and Betsy was ostracized from the rest of the family. (*Id.* ¶82, PageID 35102). Dennis and Griffy repeatedly told Betsy that her sisters "didn't want anything to do with (her)" and that, "to (her) sisters, (Betsy) was dead." (*Id.*). Dennis also told Betsy that her sisters were in agreement with whatever he wanted. (*Id.*, ¶¶81-82, PageID 35102).

The Holt Plaintiffs' only real communications concerning the 1990 Lawsuit involved a single meeting with Dennis and Griffy's counsel, Beverly Storm ("Storm") and Mark Arnzen, in October 1991. (*Id.*, ¶84 PageID 3510). They did not discuss the merits of Betsy's case with the Holt Plaintiffs, nor did they disclose that the sisters were nominal parties to the derivative claim. (*Id.*, ¶¶81, 83, 85 PageID 35102-04). The Holt Plaintiffs believed the case was about Betsy's children not getting stock, and Storm did not correct their misapprehension. (Findings, R.

856, ¶85, PageID 35104). Storm did not tell the Holt Plaintiffs the terms of their parents' wills and trusts, or that they were beneficiaries. (*Id.*, ¶86, PageID 35104). Nor did Storm tell the Holt Plaintiffs they might have facts that would support personal claims against Dennis and Griffy, or that Dennis and Griffy had breached their fiduciary duties to them. (*Id.*, ¶89, PageID 35105).

Storm also failed to tell the Holt Plaintiffs that she and her law partner had arranged, on Dennis and Griffy's behalf, for enfeebled Mr. Griffin to meet with a psychologist, Dr. Parsons, three days later, to enable Mr. Griffin to sign estate documents. (*Id.*, ¶91, PageID 35105.) This disclosure was never made to the Holt Plaintiffs, even though they were Mr. Griffin's primary caretakers. Dr. Parsons performed an IQ test on Mr. Griffin, and he found that Mr. Griffin had an IQ of 67 and a mental age of eight – a fact Storm never disclosed to the Court or Betsy's counsel. Nevertheless, Defendants caused Mr. Griffin to sign documents changing his will and 1967 Trust. Storm did not advise the Court or Betsy's counsel of Mr. Griffin's IQ or mental status. (*Id.*, ¶92, PageID 35105-6; Storm Testimony, R. 827-27, 30, PageID 33860, 33863).

Nonetheless, on November 30, 1991, Defendants caused Mr. Griffin to execute the Sixth Codicil to his will and the Fourth Amendment to his 1967 Trust, purporting to affirm his transfer of stock and to leave his estate to his daughters.

(Findings, R. 856, ¶¶93-94, PageID 35106). Neither Dennis and Griffy, nor their lawyers, told the Holt Plaintiffs about these changes. (*Id.*, ¶120, PageID 35116).

Ultimately, in January 1993, Betsy, Dennis and Griffy reached a confidential settlement, which paid Betsy her one-eleventh share of her mother's stock in Griffin Industries (1390 shares), along with cash ($304,000) and additional stock for Betsy's two children (196 shares each) to mirror what Mr. Griffin's other grandchildren held at the time. (*Id.*, ¶106, PageID 35111; PX 82, App. 744). Those shares were worth millions. Dennis and Griffy drafted an agreement for settlement of the derivative claim in February 1993, which provided for the issuance of the same number of shares of company stock to each of the Holt Plaintiffs, as well as Marty, Tommy, and Janet, in return for a release of derivative-based claims only. (*Id.*, ¶¶101-102, PageID 35109). Betsy was not a party to the February settlement agreement. (*Id.*, ¶102, PageID 35109).

When Dennis presented the February agreement to the Holt Plaintiffs, he only showed them the signature page and told them they did not need to read the document. Its sole purpose, they were told, was to keep their enfeebled father off the witness stand. Each of the Holt Plaintiffs signed the document as directed by their oldest brother, although they did not know its terms. Marty, Tommy and Janet were kept equally in the dark. (*Id.*, ¶¶101, 103, PageID 35109-10). Only later, in 2010, did they learn it was a settlement agreement.

Later, a dispute arose between Betsy, Dennis and Griffy with respect to the terms of the February 1993 agreement, and the Court held several hearings on the matter. The dispute centered on whether the agreement permitted the *issuance* of new treasury stock by Griffin Industries to fund Dennis and Griffy's settlement obligations to Betsy and her siblings. (*Id.*, ¶105, PageID 35110-11). In Court hearings, Betsy's counsel made it clear that Betsy's objective in settlement was to obtain stock from Dennis and Griffy's personal stock holdings, not the Company's. Betsy's counsel also made it clear he was not representing the interests of any other shareholders at the time. (Storm Testimony, R. 827-37, PageID 33870).

In September 1993, Betsy, Dennis and Griffy reached a confidential agreement to settle her personal claims for the aforementioned stock and cash, and to settle the derivative claims for $10,000. (DX 56, Proposed Settlement, App. 393; Findings, R. 856, ¶¶106-109, PageID 35111-12). The Holt Plaintiffs did not participate in these discussions, and Dennis and Griffy led Betsy to believe that the Holt Plaintiffs would receive the same amount that Betsy received to be fair. (*Id.*, ¶¶204-205, 214, PageID 35148-49, 35151-52). A separate settlement agreement was prepared to reflect the actual derivative settlement in September 1993, no longer providing *any* stock to the Holt Plaintiffs. (*Id.*, ¶106, PageID 35111). The Holt Plaintiffs, Marty, Tommy, and Janet were asked to sign the document, but were

never given the opportunity to read or understand its terms. (*Id.*, ¶¶204-205, 214, PageID 35148-49, 35151-52).

The Court ordered defense counsel to send notice of a fairness hearing to the Griffin sisters and Marty and Tommy regarding the September 1993 settlement. (*Id.*, ¶113, PageID 35113-14). The notice did not disclose the terms of Betsy's personal settlement. The hearing was set for September 24, 1993; thus, only three days' notice was given of the fairness hearing, and notice was not sent by certified or registered mail. The only Holt Plaintiff to receive notice of the fairness hearing was Cyndi. She inquired of Dennis, and he told her that she did not need to attend or write anything in response to the Court directive because he would handle it with the judge on her behalf. (Findings, R. 856, ¶¶114-15, PageID 35114). There was no contrary testimony.

When Judy asked Griffy what Betsy had received in the settlement, he told Judy that Betsy received "very damn little" and that it was confidential. (Findings, R. 856, ¶112, PageID 35113). Minutes of 1993 Company board of directors meeting reflect only a $10,000 payment, and make no mention of the stock transfer to Betsy and her children. (Findings, R. 856, ¶121, PageID 35116-17). Dennis and Griffy hid the full amount of Betsy's settlement from Marty, Tommy, and Janet as well. (Findings, R. 856 n. 12, PageID 35117). Dennis and Griffy then caused the record

of the case to be sealed from public view, and the seal remained in place for the next 20 years. (*Id.*, ¶123, PageID 35117).[4]

Dennis and Griffy also caused feeble Mr. Griffin to execute additional estate documents making the 1991 changes permanent. (JX3 and 4, 1967 Trust and JLG Wills and Codicils, App. 243-301). The Holt Plaintiffs were not told about these changes to Mr. Griffin's estate documents, or about any other aspect of the settlement of Betsy's case. (Findings, R. 856, ¶120, PageID 35116).

Thus, the District Court concluded that "Dennis and Griffy did not make complete disclosures of all material facts to the Holt plaintiffs such that they were on 'equal footing' with their fiduciaries" with respect to the 1993 settlement agreement, rendering it "voidable." (*Id.*, ¶204, PageID 35148).

F. Defendants' Misappropriation of Assets from Mr. Griffin's Estate and 1967 Trust in 1995.

In January 1994, just weeks after Betsy's 1990 Lawsuit was settled, Dennis and Griffy began to seek out ways to orchestrate a sale of the stock their father owned in a Griffin Industries' subsidiary, called Craig Protein, so that the stock would not go to their five sisters. (*Id.*, ¶124, PageID 35118). They also sought out ways to

[4] Due to the settlement of her personal claims in 1993, Betsy did not assert any claims in this litigation arising from the 1985-86 stock transactions. Thus, her portion of the District Court's Judgment is significantly smaller, totaling only $12.3 million in disgorgement arising from Defendants' misappropriation of real estate and Craig Protein stock from her father's estate and trust in 1995.

convey, but continue to control, valuable real estate owned by Mr. Griffin (and used by Griffin Industries in its operations) in order to "get around" Kentucky's "absolute prohibition against executors engaging in transactions which may constitute self-dealing." (DX 76, Reubel Letter, App. 455). Dennis and Griffy considered asking "the five girls to consent to the sales, but [that didn't] seem to be a realistic possibility." (Findings, R. 856, ¶128, PageID 35110-20). Their objective was to conceal these self-interested conveyances from Plaintiffs, and get the stock and real estate "sold" before Betsy found out and "demand(ed) distribution." (PX 68, Meranus Notes, App. 457**)**.

Mr. Griffin died on April 9, 1995. Dennis and Griffy were appointed Co-Executors of Mr. Griffin's Estate, and remained the Co-Trustees of his 1967 Trust. (Findings, R. 856, ¶126, PageID 36119). At the time, Betsy believed that Mr. Griffin's Estate and 1967 Trust consisted only of "cash" based on what Dennis had previously told her. (Osborn Testimony, R. 814-25, PageID 33114 ("Denny had told us dad was going to be all cash, and I believed that dad was going to be all cash (at his death).")). In truth, Mr. Griffin owned much more than cash.

1. <u>The Real Properties Misappropriated to Martom.</u>

At his death, Mr. Griffin personally owned two real properties that were used by Griffin Industries in its business operations, known as the "Adams Property" and the "Jay Gee Property" (Findings, R. 856, ¶127, PageID 35119). Mr. Griffin's 1967

Trust held three other real properties, known as the "Jackson Property," the "Henderson Property," and the "Bradford Property (collectively the "Properties"), which were likewise used by Griffin Industries in its business operations. (Stipulations, R. 748 at ¶ 32, PageID 30755; JX 17, 1986 Henderson Deed, App. 365; J. Griffin Testimony, R. 821-19-22 and 35, 33495-98, and 33511; Blair Testimony, R. 823-38, PageID 33671, and M. Griffin Testimony, R. 814-187-88, PageID 33276-77). Prior to his death, Mr. Griffin had allowed Griffin Industries to use these Properties in its business operations, in return for monthly rent payments. (PX 19-21, Leases, App. 327, 342, 302; PX 25, Trust Statement, App. 513; J. Griffin Testimony 821- 19-21 and 26, PageID 33502).

The Properties were integral to the operations of Griffin Industries, and the Griffin Industries Board – which included Dennis, Griffy, Bobby, Marty and Tommy – wanted the Properties "to maintain always in the ownership of somebody in upper management of the company because they were essential to the Company's operations. (Findings, R. 856, ¶136, PageID 35122).

Consequently, Dennis and Griffy came up with a plan which would let them continue to control the Properties through their positions at Griffin Industries, and also divert additional monies to the other boys and their children. (R. 856, Findings, ¶139, PageID 35123-24; Blair Testimony, R. 823-36-39, PageID 33669-72). Dennis and Griffy caused Martom Properties, LLC ("Martom") to be formed, which would

own the Properties and lease them back to Griffin Industries, with newly inflated rental rates. Dennis and Griffy made Marty and Tommy its managers and 1% owners, with the remaining ownership given to the children of Marty, Tommy and Bobby, ages 3 to 10. (Findings, R. 856, ¶135, PageID 35122). Although Marty and Tommy were the nominal managers of Martom, Griffin Industries' personnel controlled Martom's operations, maintained the books and records, and paid its bills from 1995 until at least 2010. Neither Marty nor Tommy had any substantive role in managing or leading Martom. (Findings, R. 856, ¶138, PageID 35123). Marty and Tommy had no role in negotiating the rental rates or purchase prices for the Properties, which were all determined by Griffin Industries. (Findings, R. 856, ¶138, PageID 35123).

The amount Martom paid for the Properties was $1,402,200, which was the combined value arrived at by different appraisers retained by Dennis and Griffy. Neither Dennis nor Griffy, however, informed any of the appraisers that the Properties were income producing, benefitting from lucrative, long-term leases which were worth millions to Martom. (*Id.*, ¶¶134, 140, PageID 35122, 35124). This omission caused the properties to be substantially undervalued. (*See* PX 76 (Neyhart opinion letter, App. 804)).

Because the Jackson, Henderson and Bradford Properties were held in the 1967 Trust, Dennis and Griffy did not file anything with the Campbell County

Probate Court that even referenced the Properties. (Findings, R. 856, ¶154, PageID 35128). The inventory that was filed with the Probate Court listed the Adams and Jay Gee Properties as "vacant" land, despite the fact that several of the Properties held buildings and active industrial operations on them at the time. (Findings, R. 856, ¶153, PageID 35128).

Defendants did not disclose the 1995 leases with Griffin Industries to the Probate Court or Plaintiffs, or the fact that these Properties were integral to Griffin Industries' business operations, or the fact that Dennis and Griffy arranged to sell those Properties to Martom, an entity that they created and controlled through Griffin Industries. (*Id.*, ¶¶153-155, PageID 35128). Nor did Dennis and Griffy seek permission from the Campbell County Probate Court to sell any of the Properties, or provide copies of the probate inventory to any of their sisters.

Thereafter, Martom accumulated over $5,118,000 in lease income (excluding interest). (*Id.*, ¶141, PageID 35124). All that while, Martom incurred little or no operational expenses, because Dennis and Griffy caused Griffin Industries to pay all real estate taxes, insurance, improvements and maintenance on each of the Properties. (JX 31-34 (1995 triple-net leases), App. 459, 471, 485, 500; PX 48-49 (2010 triple-net leases), App. 515, 547). Martom continues to own several of the Properties, which were valued at $3,160,000 at the time of trial. Martom also received an additional $711,000 in proceeds from the sale of portions of the

Henderson Property in 2008. (Chilton Testimony, R. 821 at 88-89, PageID 33563-64; PX 77-81 (Neyhart appraisals, App. 807, 917, 1005, 1109, 1202)). All told, Martom benefitted by over $8,989,000, excluding interest on the profits it enjoyed each year for the last 21 years.

2. The Craig Protein Stock Transfers

In addition to the Properties detailed above, Dennis and Griffy, as Co-Executor's of Mr. Griffin's Estate, also sold Mr. Griffin's 23.7% stake in Craig Protein at a steep discount to their younger brothers, Marty and Tommy, just six weeks after Mr. Griffin died. (Findings, R. 856, ¶130, PageID 35120). Craig Protein was a profitable company year-after-year since 1990, and became even more profitable from 1995-2002. (*See* DX 110, Craig Protein Appraisal, App. 403 at GTE00204; R. Griffin Testimony, R. 828-60, PageID 34048).

Like Martom, Craig Protein was managed and controlled by Dennis and Griffy, and Griffin Industries' employees operated it at their direction. And, just like the Properties, Dennis and Griffy wanted the Craig Protein stock to go to Marty and Tommy because they were now in upper management at Griffin Industries. (Findings, R. 856, ¶132, PageID 35121).

Dennis and Griffy never considered conveying the Craig Protein stock to their sisters pursuant to the express terms of Mr. Griffin's will and 1967 Trust. (*Id.*) Nor did Dennis and Griffy ever inform their sisters of the existence or disposition of the

valuable Craig Protein stock. Marty and Tommy, on the other hand, were fully aware that they were receiving the Craig Protein stock from Mr. Griffin's estate and that their sisters were the sole beneficiaries of his estate and 1967 Trust. (M. Griffin Testimony, R. 814-181, PageID 33270; T. Griffin Testimony, R. 816-94-95, PageID 33388). Indeed, the decision to sell the Craig Protein stock to Marty and Tommy occurred at a meeting of the Griffin Industries' Board of Directors which the brothers all attended. (Findings, R. 856, ¶131, PageID 35121; M. Griffin Testimony, R.814-183-84, Page ID 33272-73).

The price Marty and Tommy paid for the Craig Protein stock, $665,000, was far less than its true worth, or even its book value. (DX 110, Craig Protein Appraisal at pp. 15-16, 29). Ms. Medley, Plaintiff's valuation expert, testified that the stock was substantially undervalued and that it was improper to value a highly profitable rendering operation at less than half of its book value. (Medley Testimony, R. 821-58-65, PageID 33534-41; DX 110, Craig Protein Appraisal, at pp. 15-16, 29, App. 403 (reflecting book value of $5.7 million, and no long-term debt, but an appraised value of only $2.8 million)). Defendants offered no contrary testimony.

In 2002, Marty and Tommy each traded their 500 shares in Craig Protein for 1,435 shares in Griffin Industries. From 2002 through the 2010 merger between Griffin Industries and Darling, those additional shares yielded Marty and Tommy a $30,414,730 (excluding interest), plus 240,837 shares in Darling, a publicly traded

company. (Findings, R. 856, ¶133, PageID 35121). In stark contrast, Plaintiffs each received only $133,000 for the Craig Protein stock that would have otherwise gone to them under the terms of their father's will and 1967 Trust. Ultimately, Marty and Tommy's "investment opportunity" in the Craig Protein stock garnered them a 4,800 percent return. (M. Griffin Testimony, R. 814-176, Page ID 33265).

Significantly, both Dennis and Griffy openly admitted that they never informed Betsy, Cyndi, Linda, or Judy about their inheritance rights in connection with Mr. Griffin's Estate and 1967 Trust, the assets held in the Estate and Trust, the sales of the Properties and the Craig Protein stock to their younger brothers, or Defendants' personal interests in such transactions. (Findings, R. 856, ¶143, PageID 35125). Nor did any of the Holt Plaintiffs ever receive a copy of Mr. Griffin's will and 1967 Trust, nor were they aware of the terms until this litigation. (*Id.*, ¶143, PageID 35125). They were lied to about the terms, and material details were concealed from each of the Plaintiffs. (*Id.*, ¶146, PageID 35126).

Therefore, the District Court concluded that "[P]laintiffs proved by a preponderance of the evidence that Dennis and Griffy failed in their duty to disclose to their sisters all material facts pertaining to the … sale of properties from [their] Father's estate to Martom, and the sale of Father's Craig Protein stock to Marty and Tommy." (*Id.*, ¶211, PageID 35150). Defendants do not contest, and offer no basis to overturn, these important factual findings by the District Court.

G. Discovery of Defendants' Misconduct in 2010

Betsy and her sisters never discussed the terms of her settlement before 2010, because of a "confidentiality agreement that Denny had stipulated that he wanted" and because they were working to restore their damaged relationship caused by Dennis and Griffy's lies. (Osborn Testimony, R. 814, PageID 33121). Likewise, Betsy's sisters did not ask, for fear of upsetting the progress they had begun to make. (Roeder Testimony, R. 809, PageID 32900). Indeed, Dennis and Griffy were the only siblings who spoke to Betsy for the first 15 years or so after the settlement of her 1990 Lawsuit, even sending her gifts and cards to further restore Betsy's trust. (Osborn Testimony, R. 814-12-13, PageID 33101-02).

On October 31, 2010, leading up to the Darling merger, however, Cyndi received a list showing the shareholders and amounts of their holdings in Griffin Industries as of October 1, 2010, which had been mistakenly included with tax forms sent to her daughter. (Findings, R. 856, ¶213, PageID 35151). These shareholder lists were highly confidential, and none of the Holt Plaintiffs had ever seen one. Even Marty and Tommy, who were Company directors, had never seen one. (*Id.*, ¶¶166, 187, PageID 35132, 35140). The list showed that Betsy owned 1,390 more shares of Griffin Industries stock than her sisters, that children of their brothers owned substantial amounts of stock, and that their brothers owned considerably more stock than the sisters, individually or combined. (*Id.*, ¶166, PageID 35132).

At trial, Cyndi testified about her reaction:

> Sickened. Absolutely sickened. Here we're coming to the end of this and we find this out now. I was destroyed. I was absolutely destroyed when I saw this, because I felt like I had been lied to, just flat-out lied to. It was hard to believe. It was hard to imagine. I had a hard time handling this.

(Roeder Testimony, R. 809-112, PageID 32904).

Around this same time, the Holt Plaintiffs learned that the Company would be sold to Darling International, Inc., in approximately six weeks. (Findings, R. 856, ¶164, PageID 35131-32). Overwhelmed with the information learned from the shareholders list and a rapidly approaching merger, the Holt Plaintiffs began asking questions of then-CEO Bobby Griffin and their other brothers, including why they never got additional stock like Betsy. (Findings, R. 856, ¶166, PageID 35132-33). Cyndi asked Griffy to see Mr. Griffin's estate documents and/or a disbursement sheet from his estate to try and understand the issues related to the ownership of the Cold Spring property, but Griffy did not provide it. (Findings, R. 856, ¶167, PageID 35133). Cyndi also asked why the sisters never got stock, and Griffy said because Dennis said "you had enough." Bobby also told her that Dennis "did some bad shit." (Findings, R. 856, ¶166, PageID 35132).

Betsy's discovery of Dennis and Griffy's wrongdoing regarding her father's estate and Trust occurred in similar fashion. During due diligence for the merger, Darling discovered that title to the Cold Spring headquarters was held in the name

of "John L. Griffin, Trustee." (Memorandum Opinion and Order, R. 590, PageID 27433). Shortly thereafter, Betsy was told by Company counsel, Louis Solimine ("Solimine") that there was a "discrepancy on the Cold Spring corporate headquarters" and that she and her sisters "needed to sign a special warranty deed" conveying the Property to Griffin Industries for $10.00. (Findings, R. 856, ¶165, PageID 35132; Osborn Testimony, R. 814, PageID 33112). Betsy refused to sign the Special Warranty Deed, and instead, asked Solimine why the Cold Spring Property had not been included in Mr. Griffin's estate in 1995. Solomine had no answers. By this time, the Holt Plaintiffs were also asking questions about Mr. Griffin's estate.

On December 17, 2010, the Griffin-Darling merger was consummated, notwithstanding the questions raised by Plaintiffs. Dennis, Griffy and Bobby collected over $200 million <u>each</u> for their shares in Griffin Industries. Although Betsy's counsel continued to have back and forth communications with Solimine concerning the Cold Spring Property before the merger closed, those communications "died" in December 2010. (Osborn Testimony, R. 814, PageID 33114). Not until January 2011, would Betsy learn that one day before the merger was consummated, Griffy had secretly gone to the Campbell County Probate Court to re-open Mr. Griffin's estate in order to convey the Cold Spring Property to Griffin Industries for $1.00. At that point, the walls came tumbling down for Betsy, as she

realized her renewed trust in Dennis and Griffy had been misplaced, and that they had deceived her once again. (*Id.*, PageID 33115-16).

Four months later, Betsy sued her brothers for the transfer of the Cold Spring Property to Griffin Industries for $1.00. (Findings, R. 856, ¶169, PageID 35133). Because of their experience in late 2010 relative to the Cold Spring Property and discovery of the shareholders' list, when the Holt Plaintiffs read Betsy's complaints in December 2011 with this critical, newly-discovered information in-hand, they concluded that their trust in their older brothers had been misplaced all along. The Holt Plaintiffs then filed suit in 2013. (*Id.*, ¶171, PageID 35134). Remarkably, Defendants' attempts to conceal material documents and information from Plaintiffs concerning their inheritance and the subject transactions continued even throughout the first three years of this litigation, during which the District Court entered at least nine different orders compelling Defendants and their privies to produce such information.[5]

Based on these facts proven at trial, the District Court concluded that Plaintiffs "did not knowingly sit on their rights for an unreasonable time" because they "did

[5] *See* R. 189, Order, PageID 4157-62; R. 221, Memorandum Order, PageID 4845-58; R. 235, Memorandum Order, PageID 5099-5115; R. 253, Memorandum Order, PageID 5521-44; R. 277, Memorandum Order, PageID 7645-52; R. 283, Order, PageID 7691-93; R. 293, Order, PageID 7777-78; R. 298, Order, PageID 7813; and R. 359, Order, PageID 9333-41.

not learn of the breaches which form the basis of their claims until 2010 at the earliest." (Findings, R. 856, ¶225, PageID 35155-56). Defendants do not contest, and offer no basis to overturn, these important factual findings by the District Court.

H. Remedies

In support of their equitable claim for disgorgement, Plaintiffs presented the expert testimony of John Chilton, who is a Certified Public Accountant, a Certified Valuation Analyst, and accredited in business valuation by the American Institute of CPA's. (*Id.*, ¶¶ 252-253, PageID 35166). Mr. Chilton performed an analysis to determine the amount of income generated by the Griffin Industries stock and other assets wrongfully taken by Defendants. He based his conclusion on the Company's tax returns and other data showing the distributions to Defendants from 1985 to 2010, and included prejudgment interest at an annual rate of 8%.

Mr. Chilton divided the profits according to the estate plans in effect at the time of each respective breach, and he calculated that Cyndi, Judy and Linda were entitled to disgorgement in the amount of $167,148,421 each for their parents' Griffin Industries stock. He also calculated that Betsy and her sisters were each entitled to disgorgement of $9,734,766 for the Craig Protein stock, and $1,872,654 due to the real estate transfers to Martom. (*Id.*, ¶¶ 262-264, PageID 35168). Defendants offered no contrary expert opinions to any of the damages testimony, despite having ample notice of Defendants' disgorgement position and multiple

opportunities to identify a competing expert up through the trial date. *See* Pages 81-82, *infra*.

The District Court, after hearing Mr. Chilton's trial testimony, agreed with Plaintiffs as to the proper remedy and calculations. (Findings, R. 856, ¶262, PageID 35168). The District Court denied, however, Plaintiffs' request for punitive damages and attorney's fees because of the amount of the disgorgement, and it permitted annual compounding of interest, rather than monthly. (*Id.*, ¶¶ 269-270, PageID 35170).

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT THE PROBATE EXCEPTION DID NOT BAR FEDERAL JURISDICTION.

In their opening argument, Defendants claim that "this dispute centers around assets subject to probate," which Defendants contend "puts the dispute off limits" to a federal court. (Brief of Appellants ("App. Br.") at 26). Neither is true. This Court previously declined to accept this argument when it denied their Writ of Mandamus on April 21, 2015. (*See* R. 684-1, Sixth Circuit Order, PageID 29598-60). Defendants' argument fares no better this time around.

For starters, Defendants have misconstrued the controlling precedent that refutes their arguments. The U.S. Supreme Court delineated the probate exception's "distinctly limited scope" in *Markham v. Allen*, 326 U.S. 490, 494 (1946) to only

those cases where the federal court would "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham*, 326 U.S. at 494 (emphasis added) (citations omitted).

The Supreme Court narrowed the probate exception even further in *Marshall*, 547 U.S. 293, holding that the probate exception only "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate" and "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." *Id.* at 312 (citations omitted). The Supreme Court expressly ruled that "it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Id.*

The *Marshall* decision rested, in part, on the fact that the Texas probate court which probated the underlying will in that case was not "exclusively competent to entertain a (tort) claim of that genre" and likewise did not have a "special proficiency" in handling such legal claims and issues. *Id.* at 312, 314. Thus, the *Markham* and *Marshall* decisions clearly permit claims arising out of the mishandling of probated assets. It is only when the federal court attempts to exercise jurisdiction over property that is simultaneously being adjudicated in probate court that the probate exception applies. Of course, that is not the case here.

This Court subsequently examined the probate exception in *Wisecarver v. Moore*, and held that "to the extent that Plaintiffs' claims seek *in personam*

jurisdiction over the Defendants, and do not seek to probate or annul a will, the probate exception does not apply." *Wisecarver*, 489 F.3d at 750. In doing so, the *Wisecarver* Court made clear that the probate exception is limited to situations in which a federal court plaintiff seeks to: (i) "probate … a will"; (ii) "annul a will"; or (iii) "reach the *res* over which the state court had custody." *Id.* at 750.

More recently, in *Chevalier v. Estate of Kimberly Barnhart*, 803 F.3d 789, 802 (6th Cir. 2015), this Court again declined to apply the probate exception, and held that a plaintiff could maintain an *in personam* action in federal court for breach of contract, default, unjust enrichment, fraud and imposition of a constructive trust – despite the fact that the defendant died in the course of the action and her sought-after assets became the subject of a probate court proceeding. The *Chevalier* Court also permitted the plaintiff to pursue a foreclosure remedy, because at the time she filed suit the subject real estate was not "in the custody of a state probate court." *Id.* at 804 (citations omitted).

These authorities plainly refute Defendants' bald assertion that any litigation involving "assets subject to probate" is "off limits" to a federal court forever. (App. Br. at pp. 1, 26). Likewise, there is no merit to Defendants' attempt to pigeonhole all of Plaintiffs' claims as an attempt to "annul" John L. Griffin's will, or to simply recover "money damages equal to the value of" property that was referenced in probate proceedings. Plaintiffs' claims are markedly different, as the District Court

correctly recognized. Applying these binding precedents, it is clear that the probate exception is inapplicable to this case for at least four reasons.

First, none of the Plaintiffs challenged the validity of the wills or otherwise asked the District Court to perform a function that is exclusively within the jurisdiction of a Kentucky probate court. (*See generally*, Findings, R. 856, PageID 35070-172). Nor did the Plaintiffs ask the District Court to take control of any property that was under the control of a probate court. To the contrary, both Betsy and the Holt Plaintiffs invoked the *in personam* jurisdiction of the District Court and sought a disgorgement remedy. (*Id.*, ¶197, PageID 35144-45). Thus, as the Supreme Court held in *Markham* and *Marshall*, and this Court made clear in *Wisecarver* and *Chevalier*, the probate exception does not apply in cases of this sort, where Plaintiffs invoked the "*in personam* jurisdiction" of the District Court, and never sought "to probate or annul a will." *Wisecarver*, 489 F.3d at 750.

Second, Defendants cannot salvage their probate exception argument by arguing that the disgorgement remedy sought by Plaintiffs was "equal to the amount of the probate disbursement" from their parents' estates, and therefore warrants application of the probate exception. (*See* App. Br. at 27). It is plain from the District Court's Findings that Plaintiffs' sought the disgorgement of monies Defendants wrongfully obtained, regardless of whether they were disclosed to the

Probate Court or part of the probate estate. The amounts are not equal, and the probate exception has no application here.

Third, the probate exception likewise does not apply here because the bulk of the improper transactions at issue arise from the diversion or misappropriation of assets from *trusts* settled by the parents, none of which were ever listed in any probate filing, much less reviewed and approved by the probate court. (Findings, R. 856, ¶¶ 35-37, 66, 154-155, PageID 35086, 35096, 35128-29). Indeed, the improper stock transactions that make up the largest percentage of the Holt Plaintiffs' award involved the *inter vivos* transfers from the 1967 Trust. (*Id.*, ¶¶ 35-37, PageID 35086). This Court squarely held in *Wisecarver* that such *inter vivos* transactions are "remove(d)" from "the limited scope of the probate exception." *Wisecarver*, 489 F.3d at 751.

Finally, contrary to Defendants' arguments, the Campbell County Probate Court did not have jurisdiction to hear *any* of the tort claims asserted by Betsy or her sisters. Nor did any other state tribunal have any "special proficiency" or "exclusiv(e) competen(cy)" in handling the tort claims at-issue, which is another requirement before the probate exception may apply. *Marshall*, 547 U.S. at 312, 314. Indeed, Kentucky probate courts *do not have jurisdiction* to adjudicate contested tort claims relative to the administration of a trust or estate. *See, e.g.*, Ky. Rev. Stat. §24A.120(2) (directing that adversary proceedings "involving probate" be

filed in the court of general jurisdiction, and not in district (probate) courts). *See also Hale v. Moore*, 289 S.W.3d 567, 578 (Ky. App. 2008) ("While the district (probate) court would have maintained jurisdiction over any *uncontested* probate issues, as the facts developed, *all the issues were contested* so there was nothing over which the district (probate) court retained authority to act") (emphasis added).

Grasping at straws, Defendants nevertheless argue that the probate exception somehow applies to the 1985 stock transactions because Mr. Griffin's Sixth Codicil to his Will (which he executed in 1991) refers back to those transactions. According to Defendants, because the Holt Plaintiffs argued to the District Court that Mr. Griffin's Sixth Codicil did not properly ratify the stock transactions from 10 years *before* his death, such an argument is tantamount to seeking the annulment of his entire will. (App. Br. at 28). Defendants are simply wrong. The Holt Plaintiffs have never sought to annul the will, but only argued that the Sixth Codicil did not meet the stringent standards required to ratify a breach of fiduciary duty. The District Court agreed. Nor did the Holt Plaintiffs ever ask the District Court to enforce an alternate will or administer their father's estate as though he died intestate. Nor was Mr. Griffin's Company stock ever in the control of a Probate Court. *See* Pages 12-13, *supra*.

Moreover, the language Defendants rely upon from the Sixth Codicil was precatory in nature, and superseded in any event by the Seventh Codicil. In no way

was the purported "ratification" language from the Sixth Codicil "probated" or dispositive of any of Mr. Griffin's Estate assets. *See In re Croker's Will*, 105 N.Y.S.2d 190, 192 (N.Y. Surr. Ct. 1951) ("Cases have consistently held that words and phrases in a Will which are not dispositive are not actual parts of the Will.") (citations omitted). Each of these unchallenged facts, standing alone or taken together, refute Defendants' "annulment" argument.

In view of these circumstances and binding precedent, it is clear that the District Court properly exercised jurisdiction over all of Plaintiffs' claims. In fact, the District Court had "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Marshall*, 547 U.S. at 298-99. Accordingly, the probate exception does not apply to this dispute.

II. THE DISTRICT COURT PROPERLY RULED THAT THE PLAINTIFFS' CLAIMS WERE NOT TIME BARRED.

A. Kentucky Law Requires Actual Knowledge Before a Beneficiary's Claims Against a Fiduciary Begin to Run.

Defendants complain that the District Court erred in finding that Plaintiffs' claims are not barred by the five-year statute of limitations set forth at Ky. Rev. Stat. §413.120. As the District Court observed in its Summary Judgment Order, the statute of limitations does not begin to run on a breach of fiduciary duty claim until "actual discovery" of the fiduciary's wrongdoing by the injured party. (Memorandum Opinion and Order, R. 590-47, PageID 27453).

The District Court ruled that "where there is a fiduciary or other confidential relationship in which the fiduciary bears a duty of disclosure, a failure to speak constitutes a 'means of obstruction' within KRS 413.190, thereby tolling the statute of limitations." *Id.* (*quoting Security Trust Co. v. Wilson*, 210 S.W.2d 336, 339-40 (Ky. 1948)). Consequently, "[w]here such concealment or obstruction occurs in the context of a fiduciary relationship, '(t)he statute of limitations does not begin to run until actual discovery of the fraud, there being no duty on the part of the injured party to exercise due diligence to discover the fraud.'" *Id.* (*quoting Boone*, 550 S.W.2d at 574). *See also* Order, R. 797, PageID 32720 (accord).

The District Court got it right. The controlling Kentucky law on this issue is set out in the case of *Security Trust v. Wilson,* 210 S.W.2d 336.[6] In that case, the plaintiff brought suit against her uncle, the administrator of her father's estate, for "fraudulently, wrongfully, and unlawfully" transferring to himself several government bonds belonging to the estate, which should have been conveyed to the plaintiff as beneficiary. *Id.* at 336-37. The bonds were listed in the final report filed

[6] Surprisingly, the Defendants do not even acknowledge this seminal Kentucky case in their brief, despite the fact that the District Court ordered specific briefing on its application to this case. (*See* Order, R. 709 at PageID 30074). It continues to be the prevailing law on this issue, and it has been positively cited a dozen times in the past five years, including by this Court.

by the uncle with the Fayette County Court in 1925, but the plaintiff did not sue until twenty-one years later, when she actually learned of the wrongful actions. *Id.* at 336.

The *Security Trust* Court rejected the defendants' statute of limitations arguments, holding that the plaintiff's uncle was in a confidential or trust relationship with the plaintiff, both because he was the administrator of the plaintiff's father's estate and because he was her mother's brother. The plaintiff reposed the utmost confidence in her uncle's honor and integrity. *Id.* at 337-38. The *Security Trust* Court then applied the tolling provision set forth in Ky. Rev. Stat. §413.190, noting that the plaintiff's uncle, by virtue of the fiduciary duties he owed her, had an affirmative duty to "advise the said plaintiff that he had exchanged her bonds and taken the title to the ones exchanged for in his own name." *Id.* at 339. His failure to do so was a "fraudulent concealment." *Id.*

The Court also noted that because of the fiduciary relationship, there was no duty on the part of the plaintiff to take any action to detect the fraud. *Id.* at 338 (emphasis in original). The *Security Trust* Court concluded that the actions of the uncle, while acting as a fiduciary, "constituted a means of obstruction within the meaning of KRS 413.190 . . . (which) tolled the running of the statute of limitations." *Id.* at 339-40. It also rejected the argument that the ten-year statute of repose barred the action from going forward. *Id.* at 337.

Here, the District Court properly held that Kentucky law requires actual notice, and there was no actual notice until 2010 at the earliest. It recounted the evidence at trial in great detail, (*see* Findings, R. 856, ¶¶64, 84—88, 98, 101-02, 112, 118-19, 141, 144, 147-48, 164, 167-68, PageID 35095, 35103-05, 35108-09, 35113, 35115-16, 35124-26, 35131-33), then ruled that "[n]one of the documents that Defendants introduced in an effort to impute knowledge to plaintiffs disclose all the material facts regarding Defendants' handling of their parents' estate plans or their fiduciary breaches. Dennis and Griffy had an affirmative duty to make full disclosures to their sisters, and this they did not do." (*Id.*, ¶213, PageID 35151). Accordingly, since there was no "actual notice," Plaintiffs' breach of fiduciary duty claims were not time barred. (*Id.*, ¶¶ 214-215, PageID 35151-52).

Defendants do not even challenge this factual finding. This Court should therefore affirm that where, as here, a confidential and fiduciary relationship exists between the parties, the statute does not begin to run until actual discovery of the wrongdoing, and uphold the District Court's finding that Plaintiffs did not have actual notice until 2010 at the earliest.

Contrary to Defendants, Kentucky courts have consistently followed the important rule from *Security Trust*. *See LeMaster v. Caudill*, 328 S.W.2d 276, 277-78 (Ky. 1959) (holding that siblings had a "right to rely upon the (brother) as administrator of their father's estate" and no obligation to scour for real estate deeds

which may have disclosed his wrongdoing); *McMurray v. McMurray*, 410 S.W.2d 139, 141-42 (Ky. 1966) (rejecting constructive notice and due diligence arguments advanced by a self-dealing relative who wrongly claimed that statute began to run when a deed was recorded, and holding that "[t]he rationale of the actual notice requirement is that persons in a confidential relationship do not have the reason or occasion to check up on each other that would exist if they were dealing at arm's length."); *Munday v. Mayfair Diagnostic Laboratory*, 831 S.W.2d 912, 914 (Ky. 1992) ("where the law imposes a duty of disclosure, a failure of disclosure may constitute concealment under KRS 413.190(2), or at least amount to misleading or obstructive conduct"); *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 545 (Ky. 2009) (collecting cases).

Kentucky courts also follow the rule from *Security Trust* that the ten-year statute of repose also yields to the actual notice test for fiduciary relationships. *See e.g.*, *Dodd v. Dyke Industries, Inc.*, 518 F. Supp. 2d 970, 973 (W.D. Ky. 2007) (concluding that "Kentucky courts have by this Court's reckoning thus far … applied §413.190(2) to 'keep alive' a fraud claim beyond 10 years in the context of a fiduciary relationship."); *Alexander v. Lakes*, 2009 WL 102893, *2 (Ky. App. January 16, 2009) (determining that evidence of concealment or a fiduciary relationship could toll the limitations period beyond 10 years); *Blackerby v. Skaggs*, 2004 WL 911781, *2 (Ky. App. April 30, 2004) (same).

Nothing in the cases Defendants cite suggests the District Court got it wrong. For example, *Adams v. Ison*, 249 S.W.2d 791, 792 (Ky. 1952) was a medical malpractice case where the doctor told the patient that he did not have to worry about the fact that some tubing was left inside of him during surgery. Although the *Adams* Court suggested in *dicta* that the patient may have an obligation to use reasonable diligence to detect a claim when it is merely concealed, it ultimately applied a different rule in a confidential relationship, when there is an affirmative act of deception "which in point of fact misleads or deceives plaintiff and obstructs or prevents him from instituting his suit while he may do so." *Id.* at 792. Accordingly, it did not impose a due diligence requirement on the patient at all. To the extent *Adams* caused any confusion, the Kentucky high court clarified it fifteen years later, when it ruled that "(w)hen a confidential relationship exists between the parties . . . the statute does not begin to run until *actual discovery* of the fraud or mistake." *Hernandez v. Daniel*, 471 S.W.2d 25, 26 (Ky. 1971) (emphasis added).

Likewise, Defendants cannot rely on *Salmon v. Old National Bank*, 2010 WL 1463196 (W.D. Ky. April 8, 2010), an unpublished ruling by a District Court on a motion for preliminary injunction involving *pro se* litigants. As the District Court noted in its summary judgment decision, the *Salmon* decision is contrary to controlling Kentucky Supreme Court precedent.

Nor does this Court's decision in *Ham v. Sterling Emergency Servs. of the Midwest, Inc.*, 575 F. App'x 610, 614 (6th Cir. 2014), change the result. In that case, another medical negligence action, the Court ruled that equitable tolling did not apply because "(t)he record belies any contention that [the doctor's] illegible signature and failure to correct the medical records was 'calculated to mislead or deceive' [the plaintiff]" *Id.* at 614. The rule also did not apply because the defendant's "conduct did not 'in point of fact' mislead or deceive [plaintiff], or obstruct him from timely filing suit." *Id.*

In sum, both the jurisprudence of Kentucky and that of this Court compel affirmation of the District Court finding that where, as here, a confidential and fiduciary relationship exists between the parties, the statute does not begin to run until actual discovery of the wrongdoing, and uphold the District Court's finding that Plaintiffs did not have actual notice until at least 2010.

B. The Statute of Limitations Was Also Properly Tolled Based on the District Court's Unchallenged Findings that Defendants Intentionally Misled Plaintiffs and that Plaintiffs Acted Reasonably in Trusting Them.

Even if the Court were to apply a constructive notice standard, Defendants still could not prevail because the District Court's Findings show that Plaintiffs acted with due diligence by relying on the statements of their older brothers. The District Court ruled on summary judgment that the RICO claims were time barred because

Plaintiffs had not sought out information that could have caused them to discover their brothers' wrongdoing. (Memorandum Opinion and Order, R. 590, PageID 27481, 27485). Unlike a federal RICO claim, Kentucky law puts the onus on the fiduciary to reveal his fraud, not on the beneficiary to ferret out the fraud. (*See* Pages 45-51, *supra*). In light of these very different standards, the District Court ruled that Plaintiffs had not met "RICO's stringent duty of due diligence," which it noted was "(u)nlike the beneficiary-friendly standards under Kentucky law. " (*Id.*)

After hearing the evidence at trial on Plaintiffs' state law breach of fiduciary duty claims, however, the District Court found unusual family dynamics at work, where the older brothers "occupied positions of authority vis à vis their sisters, and no more so than when their parents' health failed and responsibility for the company and the family fell to the next generation." (Findings, R. 856, PageID 35072-73). Consequently, the District Court found that Defendants possessed an unusual ability to manipulate their sisters into not challenging their actions:

> The record of this case reveals a pattern, spanning decades, of the brothers exercising their authority over their sisters by sharing information selectively; by leveraging their roles to discourage and, sometimes, intimidate, the sisters from seeking information or from questioning their brothers' decisions; by pitting one sister against the others; and by staunchly insisting that their actions were in keeping with their Father's wishes, even in the face of documents that reflected the contrary.

(*Id.*, PageID 35073). It was in the context of this family dynamic that the brothers were able to perpetuate their fraudulent scheme, by preying on their sisters' trust. "[T]he above dynamics enabled Defendants to successfully rebuff their sisters' inquiries over the years, not in a way that would have given the sisters full knowledge that something was legally awry, but simply in a way that reinforced the message that the sisters, who had always been admonished to respect and trust their brothers' authority, had neither the need nor the right to know the details regarding their parents' estates." (*Id.*) The District Court detailed in its extensive filings why Plaintiffs were not "remiss for not ferreting out the fiduciary breaches sooner." The Holt Plaintiffs asked to see the wills, but their brother Dennis refused to show them, and intimidated them into not asking again. The Holt Plaintiffs had no reason to scour the probate court records because they trusted their brothers – and fiduciaries – who had also told them that their parents' estates would not be probated. (*Id.*, ¶42, PageID 35088).

Likewise, the Holt Plaintiffs did not seek out Betsy's 1991 complaint because the brothers told them her suit was meritless, it did not involve them, their allegiance would help keep Mr. Griffin off the stand, and the details of the case were confidential between Dennis, Griffy and Betsy. They did not read the document Dennis told them to sign or seek out a copy of settlement agreement because the brothers told them that they received the same amount as Betsy, which Dennis and

Griffy characterized as "very damn little." (*Id.*, ¶112, PageID 35113). They believed what Dennis told them about it. They trusted and respected their older brother, and "they believed Dennis 'was the best person in the world' who 'did the best he could.'" (*Id.*, ¶87, Page ID 35104). Other siblings, Marty, Tommy, and Janet, similarly trusted and relied on Dennis and Griffy without question. (*Id.*, ¶103, Page ID 35109-10).

The District Court heard the testimony on these issues, and it found that Plaintiffs had no reason to distrust their older brothers at all relevant times, and were not deficient in failing to do more. Indeed, the District Court found "credible Cyndi's trial testimony that, in 1990, she did not take steps to obtain a copy of Mother's estate documents because she understood that Dennis had 'taken care' of everything and that she 'thoroughly trusted that whatever he did was what the will said to do.'" (*Id.*, ¶72, PageID 35098-99).

For their father's estate, even inquiring at the Probate Court would not have alerted them to the fraud. The inventory lists filed in the Probate Court misrepresented the property Mr. Griffin owned, and did not identify the buyers – Martom, Tommy and Marty. (*Id.*, ¶155, PageID 35128-29). When Cyndi asked even the most cursory questions, Dennis became "very offended and accused her of not trusting him. He also said it was "all there," and Cyndi "took his word for it." Betsy and Linda never received any accountings or inventories with respect to Mr.

Griffin's Estate or the 1967 Trust, and no one told Plaintiffs they had a right to the Properties and the Craig Protein shares from their father's Estate and Trust. (*Id.*, ¶¶ 143, 162-63, PageID 35125).

Moreover, Betsy did not have reason to scour for real estate filings or probate records in 1995, because she was led to believe that her father did not own valuable real property or shares in Craig Protein at his death. Indeed, Dennis told her that her father's estate would not be probated and would be "all cash," and Dennis and Griffy's attorney told Betsy that her older brothers would fulfill their fiduciary obligations in the matter. (Osborn Testimony, R. 814; PageID 33105-06, 33114; Findings, R. 856, ¶179, PageID 35137).

The actions Plaintiffs took, and did not take, were reasonable in the context of this family, and the other family members acted the same way. (*Id.*, ¶103, PageID 35109-10). Janet knew nothing about the administration of her parents' estates. Share holdings were closely guarded secrets, even from the younger brothers who were directors. Marty and Tommy testified that the first time they ever learned how many shares of Griffin Industries their siblings owned was during the Company's merger with Darling in 2010. (*Id.*, ¶174, PageID 35136).

The District Court's findings after the trial thus reflect a more full understanding of the family context, and ultimately concludes that Plaintiffs were not "remiss for not ferreting out the fiduciary breaches sooner." (*Id.*, p. 3, PageID

35072). Even if there was a due diligence obligation, the District Court has found the Plaintiffs exercised any due diligence which was warranted under their peculiar circumstances. Defendants simply ignored these Findings in their Brief, which are not clearly erroneous. Rather, these Findings are fatal to Defendants' constructive notice and due diligence arguments.

To the extent Defendants contend that these Findings are inconsistent with the Court's dismissal of Plaintiffs' RICO claims at the summary judgment stage, the District Court was free to reach a different factual conclusion on the issue after hearing all of the evidence presented at trial. *Brown v. United States*, 355 F. App'x 901, 907 (6th Cir. 2009) ("District courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment") (quoting *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991)). Likewise, this Court is free to affirm the Judgment even if it decides a constructive notice standard should have been applied. *Stromback v. New Line Cinema*, 384 F.3d 283, 305 (6th Cir. 2004). Plaintiffs complied with whatever diligence requirement Kentucky law imposed upon them.

C. Equitable Tolling Principles Apply Equally to Martom.

Despite the tolling principles set forth above, Martom argues that it should benefit from the statute of limitations because it "never stood in a fiduciary capacity as to plaintiffs" and its mere "silence" as to Plaintiffs' claims cannot constitute

concealment for purposes of tolling under Ky. Rev. Stat. §413.190(2). (App. Br. at 36). Martom neglects to account for the fact that it was created and controlled by Dennis and Griffy "through their positions at Griffin Industries" in an "attempt to circumvent the law against indirect self-dealing." (Findings, R. 856, ¶238, PageID 35160-61). None of the Defendants challenge these factual findings, nor can they.

Because Martom was jointly involved in a breach of fiduciary duty with Dennis and Griffy, it stands "in the same shoes as the original tortfeasor." *Anderson v. Pine Street Capital, LLC*, 177 F. Supp. 2d 591, 604 (W.D. Ky. 2001). To that end, Martom remains "jointly and severally liable" with Dennis and Griffy for the profits that accrued from their breaches of fiduciary duty. *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 486 (Ky. 1991). Martom cites no law for the notion that these principles yield when it comes to a statute of limitations analysis; nor should it. Indeed, Kentucky law does not permit a "fraudulent or inequitable resort to a plea of limitations." *Emberton*, 299 S.W.3d at 573.

Moreover, Kentucky law is settled that a court will ignore the purported separation of a "corporate entity where it serves as a shield for fraudulent or criminal acts or where it serves to subvert the public policy of this state." *Commonwealth ex rel. Beshear v. ABAC Pest Control, Inc.*, 621 S.W.2d 705, 708 (Ky. App. 1981). Under this principle as well, Martom cannot distinguish itself or its liability from that imposed on Dennis and Griffy.

Martom's statute of limitations argument deserves no credence under these factual circumstances and legal authorities. Plaintiffs were deceived through the creation and operation of Martom, by Dennis and Griffy, as a sham attempt to shield their fraud and "circumvent the law against indirect self-dealing." (Findings, R. 856, ¶238, PageID 35160-61). Martom "stands in the same shoes" as Dennis and Griffy, and the District Court did not err in finding that the statute of limitations was tolled against Martom as well, until Plaintiffs learned of Defendants' fraudulent scheme in 2010.

III. THE DISTRICT COURT PROPERLY RULED THAT THE SETTLEMENT OF THE DERIVATIVE SUIT DID NOT BAR THE HOLT PLAINTIFFS' PERSONAL CLAIMS.

A. There Is No Claim Preclusion from the 1993 Judgment Because Betsy Was Not An Adequate Class Representative.

The District Court correctly ruled that *res judicata* does not bar the Holt Plaintiffs claims. The Holt Plaintiffs were not parties to Betsy's personal claims, and only unknowingly nominal parties to the derivative claim because they were shareholders of the Company. They were never served with the Complaint, and they were unaware they were parties in any capacity. (Findings, R. 856, ¶77, PageID 35100). The District Court found that they did not know the nature of the allegations, and the information Dennis and Griffy gave them about the case was false. (*Id.*, ¶¶ 78, 81-82, 85, PageID 35101, 35104).

Ultimately, Dennis and Griffy settled with Betsy in September 1993 without offering the Holt Plaintiffs the same terms Betsy received – one-eleventh of their mother's stock, along with cash and additional stock for Betsy's children to mirror what Mr. Griffin's other grandchildren held at the time. In stark contrast, Dennis and Griffy paid only $10,000 to the Holt Plaintiffs, and they paid that amount from the coffers of Griffin Industries, rather than their own funds. Betsy was not a party to the settlement agreement regarding the derivative claims. (*Id.* ¶111, PageID 35113). Dennis and Griffy led the Holt Plaintiffs to believe they received the same amount as Betsy received to be "fair," and they led Betsy to believe the Holt Plaintiffs had received stock as well. (Roeder Testimony, R. 809, PageID 32891; Prewitt Testimony, R. 813, PageID 33050; Holt Testimony, R. 816, 33325; Osborn Testimony, R. 814-21-22, PageID 33110-11).

It is apparent now that Betsy was not able to act as an adequate representative of her sisters. Indeed, Dennis and Griffy's lies to Betsy and the Holt Plaintiffs and the brothers' manipulation of their relationship guaranteed Betsy could not represent the Holt Plaintiffs' interests. The District Court properly ruled that the settlement of Betsy's case, under these circumstances, did not bar the Holt Plaintiffs from bringing suit. It cited this Court in *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981), for the common-sense proposition that "non-parties and their privies in shareholder derivative actions 'are bound by judgments *if their interests were adequately*

represented.' *Nathan*, 651 F.2d at 1226 (emphasis added)." (Memorandum Opinion and Order, R. 590, PageID 27457). Consequently, the District Court ruled, "'It is well settled that the constitutional requirements of due process and full faith and credit mandate that absent class members are not bound by a judgment in a class action unless the class representative provided adequate and fair representation.' *Id.* at 1227 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940))." (*Id.*)

The "adequacy" determination was an easy call. In making the "adequacy" determination, "a court must take into consideration (1) whether the named representative has a common interest with the absent members of the class, and (2) whether the class representative vigorously pursued the interests of the class through the use of competent and qualified counsel." *Bowen v. Gen. Motors Corp.*, 685 F.2d 160, 162 (6th Cir. 1982). The Holt Plaintiffs would not communicate with Betsy because Dennis and Griffy had corrupted the relationship, telling them Betsy was just being greedy and that her lawsuit would destroy the family. (R. 590, Memorandum Opinion and Order, PageID 27459-60). Dennis and Griffy, in turn, told Betsy that their sisters would receive the same thing in settlement as she did, which of course she learned in 2010 was not true. (*Id.*)

Because of Dennis and Griffy's lies, Betsy could not "adequately represent" the Holt Plaintiffs' interests, and "her settlement position ultimately was, at least in part, adverse to them." (*Id.*) Dennis and Griffy fostered this secret discrepancy, and

purposely deceived and short-changed the Holt Plaintiffs. Then they manipulated the fairness hearing, and kept the discrepancy secret for twenty years. The District Court's factual finding on this issue was correct.

Finally, Defendants are wrong to suggest that the District Court reversed its ruling on Betsy's adequacy. (App. Br. at 39). In its 1992 ruling, the District Court deferred ruling on the issue, holding that it was an issue of fact for trial. (August 27, 1992 Memorandum Opinion, *Osborn v. Griffin*, No. 90-209, R. 591-4, PageID 27677). Defendants never went to trial on that issue. The inadequacy arose later, when Dennis and Griffy settled with Betsy on terms different from the Holt Plaintiffs. Thus, it is Defendants who attempted to switch course in front of the District Court. The District Court recognized this attempted deception by Defendants at trial, and ruled accordingly.

The cases Defendants cite do not suggest the District Court was incorrect. *Adams v. Southern Farm Bureau Life Ins. Co.*, 493 F.3d 1276 (11th Cir. 2007) requires that absent class members receive adequate notice before *res judicata* will bar there claims. *Id.* at 1285. By contrast here, there was insufficient notice to the Holt Plaintiffs, and the information Dennis and Griffy gave them was false. The Court in *Pram Nguyen ex rel. U.S. v. City of Cleveland*, 534 F. App'x 445, 453 (6th Cir. 2013), ruled that claim preclusion did not apply. *Id.* at 453. The Court in *Laskey v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 638

F.2d 954 (6th Cir. 1981), found that the class representatives and legal counsel were adequate, and the plaintiffs in the later case were active participants in the first one. *Id.* at 957.

These cases are a far cry from the present circumstances, where the Holt Plaintiffs did not know what the 1990 Lawsuit was about, or even that they were nominal plaintiffs. The District Court's decision on this issue was therefore correct and should be affirmed.

B. The District Court Properly Held that the 1993 Settlement Agreement Was Not Enforceable.

1. The District Court Properly Found that Dennis and Griffy Remained Fiduciaries For Their Sisters.

The District Court also correctly ruled that the September 1993 Settlement Agreement was not enforceable because Dennis and Griffy remained fiduciaries for the Holt Plaintiffs. Fiduciaries are not permitted to cheat their beneficiaries. A contract between a fiduciary and a beneficiary may be voided unless the contract is fair, and the beneficiaries possess the same information as the fiduciary. RESTATEMENT (SECOND) CONTRACTS, § 173 and cmt. a. (1981). The beneficiary "must be put on an equal footing with full understanding of his legal rights and of all relevant facts that the fiduciary knows or should know." *Id.*

In *Mazak Corp. v. King*, 496 Fed. Appx. 507 (6th Cir. 2012), this Court relied upon this passage to hold that a release did not bar a claim by a company against its

former officer. It ruled that, like "the vast majority of state and federal courts," Kentucky law requires that a "release must be set aside if the fiduciary failed to make a full disclosure of all relevant facts to the beneficiary." *Id*. at 511. The District Court also relied on *Hale v. Moore*, 289 S.W.3d 567, 582-83 (Ky. App. 2008), where the Kentucky Court of Appeals refused to give effect to releases signed by estate beneficiaries who "were not fully apprised of the consequences of signing the releases by" their fiduciary. *See also Street v. J.C. Bradford & Co*., 886 F.2d 1472, 1481-82 (6th Cir. 1989) (securities purchaser's release of his broker might be ineffective if the parties were not on equal footing); *Masterson v. Pergament*, 203 F.2d 315, 322 (6th Cir. 1953) ("A release obtained by a fiduciary through concealment or misrepresentation is of no effect").

The District Court followed these authorities to find that the Settlement Agreement was not enforceable against the Holt Plaintiffs. It first found that Dennis and Griffy continued to be fiduciaries to the Holt Plaintiffs despite the litigation. "The record is clear that the sisters reposed both trust and confidence in Dennis and Griffy as brothers and family leaders in handling the Osborn litigation, which the brothers said 'did not concern' them. They described Dennis to Beverly Storm as the 'best person in the world'. . . ." (Findings, R. 856, ¶196, PageID 35144).

In addition, Dennis and Griffy continued to serve as fiduciaries to the Holt Plaintiffs in other respects. The District Court noted "that Dennis and Griffy were

the Holt plaintiffs' brothers; that they were directors of the company in which the sisters held stock; that they had undertaken to manage their parents' affairs; that they had been the administrators of Mrs. Griffin's estate; and that they told the sisters that they would handle Betsy's lawsuit. . . ." (*Id.*, ¶197, Page ID 35144-45). It could also have noted that Dennis and Griffy continued to be the Co-Trustees of the 1967 Trust, of which the Holt Plaintiffs were beneficiaries.

Defendants do not quarrel with the District Court's findings of these aspects of their continuing relationship, which were not clearly erroneous. Rather, they argue that fiduciary ties should be cut off once there is any sort of litigation between the parties. (App. Br., p. 39). They offer no Kentucky authority for such an argument because there is none. In Kentucky, the presence of a fiduciary relationship is defined by the particular factual circumstance. *Steelvest,* 807 S.W.2d at 485–86 ("(B)ecause the circumstances which may create a fiduciary relationship are so varied, it is extremely difficult, if not impossible, to formulate a comprehensive definition of it that would fully and adequately embrace all cases"). Wherever there is a relationship "founded on trust or confidence reposed by one person in the integrity and fidelity of another," there is a fiduciary relationship. *Id.* The Holt Plaintiffs had such a relationship with their brothers and the litigation made no difference to the relationship.

Against the backdrop of the above facts adduced at trial, it is beyond doubt that the District Court correctly found that Holt Plaintiffs were not put on "equal footing" with their fiduciaries and they lacked a "full understanding of their legal rights and of all relevant facts" in 1993 and for many years thereafter. (Findings, R. 856, ¶204, PageID 35147-48). As such, the purported release in the September 1993 Settlement Agreement is voidable and ineffective. These findings are not clearly erroneous, and this Court should reject Defendants' attempt to overturn the District Court's rulings.

2. A Variety of Other Reasons also Justified the District Court's Decision.

The District Court was satisfied from the analysis of the fiduciary relationship that the September 1993 Settlement Agreement could not be enforced. There were other reasons as well.

First, it is undisputed that the Holt Plaintiffs never received any consideration at all for the purported release of their breach of fiduciary duty claims against Dennis and Griffy under the September 1993 Settlement Agreement. While Section 3 of that document contemplates a $10,000 payment for the settlement of specific claims, none of those are the instant *personal* claims for breaches of fiduciary duty arising out of Dennis and Griffy's administration of Mr. Griffin's Trust or Mrs. Griffin's estate. Rather, they are strictly those claims "based on conduct of Dennis Griffin (and) John M. Griffin . . . in their capacities as officers and directors of Griffin

Industries(.)" (September 1993 Settlement Agreement, R. 838-1, p. 4, PageID 34626). The Holt Plaintiffs received nothing for any personal claims against their brothers based on their conduct as fiduciaries. Thus, the September 1993 Settlement Agreement cannot bar their personal claims. *Scearse v. Lewis*, 43 S.W.3d 287, 289 (Ky. App. 2001) ("A settlement agreement which lacks consideration cannot be enforced as a binding contract").

Second, Defendants waived the defense of release. Federal Rule of Civil Procedure 8(c)(1) requires a party to raise certain affirmative defenses, including the defense of release, in a responsive pleading. "The rule is mandatory and should not be lightly disregarded." *Lattanzio v. Ackerman*, 682 F. Supp.2d 781, 785 (E.D. Ky. 2010). A defendant's failure to comply with Rule 8(c) will result in a waiver if the plaintiff is prejudiced by such failure. *Id*. at 785-86. Defendants' Answer contains fourteen affirmative defenses, none of which is release. (Case No. 2:13-cv-00032, R. 113). It is hard to imagine a more striking example of prejudice than that of a defendant being allowed to raise a brand new defense after years of litigation culminating in an eight-day trial on the merits.

Finally, Defendants cannot explain how the September 1993 Settlement Agreement could be enforced, since there is a prior, fully executed Settlement Agreement that Dennis and Griffy caused the Holt Plaintiffs to sign in February 1993. If a party seeks to prove that one contract replaces another, it must prove the

elements of the doctrine of "novation." A novation is "the substitution of a new obligation for an old one, with intent to extinguish the old one." *Guangzhou Consortium Display Prod. Co. v. PNC Bank, Nat. Ass'n*, 956 F. Supp. 2d 769, 786 (E.D. Ky. 2013), *quoting G.D. Deal Holdings, Inc. v. Baker Energy, Inc.*, 501 F. Supp. 2d 914, 919 (W.D. Ky. 2007). Here, however, Defendants failed to prove that the parties intended to replace one for the other. Thus, the District Court was again correct in not enforcing the September 1993 Settlement Agreement.

IV. THE DISTRICT COURT PROPERLY FOUND THAT DENNIS AND GRIFFY BREACHED THEIR FIDUCIARY DUTIES.

Defendants do not challenge the District Court's findings that they engaged in duplicitous, abhorrent behavior, designed to enrich themselves at the expense of their sisters. Rather, they argue that they should continue to get away with it.

A. Dennis and Griffy Owed, and Breached, a Fiduciary Duty to the Holt Plaintiffs in Connection with their Father's Stock.

Defendants also seek to excuse Dennis and Griffy's misconduct and self-dealing with respect to their enfeebled father's stock. Here, Dennis and Griffy fired the bank that had served as the trustee of the 1967 Trust for nearly two decades and installed themselves. Then they caused Mr. Griffin to sell all of his stock to the 1967 Trust, which they now controlled. They then sold the stock to themselves and two of their other brothers, for a fraction of what it was worth.

Defendants nevertheless attempt to excuse this misconduct by arguing that Ohio law governs their actions, and that Ohio law did not bar such self-dealing. They are wrong for several reasons. First, Kentucky law, not Ohio law, properly applies, and it holds that the trustees of a trust may not self-deal in the assets of the trust, even if the settlor is living. On choice of law questions, a federal court starts with the choice of law rules of the forum state. Kentucky courts "are very egocentric or protective concerning choice of law questions." *Paine v. La Quinta Motor Inns, Inc.*, 736 S.W.2d 355, 357 (Ky. App. 1987) *overruled on other grounds by Oliver v. Shultz*, 885 S.W.2d 699 (Ky. 1994). This Court has routinely recognized the strong preference articulated in Kentucky's choice of law rules. *See e.g.*, *Wallace Hardware Co., Inc. v. Abrams*, 223 F.3d 382, 391 (6th Cir. 2000); *Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219, 230 (6th Cir. 1997).

Where a choice-of-law issue arises in cases involving tort claims, as here, Kentucky courts apply the "any significant contacts" test. *See, e.g.*, *id.* Under this test, "any significant contact with Kentucky (is) sufficient to allow Kentucky law to be applied." *Bonnlander v. Leader Nat'l Ins. Co.*, 949 S.W.2d 618, 620 (Ky. App. 1996); *see also Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968).

Here, Kentucky has ample contacts with the subject matter to apply its own law. The dispute concerns actions taken in Kentucky, by Kentucky residents, in

respect to a trust established by a Kentucky resident, which caused injuries to other Kentucky residents. The District Court correctly applied Kentucky law.

Even if the Court had applied Ohio law, however, the result would have been the same. Ohio law also forbids self-dealing by fiduciaries in the assets of a trust. "The law is jealous to see that a trustee shall not engage in double dealing to his own advantage and profit. The reason is not difficult to discover when it is remembered that a trusteeship is primarily and of necessity a position of trust and confidence, and that it offers an opportunity, if not a temptation, to disloyalty and self-aggrandizement. The connotation of the word and name 'trustee' carries the idea of a confidential relationship calling for scrupulous integrity and fair dealing." *In re Binder's Estate*, 137 Ohio St. 26, 37–38, 27 N.E.2d 939, 947 (1940). Contrary to Defendants' arguments, that rule applies equally to *inter vivos* trusts. *See e.g., Cent. Nat. Bank of Cleveland v. Brewer*, 8 Ohio Misc. 409, 412–17, 220 N.E.2d 846, 848–52 (Com. Pl. 1966) (requiring trustee of an *inter vivos* trust to obtain court approval before engaging in a transaction with the trust).

Defendants' other argument – that Mr. Griffin wanted all of his stock to go to his sons, not his daughters – was soundly contradicted by the evidence at trial. The Defendants did not introduce a single document to support their theory. Instead, the District Court found that Mr. Griffin never created any estate plans before his stroke that divided his stock unequally between his children, and he was working with his

attorneys to correct the imbalance in the amount of stock his children owned before his stroke in 1983. (Findings, R. 856, ¶¶13, 15, PageID 35080-81). Any contrary testimony by Janet Means was not credible. (*Id.*, ¶¶16-18, PageID 35081-82). These findings are not clearly erroneous.

Similarly, Mr. Griffin did not confirm in his Sixth Codicil in 1992 that he had intended to make the transfers to his sons in 1986. (App. Br. at 10). The District Court found that Mr. Griffin's purported ratifications of those sales were orchestrated merely "to obtain Father's *post hoc* imprimatur on the prior sales that Defendants orchestrated for purposes of retaining control of the Company." (R. 590, Memorandum Opinion and Order, at 51, PageID 27457; Findings, R. 856, ¶249, PageID 35165). Mr. Griffin, at the time he executed an affidavit and estate documents "ratifying" the prior sales, had suffered a debilitating stroke when rendered him unable to speak, work, take care of himself, or understand business decisions. He had an IQ of 67. (*Id.*, ¶¶ 21, 92, PageID 35082-83, 35105-06). Even Griffy testified that Mr. Griffin could not understand complicated issues. (J. Griffin Testimony, R. 821, PageID 33485). The District Court found that Mr. Griffin could not have ratified the sales, because he did not have a full understanding of all the facts and circumstances. (Findings, R. 856, ¶249, PageID 35165). Defendants do not, and cannot, argue that the District Court's findings on these issues were clearly erroneous.

The District Court's ruling on the duties Dennis and Griffy owed, not to self-deal in the stock held in the 1967 Trust, should be affirmed as well.

B. Dennis and Griffy Owed, and Breached, a Fiduciary Duty to the Holt Plaintiffs in the Administration of their Mother's Estate.

Dennis and Griffy make the audacious argument that they owed no duty to the Holt Plaintiffs that prevented them from taking Mrs. Griffin's stock for themselves. As a matter of Kentucky law, a fiduciary is prohibited from self-dealing in estate property—such as the Griffin Industries stock owned by Mrs. Griffin at the time of her death. *See e.g.*, *Bryan v. Security Trust Co.*, 176 S.W.2d 104 (Ky. 1943); *Hutchings*, 276 S.W.2d at 464. Dennis and Griffy violated Kentucky law when they sold Griffin Industries stock to themselves; and further violated their duties by purchasing the shares at an unreasonably low price. (*See e.g.*, R. 428-37 at 4, 6 (Installment Notes for Martin and Dennis for Mrs. Griffin's Stock and Installment Note for Dennis for Mr. Griffin's Stock); R. 428-9 (1983 Shareholders List, R. 428-9)). The District Court was correct to rule in this manner.

Further, Defendants are simply wrong to suggest the Holt Plaintiffs were never beneficiaries of their mother's estate. Once Mr. Griffin disclaimed his right to inherit under Mrs. Griffin's will and under her Trust, the Holt Plaintiffs became direct beneficiaries, along with their siblings. (R. 590, Memorandum Opinion and Order, PageID 27455). Defendants then owed them the duty of "utmost fidelity and loyalty." *Hutchings*, 276 S.W.2d at 464 (a fiduciary "owes the duty of utmost

fidelity and loyalty to the beneficiary and if it appears that the trustee is guilty of such self dealing the courts will not hesitate to declare such a transaction void"). It is undisputed that Dennis and Griffy created, implemented, and benefited from the 1985 Plan. It is also undisputed that Dennis and Griffy, despite their fiduciary obligations as co-executors, stood on both sides of the stock transaction. This violation is prohibited as a matter of Kentucky law. *See Hutchings*, 276 S.W.2d at 464. There were no material facts in dispute, and the District Court correctly granted the Holt Plaintiffs' motion for summary judgment.

Defendants argue that the Holt Plaintiffs should have sued Star Bank, the trustee of the Rosellen Griffin Trust, not Dennis and Griffy. In its Opinion, the District Court in no uncertain terms rejected this argument because Defendants had contrived to eliminate the trustee's oversight. "Dennis and Griffy effectively short-circuited the reversion of Mother's stock to her trust following Mr. Griffin's disclaimer and, in their capacities as Co-Executors, sold the stock to themselves and their brothers. A claim for breach of fiduciary duty based on their actions thus lies." (R. 590, n.13, Memorandum Opinion and Order, PageID 27455). The District Court's ruling followed the RESTATEMENT (SECOND) OF TRUSTS, §§ 281 and 282, which permits a beneficiary to sue directly if either the trustee fails to bring suit or if there is no trustee. RESTATEMENT (SECOND) OF TRUSTS, § 282. *See also* Bogert, THE LAW OF TRUSTS AND TRUSTEES, § 869 ("If the trustee . . . fails to act, or the

trusteeship is vacant, . . . the beneficiary may bring the action against the third person").

Here, the trustee, Star Bank, failed to bring suit against Dennis and Griffy. Moreover, in an affidavit made on July 31, 1990, Donald M. Levi, an employee of Star Bank testified as follows:

> 6. As of August 10, 1989, all of the Trust's assets had been distributed to its beneficiaries in accordance with its terms. Star Bank did not foresee any further infusions of property into the Trust. Star Bank terminated all shares under the Trust, and, perforce, the Trust itself, under Section 2.8 thereof, since its aggregate principal amount was less than twenty thousand dollars. At that time, Star Bank believed that, pursuant to the provisions of Section 2.1 of the Trust, *its general powers and authority as trustee of the Trust ceased to exist*.

(R. 430-13, Affidavit of Donald Levi, PageID 19502) (emphasis added)). Therefore, there was no trustee at the time the Holt Plaintiffs learned of the breach of fiduciary duty, and they were authorized to assert their claims against Dennis and Griffy directly.

C. Dennis and Griffy Owed, and Breached a Fiduciary Duty to Plaintiffs in Connection with their Father's Estate and 1967 Trust.

Finally, little need be said about the Defendants' argument that Dennis and Griffy did not breach a fiduciary duty in their self-dealing sales of the Craig Protein shares and the Martom Properties. The District Court found that Dennis and Griffy were prohibited from selling the Craig Protein stock to themselves or Griffin

Industries because of their majority stake in the Company. (Findings, R. 856, ¶124, PageID 35118). Their own lawyers had given them the same advice. *Id.* They nevertheless attempted to get around this legal prohibition by forging an "option agreement" with Marty and Tommy that the two admitted they had never seen before and that the District Court found to be invalid. (*Id.*, ¶125, PageID 35118-19). Defendants do not even argue otherwise. Likewise, the District Court found that they could not sell the Properties to Martom because they effectively controlled Martom, and they admitted the sales were designed to advance their personal agenda of control over Griffin Industries and its operations. (*Id.*, ¶138, PageID 35123). Defendants do not challenge this finding on appeal.

Instead, Defendants fall back on a conclusory legal opinion from their purported expert that "cash is typically a better result for beneficiaries" than "illiquid assets." (App. Br. at Pg. 51). Of course, Defendants' purported expert made no effort to discern whether the cash the Plaintiffs received was more valuable than the Craig Protein shares conveyed to Marty and Tommy or the Properties conveyed to Martom. The District Court, however, performed just such an analysis. The District Court noted that Martom bought the real properties for $1.4 million, and as of the trial it had already received $5.1 million in rent, while continuing to own and lease the properties. (Findings, R. 856, ¶¶ 140-41, PageID 35124). Martom was able to purchase the Properties for less than their true value because Defendants did not tell

the appraiser about the leases, causing them to appraise several properties as "vacant land" and without consideration of their investment potential. (*Id.*, ¶¶134, 153, PageID 35122, 35128).

With respect to the Craig Protein shares, Marty and Tommy earned over 45 times what they paid for such stock. (*Id.*, ¶¶130-33, PageID 35120-21). Significantly, Ms. Medley testified it was substantially undervalued in the appraisal Dennis and Griffy arranged for that stock, and Defendants did not even challenge her opinion on cross-examination. (R. 821, Medley Testimony, PageID 33542). The District Court was correct in giving no credence to these generalized and uninformed opinions of Defendants' purported expert, and such decision was not clearly erroneous.

Second, a trustee violates his fiduciary duty when he engages in a self-dealing transaction, regardless of whether the price is fair. *See, e.g.*, *Bryan*, 176 S.W.2d 104; *Hutchings*, 276 S.W.2d at 464. Thus, once again, the District Court correctly found that Dennis and Griffy breached their fiduciary duties, and that ruling should be affirmed.

Martom's argument that it cannot be held liable for the misdeeds of Dennis and Griffy is similarly unavailing. (App. Br. at 521). According to Martom, it owed no fiduciary duties to Plaintiffs and thus could not be held liable for the profits it realized from the misappropriation of the Properties from Mr. Griffin's Estate and

Trust. Not surprisingly, Martom offers no legal support for this argument, which flies in the face of numerous authorities cited by the District Court. (R. 790, Order, PageID 32571-73 (*citing Harris Trust*, 530 U.S. at 250; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, comments g-h); Findings, R. 856, ¶ 237, PageID 35160 (citing *In re Arctic Express, Inc.*, 636 F.3d 781, 801 (6th Cir. 2011); *Curtis v. Drybrough*, 70 F. Supp. 151, 153-54 (W.D. Ky. 1947)).

Indeed, when purchasing real estate from an executor, as Martom did here, the purchaser "is bound to know whether or not the latter is authorized by the will to make the sale, and if the executor has no such power the purchaser is not an innocent or bona fide purchaser." *Buckner v. Buckner*, 215 S.W.420, 425 (Ky. 1919) (emphasis added). Moreover, a purchaser may "not disregard information which he cannot avoid receiving without extraordinary negligence; and if he has notice that the sale is made for a purpose other than that for which the will empowers the executor to sell, or is unauthorized, the legal title of the (estate beneficiaries) is not divested. Where the sale is tainted by fraud and covin between the executor and the purchaser, it is absolutely void." *Id.*

The same principles apply with respect to Martom's purchase of real estate from the 1967 Trust. The United States Supreme Court recognized in *Harris Trust & Savings Bank* that "it has long been settled that when a trustee in breach of his fiduciary duty to the beneficiaries transfers trust property to a third person, the third

person takes the property subject to the trust, unless he has purchased the property for value and without notice of the fiduciary's breach of duty." 530 U.S. at 250. The remedy is that "[t]he trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom." *Id.*

Absent any argument to contravene these authorities or otherwise support Martom's position on appeal, Defendants switch tracks and challenge the District Court's factual findings by claiming that "Plaintiffs introduced no evidence that Martom – or its owners or agents – had such knowledge" of Dennis and Griffy's breaches and lack of authority to convey the subject real estate. (App. Br. at 52). Not true. The District Court made a series of factual findings as to the genesis, purpose, and operations of Martom, then concluded that "Martom was not an innocent purchaser for value of the real properties transferred to it from Father's estate and trust." (Findings, R. 856, ¶¶ 133-39, 238, PageID 35160-61).

Indeed, Dennis and Griffy caused Martom to be created after Mr. Griffin's death for the purpose of purchasing those properties, and Marty and Tommy knew it. "They also knew that their sisters were the beneficiaries of Father's estate and recalled no discussion about offering the properties to them. Marty and Tommy were mere figureheads, Martom was operated as part of Griffin Industries, and Dennis

and Griffy controlled Martom through their positions at Griffin Industries until the merger with Darling in 2010." (*Id.*) Martom had an illegal purpose all along: to try and "circumvent the law against indirect self-dealing." (*Id.*)

Given these unchallenged findings of fact, which Defendants did not account for in their Brief, this is not a situation in which the District Court merely "impute(d) notice to Martom" through Dennis and Griffy's control of "Martom through their positions at Griffin Industries." (App. Br. at 52). Rather, the District Court found that Marty and Tommy, who purported to manage Martom, *had notice and knowledge* of Dennis and Griffy's breaches relative to the subject real estate. Thus, under the foregoing legal authorities, the District Court did not err in requiring Martom to disgorge its profits from these transactions. Nor is there any "clear error" in the District Court's findings, particularly given Defendants' failure to offer any sound basis for setting aside such findings. *See Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 585-86 (6th Cir. 2015).[7]

[7] Even if "imputed knowledge" from Dennis and Griffy to Martom was somehow a basis for imposition of the disgorgement remedy against Martom, then it would not have been error given the findings that Dennis and Griffy orchestrated the entire scheme in order to "retain control" over the real estate and "circumvent the law against indirect self-dealing." (*See* Findings, R. 856, ¶139, PageID 35123-24). Martom was their alter-ego and suffers the same fate.

Finally, with respect to Defendants' argument that Martom is insulated from Plaintiffs' disgorgement claim under an "adverse possession" theory, that theory only governs Martom's right to hold and maintain title ownership to the real estate. Betsy never sought, and the Holt Plaintiffs timely remanded any request for, title ownership to the subject real estate. Nor did the District Court award title to any real estate. Accordingly, the adverse possession theory has no application.

Indeed, Defendants fail to offer any case law in which adverse possession was a valid defense under similar circumstances, and the two non-binding cases they cite did not involve a disgorgement claim against fiduciaries who looted an estate or trust, as here. *See Counce v. Yount-Lee Oil Co.*, 87 F.2d 572, 575 (5th Cir. 1937); *Breuer v. Covert*, 614 P.2d 1169, 1170 (Or. 1980). Rather, Defendants' "adverse possession" cases both involved situations where a party sought to recover legal title to real estate, a critical distinction which does not exist here. *Id.*

Likewise, Defendants failed to present any evidence at trial that Martom had "exclusive," "open and notorious," and "hostile" possession of the subject real estate vis-à-vis the Plaintiffs, such to establish an adverse possession theory in any event. *See Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co.*, 824 S.W.2d 878, 880 (Ky. 1992). Nor could they, as Griffin Industries all along used the real estate, and Plaintiffs' claims were concealed from them until 2010.

In sum, Defendants offer no theory which can save them from Dennis and Griffy's indisputable breaches of fiduciary duty relative to Mr. Griffin's Estate or Trust, or the disgorgement remedy which follows.

V. THE DISTRICT COURT PROPERLY COMPUTED THE DISGORGEMENT REMEDY.

Defendants erroneously argue that the District Court should not have admitted and accepted the disgorgement calculations and testimony offered by Plaintiffs' expert, John E. Chilton, based on their contention that his calculations were somehow flawed or inconsistent, and beyond the remedial bounds of equitable disgorgement because some of the proceeds from Defendants' fraud went to "third parties." (App. Br. at pp. 53-55, 63). Defendants are wrong in each contention.

A. The District Court Correctly Found that Plaintiffs Were Entitled to a Substantial Disgorgement Award.

Defendants knew long before trial that Plaintiffs sought the equitable remedy of disgorgement. (*See, e.g.*, Motion for Separate Judgment on Equitable Claims and Defenses, R. 651, PageID 28416; Order, R. 759, PageID 31252). A district court, exercising its powers of equity, may require the disgorgement of profits and determine the amount of profits to be disgorged. *S.E.C. v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001) (*citing S.E.C. v. Blavin*, 760 F.2d 706, 713 (6th Cir. 1985)) (district court possesses the equitable power to grant disgorgement). There is no question that "(r)estitution and disgorgement are part of

a court's traditional equitable authority." *Universal Mgmt.*, 191 F.3d at 760. The District Court had the same authority under Kentucky law. *See e.g., Bryan*, 176 S.W.2d at 107-08: *Stewart v. Paving Co., Inc.*, 557 S.W.2d 435, 439 (Ky. App. 1977) (affirming award of lost profits in breach of fiduciary duty case); *Patmon v. Hobbs*, 280 S.W.3d 589, 598-99 (Ky. App. 2009).

Plaintiffs' damages expert, Mr. Chilton, presented the only evidence about remedies to the Court. There was no challenge to the accuracy of Mr. Chilton's disgorgement calculations, which were compiled directly from liquidated amounts referenced in the tax returns and financial statements produced by Griffin Industries and Martom. (*See* Chilton Reports, PX 85-87; App. 1252, 1277, and 1295). For their part, Defendants offered no expert witness of their own to challenge Mr. Chilton's calculations, despite having multiple opportunities up through trial to designate a competing expert. (*See, e.g.*, Transcript, R. 775 at PageID 32314). Mr. Chilton's calculations were accurate and appropriate, and the District Court acted properly in admitting them in evidence and finding that they correctly stated the amount of disgorgement required.

Defendants do not seriously challenge the accuracy of Mr. Chilton's calculations in this appeal, either. Nor do they challenge the District Court's ability to order disgorgement, or that disgorgement is an appropriate remedy. Instead, they quibble about whether disgorgement should include funds that Defendants caused to

go to other parties, whether the Court should make a reduction for taxes, and how the disgorgement should be divided between the siblings. Plaintiffs address those issues below.

B. The District Court Properly Ruled that Tax Issues Were Not Relevant.

Defendants also complain that Mr. Chilton should have offset his disgorgement calculations by the amount of taxes Dennis and Griffy *claim* (but did not prove) they paid from distributions attributable to the Griffin Industries stock they misappropriated. The Court should reject the argument for at least two reasons.

First, this Court has unequivocally held that a "(p)laintiffs' (damage) award should not be reduced by tax benefits, if any, received." *See Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989). Stated differently, Plaintiffs' damages may not be reduced or offset by the fact that they previously did not have to pay income taxes on the amounts sought at trial, or because of taxes the Defendants claim to have already paid (but failed to specify or prove). This is because Plaintiffs must pay taxes on their recovery here. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 503 (1968) ("(I)n practice the Internal Revenue Service has taxed recoveries…at the time the recoveries are made, not by reopening the earlier years"); *see also Burdett v. Miller*, 957 F.2d 1375, 1383 (7th Cir. 1992) ("the tax treatment of the damages award is irrelevant to the defendant's liability; it is a matter between the plaintiff and the government"); *Portis v. Wal-Mart Stores East, L.P.*, No. 07-

0557-WS-C, 2008 U.S. Dist. LEXIS 57717, *18 (S.D. Ala. July 30, 2008) ("(T)he Court will not artificially constrain (Plaintiff's) recovery…to post-tax earnings, nor will it oblige (Plaintiff) to present expert testimony at trial concerning the impact of federal and state taxes…as a precondition to any award of same").

Defendants do not address any of the foregoing authorities in their Brief. Instead, Defendants claim that the present situation is different, because the bulk of their ill-gotten gains were derived from distributions from an S-Corp (which they controlled), rather than capital gains or some other form of income. (App. Br. at 58). Defendants again cite no case law to support their made-up proposition.

The Court should reject this argument because it is barred under the authorities detailed above. The law requires Defendants to return all of their ill-gotten gains, regardless of whether they spent some of their gains on necessary expenses such as taxes, food, or clothing, or discretionary purchases. There is no reason to distinguish what Defendants did with their ill-gotten gains. They were not entitled to any of it, and they should have to return what they received and pay prejudgment interest on it.

The argument also makes no economic sense. Defendants offer a misleading hypothetical which proves the fallacy of their argument. Defendants offer an inapposite "comparison" between S-corporation shareholders and two lottery ticket winners who agreed to split their winnings. In their hypothetical, A receives

$100,000 that he should have shared with B. A must pay taxes at, say 35%, so he nets $65,000. When B sues and wins $50,000, he must pay 35% tax on his judgment, so he nets $32,500. A gets a credit for the $50,000 on which he has paid taxes, or $17,500, so he nets $32,500 as well. (App. Br. at 58).

Defendants then try to compare their lottery situation with one in which A is a shareholder in an S-corporation which has earned net income of $287,500 it allocates to A, and then paid him $100,000 in distributions – all of which he sends to the IRS to pay income taxes. If B sues and wins $50,000, he pays 35% in taxes and nets $32,500, the same as in the lottery ticket scenario. A is worse off, Defendants claim, because he has paid both $100,000 to the IRS and $50,000 to B.

The Defendants do not consider, however, what happens in the next year, when the S-corporation pays out the remaining earnings from Year 1. Assume the company makes no additional income in Year 2, but merely pays out its retained earnings. A then receives $187,500, tax free, because he has already paid taxes on that amount. He pays half of it, $93,750, to B. B has now received a gross judgment of $143,750, and paid taxes of $50,312.50, for a net of $93,437.50. Likewise, A has received the same gross amount and paid the same taxes as B. B gets no windfall, and A pays no penalty.

When the Court considers the full time period from 1985 to 2010, all the disparities even out. The Company merged with Darling in 2010, and Griffin

Industries ceased to exist. Over time, all of the Company's earnings were paid out to its shareholders. There were no retained earnings on which taxes were paid but not distributed to the shareholders. (Chilton Report, PX 85 at Ex. 1; App. 1252). There is no difference, then, between a judgment against the lottery winner and a shareholder of an S-corporation. Defendants, however, want to give a windfall to the S-corporation shareholder.

Second, Defendants presented no evidence at trial that they paid any taxes at all, at any time. The District Court properly rejected Defendants' tax argument in its Findings, in part by noting that Defendants "presented no evidence of such (tax) expenses from which the amount of any such credits could be determined." (Findings, R. 856, ¶248, PageID 35164-65 (also noting that it was Defendants' burden to present evidence to support their tax "offset" argument)). Indeed, the Defendants previously objected and refused to produce their tax returns in discovery. (PX 88, Discovery Responses, App. 568).

Defendants' Brief, like their trial presentation, does not include a single reference to any taxes Defendants actually paid. They cannot fault Plaintiffs, Mr. Chilton, or the District Court for not calculating their alleged tax payments when the Defendants did not even bother to do the work for the Court's consideration. (Findings, R. 856, ¶248, PageID 35164-65 (citing *Avianca v. Corriea*, 1993 WL at *4 (noting that defendant bears the burden of proving expenses which could be

credited against disgorgement amount)); *Salmon v. Old Nat'l Bank*, No. 4:08-CV-116-JHM, 2012 U.S. Dist. LEXIS 133984 (W.D. Ky. Sept. 19, 2012) (refusing to disqualify damages expert because "Defendant remains free to rebut Plaintiffs' damages calculation, that burden does not fall on Plaintiffs")).

In light of the foregoing, the Court should reject Defendants' S-Corp taxation and damages "offset" argument. It is not grounds for reversal, or grounds for disqualification of Mr. Chilton's opinions under any sort of *Daubert* analysis.

C. There are No Inconsistent Assumptions in the Disgorgement Analysis.

In complaining about alleged "inconsistent assumptions," Defendants feign ignorance about Mr. Chilton's well-reasoned approach. Mr. Chilton did not make any assumptions at all. He performed an analysis to determine what income was derived from the parents' stock, and he reported his conclusions to the Court. Defendants have not challenged the accuracy of his calculations in that respect, or presented any contrary expert testimony of their own. His testimony that the parents' stock generated over $908 million in income stands undisputed. (Chilton Report, PX 85 at Ex. 1; App. 1252).

What Defendants complain about are legal conclusions that arise from Mr. Chilton's testimony. First, they contend he erroneously assumed Mr. Griffin did not change his estate plan after 1986. (App. Br. at 61). There is no dispute, of course, that Dennis and Griffy caused Mr. Griffin to change his estate plan to assist them in

defending against Betsy's 1990 Lawsuit, and as part of the settlement of her claims against them in 1993. The legal implications of those changes are addressed elsewhere. For purposes of Mr. Chilton's analysis, however, when Mr. Griffin changed his estate plan and why was irrelevant. Mr. Chilton's charge was simply to determine the amount of income derived from the parents' stock, as set forth in corporate documents produced by Griffin Industries.

Second, Defendants complain that Mr. Chilton and the Court erred by dividing the disbursement amount by eleven for the property Dennis and Griffy obtained from their self-dealing in 1985 and 1986, and by dividing by five for the Craig Protein and Martom Properties that were misappropriated in 1995. (App. Br. at 61). These divisors reflect the distribution reflected in the Griffin estate plans at the time the breach occurred. As Mr. Chilton explained, his analysis did not depend on what divisor the District Court chose to use. (Chilton Testimony, R. 821-132, PageID 33608). The Holt Plaintiffs argued, and the District Court agreed, that it would be appropriate to divide by eleven when computing their damages from Defendants' wrongful acquisition of their parents' stock in 1985 and 1986, since both parents' estate plans divided the stock eleven ways at the time.

For the same reason, the District Court agreed it was appropriate to divide by five when computing Plaintiffs' damages from the Martom Properties and Craig Protein breaches because Mr. Griffin's estate plan at the time called for a five-way

division of assets between his daughters. Mr. Chilton did not change his computations to "maximize() Plaintiffs' recovery," as Defendants' argue. (App. Br. at 61). If he had, all of Defendants' profits would have been divided by five. Instead, Mr. Chilton reasonably divided his overall disgorgement figures based on the division called-for in the estate plans that were in place at the time of Defendants' various breaches. It was not clear error for the District Court to accept this approach.

Finally, Defendants criticize Mr. Chilton's computations because he included distributions from Mr. Griffin's stock from 1986 to 1994. (App. Br. at 62). They offer no coherent reason not to do so, and since Mr. Chilton was calculating the amount of unlawful profits Defendants accumulated, it would have been wrong for Mr. Chilton to ignore the substantial profits they made from this stock during this period.

In sum, there is no substance to Defendants' overstated allegations that Mr. Chilton used "inconsistent assumptions" in his calculation of profits derived from separate breaches of fiduciary duty that occurred at different points in time. Nothing which Defendants offer rises to the level of incompetence or unreliability that would have warranted disqualification of Mr. Chilton under *Daubert*, or clear-error by the District Court in adopting his disgorgement figures.

D. Disgorgement Includes Funds the Fiduciaries Caused to go to Third Parties.

Contrary to Defendants' contention, there is no question that the disgorgement remedy extends to benefits obtained by third parties as a result of a fiduciary's breach of duty. *Harris Trust*, 530 U.S. at 250-51. In *Harris*, the Supreme Court relied in part on common law trust principles in holding that a statute authorizing civil actions to obtain equitable relief to redress ERISA violations permitted suits against non-fiduciaries who engaged in prohibited transactions with the plan. The Court observed that where a trustee breaches his fiduciary duties by transferring trust property to a third person, "(t)he trustee or beneficiaries may then maintain an action for restitution of the property (if not already disposed of) or disgorgement of proceeds (if already disposed of), and disgorgement of the third person's profits derived therefrom." *Id*. at 250.

This Court relied upon *Harris* in holding that trust beneficiaries could pursue a disgorgement remedy against a non-fiduciary bank which received trust assets in breach of the trust. *In Re Arctic Exp. Inc*., 636 f.3d 781, 798 (6th Cir. 2011) (*quoting Harris*, 530 U.S. at 250-51). In another case, this Court upheld an opinion ordering a fiduciary to disgorge all profits derived from his breach, including those that flowed to a third party in the form of stock distributions. *Mazak*, 496 F. App'x at 511. *See also S.E.C. v. Contorinis*, 743 F.3d 296, 307 (2d Cir. 2014) (accord);

Avianca, Inc. v. Corriea, 1993 WL 797455, *4 (D.C. Dist. 1993) (accord). Defendants conveniently ignore all of these precedents.

Instead, Defendants cite a 1936 Kentucky case, *Edwards v. Lee's Adm'r,* 96 S.W.2d 1028 (Ky. 1936), which has nothing to with the issues here. In that case, which the Court described as *sui generis*, the Court addressed the remedy to be paid from one landowner to another for the profits received from exhibiting a cave lying under the land of each. *Id.* at 1032. The Court decided the remedy should be the amount of profits the defendant received from using the property of the plaintiff. It did not address how to account for the profits third parties receive from the plaintiffs' profit, and in fact there were no third parties there.

Here, Dennis and Griffy each received $534,732,943 in distributions from their parents' stock, a total of almost $1.1 billion. (Chilton Report, PX 85 at Ex. 1, App. 1252). Requiring Defendants to pay back the compensatory damages they owe Plaintiffs still leaves Dennis and Griffy with nearly $600 million from their parents' inheritance. This amount is in addition to the amounts they received in salaries, leases, and other income over the years. Defendants still have profited handsomely from their parents' legacy. An award to the Holt Plaintiffs of all the stock and real estate proceeds they should have received is certainly not inequitable, but is necessary to restore them to the position in which they would have been had the breaches not occurred in 1985-86, and again in 1995. The same holds true for the

disgorgement award to Betsy of $12.3 million, attributable to Dennis and Griffy's misappropriation of stock and real estate from her father's Estate and Trust in 1995. These wrongs require a remedy, and disgorgement was the appropriate remedy here.

E. The District Court's Findings on the Amount of Prejudgment Interest Were Correct and Appropriate.

Defendants likewise have no basis to challenge the District Court's ruling on pre-judgment interest. The District Court correctly found that whether pre-judgment interest should be awarded is an issue of state law and one within the District Court's discretion, and Kentucky law makes pre-judgment interest mandatory on liquidated amounts. (Findings, R. 856, ¶¶ 255, 259, PageID 35166-67). The District Court also correctly found that the claims here were "liquidated" because the amounts were "capable of ascertainment by mere computation, can be established with reasonable certainty, can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values." (*Id.*, ¶260, PageID 35167); *see Ford Contracting, Inc. v. Kentucky Transp. Cabinet*, 429 S.W.3d 397, 414 (Ky. 2014); *see also International Business Machines Corp. v. Omnicare, Inc.*, 162 Fed. Appx. 432, 438-39 (6th Cir. 2006) ("because the amount owed to IBM on its original claim constitutes liquidated damages, prejudgment interest follows as a matter of right"). Kentucky law sets the interest rate by statute at 8%. (Findings, ¶262, PageID 35168; Ky. Rev. Stat. §360.010(1)).

Contrary to the Defendants, this is the mandatory rate for liquidated amounts, not the "maximum." *Poundstone v. Patriot Coal Co.*, 485 F.3d 891, 904 (6th Cir. 2007).

Defendants nevertheless argue that the amounts were uncertain and, therefore, not capable of being computed. (App. Br. at 64). They argued the opposite at trial. There, Defendants derisively referred to Mr. Chilton as merely a "human calculator" because he generated the disgorgement and interest amounts by mere calculation, using figures drawn directly from financial statements and tax records produced by Griffin Industries and Martom. (Chilton Testimony, R. 821-130, PageID 33606). Defendants could have used the same calculator Mr. Chilton used, long before the litigation began, thus demonstrating that the disgorgement calculations were certain and liquidated all along.

Moreover, none of the cases Defendants cite suggest that the District Court was incorrect in awarding prejudgment interest. In *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136 (Ky. 1991), the plaintiff conceded that the damages amount – property damage -- was unliquidated. In *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257 (6th Cir. 2010), the Court of Appeals actually upheld the trial court's decision to award pre-judgment interest to the plaintiff insurance company. It did not award pre-judgment interest to the defendant on its counterclaim, but only because the amount owed could not have been readily calculated by the insurance company. *Id.* at 276. Both *Ventas, Inc. v. HCP, Inc.*,

2009 WL 3855638, at *9 (W.D. Ky. Nov. 16, 2009), *rev'd in part on other grounds*, 647 F.3d 291 (6th Cir. 2011), and *Hale v. Life Ins. Co.*, 795 F.2d 22, 25 (6th Cir. 1986), awarded prejudgment interest, and neither deemed it to be "punitive," as Defendants complain.

The District Court recognized that "'equity and justice demand that one who uses money or property of another' should generally pay for its use." *Ford Contracting, Inc. v. Kentucky Transp. Cabinet*, 429 S.W.3d 397, 414 (Ky. App. 2014), *reh'g denied* (Apr. 7, 2014), *quoting Curtis v. Campbell*, 336 S.W.2d 355, 361 (Ky. 1960) (citation omitted). The prejudgment interest merely takes from Defendants the earnings they made on their stolen bounty to make Plaintiffs whole. Again, the award of prejudgment interest is a matter within the sound discretion of the District Court and should not be disturbed by this Court in any event.

To the extent Defendants complain about the size of the pre-judgment interest award, they have only themselves to blame. Defendants hid their misconduct for over twenty-five years. A great deal of interest accrues over such a long time period, but Defendants could have terminated the period at any time, simply by disclosing their wrongdoing to their sisters. They chose not to do so, and the District Court did not abuse its discretion in ruling that this inequitable conduct requires compensation through pre-judgment interest. *Church & Mullins Corp. v. Bethlehem Minerals Co.*, 887 S.W.2d 321, 325 (Ky. 1992).

VI. THE DISTRICT COURT PROPERLY DECIDED THE EQUITABLE ISSUES IN THIS CASE WITHOUT A JURY.

Defendants' only remaining argument is that the District Court erred in not conducting a jury trial. Without disputing that equitable issues are to be tried and decided by the court instead of a jury, Defendants contend that the disgorgement remedy sought by Plaintiffs was tantamount to "money damages" and legal in nature, entitling Defendants to a jury trial. (App. Br. at 67-68).

But the District Court did not consider money damages, but instead only the equitable remedy of disgorgement. (Findings, R. 856, ¶189, PageID 35141). A defendant is not entitled to a jury trial on a disgorgement claim. *Universal Servs.*, 191 F.3d at 760 ("Restitution and disgorgement are part of a court's traditional equitable authority"); *Roberts v. Sears, Roebuck and Co.*, 617 F.2d 460, 465 (7th Cir. 1980) ("Restitution for the disgorgement of unjust enrichment is an equitable remedy with no right to a trial by jury"); *S.E.C. v. Bravata*, 3 F. Supp. 3d 638, 661 (E.D. Mich. 2014) (accord).

It is what Plaintiffs sought at trial that matters in determining the feasibility of Defendants' demand for a jury, no matter Defendants' allegation that Plaintiffs also sought "money damages" in their Complaint. It also makes no difference that Plaintiffs sought the disgorgement of assets that Defendants diverted to both themselves and their agents. The disgorgement remedy is still equitable in nature and beyond the ambit of Defendants' jury trial demand.

Defendants are also wrong in their reliance on *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), for the proposition that Plaintiffs' equitable disgorgement remedy was actually legal in nature, based on the notion that Plaintiffs' *could have* asserted "title or right to possession of particular property." (*See* App. Br. at 68). Unlike the assets at issue in *Knudson*, which were readily retrievable, "title or right to possession" of the subject assets was never feasible in this case because: (i) the Craig Protein stock was exchanged for Griffin Industries' stock in 2002 (Findings, R. 856, ¶133, PageID 35121); (ii) the Griffin Industries stock was exchanged for cash and Darling stock in the 2010 Griffin-Darling merger (*id.*, ¶133, PageID 35121); (iii) several of the Martom Properties were sold or modified prior to trial (C. Griffin Testimony, R. 828-7, 9-12, PageID 33995, 33997-34000); and (iv) Defendants and their privies received enormous sums of money through their use and control of those assets between the time they were misappropriated and the District Court's Judgment in favor of Plaintiffs. (*See generally*, Chilton Reports, PX 85-87, App. 1252, 1277, and 1295). The *Knudson* case involved nothing of the sort.

In fact, *Knudson* was an ERISA dispute that turned on an analysis of available contract remedies for restitution which were governed by federal statute, and which did not involve the equitable disgorgement of profits as a result of a breach of

fiduciary duty under state law. 534 U.S. at 206, 212. Thus, *Knudson* is inapposite on the facts and the law.

Indeed, Defendants conveniently overlook that the U.S. Supreme Court in *Knudson* expressly distinguished the circumstances presented in that case from the situation it faced in *Harris Trust*, 530 U.S. 238, in which the *Harris* Court held that "an action for restitution [or disgorgement] against a transferee of tainted [trust] plan assets" is "appropriate equitable relief." *Knudson*, 534 U.S. at 215 (quoting *Harris*, 530 U.S. at 250, 253). Such is the case here, where disgorgement was an appropriate *equitable* remedy imposed against the Defendants.

Defendants' jury trial argument fares no better when viewed under the light of their so-called "legal limitations defense." (App. Br. at 69). Contrary to Defendants, the question at trial was not whether the statute of limitation period had run, but rather, whether the limitations period should be *equitably tolled*. Kentucky law is clear that tolling is equitable in nature, for which there is no right to a jury trial. *Hasken*, 265 S.W.3d at 226 ("the issue regarding the equitable tolling of the statute of limitations was one for the circuit court to decide as a matter of law."); *Daniels v. CDB Bell*, 300 S.W.3d 204, 210 (Ky. App. 2009) ("equitable issues are not triable by juries unless agreed to by the parties").

Nor does it make any difference whether the Court analyzes these issues under state or federal law, as Defendants erroneously suggest, because federal courts have

likewise reserved to themselves the resolution of equitable claims and defenses. *Bonner Farms*, 355 Fed. Appx. at 18 ("The determination of equitable defenses and equitable remedies is a matter for the court to decide, not the jury"). Defendants offer nothing to the contrary in their Brief, nor do they offer any credible authority for the proposition that equitable tolling is a legal issue under federal law. Nor do Defendants challenge the fact that their other defenses at trial, laches and acquiescence, were also equitable in nature and properly resolved by the Court. *TWM Mfg. Co., Inc. v. Dura Corp.*, 722 F.2d 1261, 1268 (6th Cir. 1983) ("Laches, an equitable doctrine, is left to the sound discretion of the trial judge."); *Hazard Coal Corp. v. Ky. West Va. Gas Co., LLC*, 311 F.3d 733, 740 (6th Cir. 2002) (identifying acquiescence as an equitable defense).

In view of the foregoing, the District Court acted properly in conducting a bench trial.

CONCLUSION

Defendants breached their fiduciary duties, repeatedly lied about it, and then secretly reaped a half a billion dollars in ill-gotten profit. Plaintiffs timely filed suit when they discovered the breaches, which suit did not lie in a Kentucky probate court.

The District Court properly exercised jurisdiction, held a fair bench trial on Plaintiffs' equitable claim for disgorgement, made well-reasoned and

comprehensive Findings in accordance with the law, and properly calculated the disgorgement amount using liquidated figures verified and compiled by a respected accounting expert. There was no error here, no matter Defendants' attempts to manufacture error out of misplaced allegations and willful ignorance of the law. The Court should affirm the Judgment of the District Court in all respects.

Respectfully submitted,

/s/ Benjamin J. Lewis (with permission)
Janet P. Jakubowicz
Benjamin J. Lewis
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
Louisville, KY 40202
Phone: (502) 589-4200
E-mail: jjakubowicz@bgdlegal.com
E-mail: blewis@bgdlegal.com

Counsel for Plaintiff-Appellee Elizabeth A. Osborn

/s/ Eva Christine Trout
Eva Christine Trout
TROUT LAW OFFICE PLLC
P.O. Box 22853
Lexington, KY 40522
Phone: (859) 351-7773
E-mail: christy@troutlawoffice.com

/s/ Kent Wicker
Kent Wicker
DRESSMAN BENZINGER LAVELLE PSC
321 W. Main Street, Suite 2100
Louisville, KY 40202
Phone: (502) 572-2500
E-mail: kwicker@dbllaw.com

Counsel for Appellees Linda G. Holt, Judith E. Prewitt, and Cynthia L. Roeder

CERTIFICATE OF SERVICE

It is hereby certified that a true and accurate copy of the foregoing was electronically filed with the Court on this 29th day of December, 2016, which will electronically notify all counsel of record.

/s/ Kent Wicker
COUNSEL FOR APPELLEES

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 32(b)(1), this brief contains 23,872 words. Plaintiffs simultaneously have filed a motion seeking leave to file a single overlength brief for all Plaintiffs in these four consolidated appeals. As explained in that motion, this single brief is well below the words to which Plaintiffs would be entitled if they had filed separate briefs.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font.

/s/ Kent Wicker
COUNSEL FOR APPELLEES

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Appellees have designated the following docket entries:

RE#	Description	PageID Range
1	Osborn's Complaint (Osborn V. Griffin, Case No. 11-CV-00089)	1-12
1	Holt Plainitffs' Complaint (Holt v. Griffin, Case No. 13-CV-00032)	1-47
113	Defendants' Answer to Holt Plainitff's Complaint (Case No. 2:13-CV-0032)	1472-1505
189	Order	4157-4162
221	Memorandum Order	4845-4858
235	Memorandum Order	5099-5115
253	Memorandum Order	5521-5544
277	Memorandum Order	7645-7652
283	Order	7691-7693
293	Order	7777-7778
298	Order	7813-7815
359	Order	9333-9341
428-37	SEALED EXHIBIT - Installment Note	--
428-9	SEALED EXHIBIT - Shareholders List	--

430-13	Exhibit 11, Part Three, Rosellen Griffins' Probate File	19442-19574
590	Memorandum Opinion and Order	27407 - 27489
591-4	Exhibit D (Memorandum Opinion) to Defendants' Motion for Partial Reconsideration	27661-27677
684-1	Order, Sixth Circuit Court of Appeals, Case No. 15-5139	29598-29600
709	Order	30073-30075
748	Joint Stipulation of Facts	30750 - 30758
759	Order	31250 - 31254
797	Order	32716 - 32721
809	Transcript of Trial Proceedings (Day 1) held 9/14/2015	32793 - 32976
813	Transcript of Trial Proceedings (Day 2) held 9/15/2015	32980 - 33089
814	Transcript of Trial Proceedings (Day 3) held 9/16/2015	33090 - 33293
816	Transcript of Trial Proceedings (Day 4) held 9/17/2015	33295 - 33460
821	Transcript of Trial Proceedings (Day 5) held 9/18/2015	33477 - 33615
823	Transcript of Trial Proceedings (Day 6) held 9/21/2015	33634 - 33828
827	Transcript of Trial Proceedings (Day 7) held 9/22/2015	33834 - 33988

828	Transcript of Trial Proceedings (Day 8) held 9/23/2015	33989 - 34107
838-1	Settlement Agreement and Release, dated 9/10/93	34623-34631
843	Holt Plaintiffs' Emergency Motion	34673-34678
856	Findings of Fact and Conclusion of Law Order	35070 - 35172
859	Amended Trial Exhibit and Witness List	35180 - 35188
863	Judgment	35203-35208
1090	Order	37331-37332