Docket No. 14-60811

In the

United States Court of Appeals

For the

Fifth Circuit

THOMAS E. PEREZ, SECRETARY, DEPARTMENT OF LABOR,

Plaintiff, Appellee and Cross-Appellant,

v.

HERBERT BRUISTER and AMY SMITH,

Defendants, Appellants and Cross-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of Mississippi (Northern (Jackson)), No. 3:13-CV-1001 · Honorable Daniel P. Jordan, III

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS OF DEFENDANTS - APPELLANTS - CROSS-APPELLEES HERBERT C. BRUISTER AND AMY O. SMITH

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification and/or recusal.

Defendants - Appellants - Cross-Appellees	Present or Former Counsel
• Herbert C. Bruister • Amy O. Smith • Bruister Family Limited Liability Company, Delaware limited liability company ("BFLLC") (Defendant and Appellant in Related Appeal in this Court, No. 14-60816) • Jonda C. Henry (Defendant and former Appellant-Cross-Appellee) • J. Michael Bruce (former Defendant below)	• David R. Johanson, Esq. Douglas A. Rubel, Esq. • Hawkins, Parnell, Thackston & Young, LLP • C. Maison Heidelberg, Esq. • Heidelberg Harmon, PLLC • Christopher J. Rillo, Esq. • Susan J. Luken, Esq. • Nicole S. Magaline, Esq. • Schiff Hardin, LLP • Jason M. Stein, Esq. • Rene E. Thorne, Esq. • Jackson Lewis, P.C. • William B. Wahlheim, Esq. • Ollie A. Cleveland, III, Esq. • John David Collins, Esq. • Peter S. Fruin, Esq.

	• Maynard Cooper & Gales, P.C. • Robert L. Gibbs, Esq. • Stephen J. Carmody, Esq. • Brunini, Grantham, Grower & Hewes • Gibbs Whitwell, PLLC • Alexander Medina, Esq. • Matthew G. Jacobs, Esq. • Stevens & O'Connell, LLP
Plaintiff - Appellee - Cross-Appellant	Present or Former Counsel
Thomas E. Perez, Secretary of the United States Department of Labor	• Timothy Hauser, Esq. • Dane L. Steffenson, Esq. • Leslie C. Perlman, Esq. • Michael Schloss, Esq. • Angela Faye Donaldson, Esq. • Anna O. Crowell, Esq. • Peter B. Dolan, Esq. • Stephen A. Silverman, Esq. • Thomas Tso, Esq. • Pshon Barrett, Asst. U.S. Attorney • Robert M. Lewis, Esq. • Jennifer Del Nero, Associate Regional Director
Plaintiffs - Appellee in Consolidated District Court Action	Present or Former Counsel
• Joel D. Rader (Plaintiff below) • Vincent Sealy (Appellee in related appeal in this Court, No. 14-60816)	• Charles P. Yezbak, Esq. • The Yezbak Law Offices • Gary D. Greenwald, Esq. • Gary A. Gotto, Esq. • Juli E. Ferris, Esq. • Michael D. Woerner, Esq. • Keller Rohrback PLLC

	• Louis H. Watson, PLLC • Robert Nicholas Norris, Esq. • Watson & Norris, PLLC
Interested Parties	
• Bruister and Associates Investments, LLC (owner of assets frozen under Post-Judgment Preliminary Injunction by the District Court below) • Linda C. Bruister (wife of Herbert C. Bruister and owner of assets frozen under Post-Judgment Preliminary Injunction entered by the District Court below) • Community Bank, Meridian, Mississippi (mortgagor of an asset frozen under Post-Judgment Preliminary Injunction entered by the District Court below) • Premium Funding, LLC (third-party financer of certain assets frozen under Post-Judgment Preliminary Injunction entered by the District Court below) • Nathan I. Prager (servicing agent for Premium Funding, LLC) • Beazley Insurance Company, Inc. (Fiduciary Insurer of Appellants and defendant in litigation arising out of this litigation)	• Patrick F. McAllister, Esq., Counsel to Community Bank, Meridian, Mississippi • Williford, McAllister & Jacobus, LLP • Andrew R. Wilson, Esq., Counsel to Premium Funding, LLC • Bennett, Lotterhos, Sulser & Wilson, P.A. • Eugene J. Comey, Esq., Counsel to Beazley Insurance Company, Inc. • Susan Rigby, Esq., Counsel to Beazley Insurance Company, Inc. • Comey Rigby P.C. • Tammy Yuen, Esq., Counsel to Axis Insurance Company • James Skarzynski, Esq., Counsel to Axis Insurance Company • Skarzynski Black, LLC

• Axis Insurance Company (Fiduciary Insurer of Appellants and defendant in litigation arising out of this litigation)	

Dated: June 26, 2015

Respectfully submitted,

HAWKINS PARNELL THACKSTON & YOUNG LLP

By: /s/ David R. Johanson
David R. Johanson

Counsel of Record for Herbert C. Bruister and Amy O. Smith, Defendants - Appellants - Cross-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Herbert C. Bruister ("Bruister"), and Amy O. Smith ("Smith") (collectively, "Defendants"), respectfully request that oral argument be heard on this appeal. The arguments addressed herein concern the interpretation of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), with respect to a variety of complex transactions. Defendants respectfully submit that oral argument will substantially assist this Court in its consideration of this appeal.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 based on alleged violations of ERISA. The parties to this appeal are Bruister, a resident of Mississippi, and Smith, a resident of Florida, and Thomas E. Perez, Secretary of the United States Department of Labor ("Secretary").

This Court has jurisdiction hereof pursuant to 28 U.S.C. § 1291 as this appeal is taken from a final judgment of a district court of the United States which disposed of all parties' claims in the underlying cause. The district court entered the final judgment on October 16, 2014 ("Final Judgment"). ROA.25315. No motion for a new trial or alteration of the Final Judgment or any other motion that would have tolled the time to appeal was filed. Defendants timely filed their Notice of Appeal on November 13, 2014. ROA.25402. Secretary filed his Notice of Cross-Appeal on December 12, 2014. ROA.25488. This is not an appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES

Defendants appeal from the Final Judgment issued against them in the district court to address the following issues:

1. Whether the district court was clearly erroneous in finding that Bruister was a fiduciary who exercised improper influence on the Matthew Donnelly ("Donnelly") valuations or Trustees Smith and Jonda C. Henry ("Henry");

2. Whether the findings relating to inaccurate projections for Bruister and Associates, Inc., a Mississippi corporation now known as Southeastern Ventures, Inc. ("BAI") substitute 20/20 hindsight for the reasoned views of Smith and Henry at the time of the 2004 and 2005 transactions involving the Bruister & Associates Employee Stock Ownership Trust (the "ESOT");

3. Whether the district court erred in averaging the conclusions of the conflicting experts presented at trial to determine both the availability of the statutory exemption under ERISA Section 408(e) and the measure of damages available under ERISA Section 409;

4. Whether the district court erred in treating debt issued in the 2004 and December 2005 Transactions that was never paid in determining the measure of damages against Defendants;

5. Whether the district court erred in treating the $3,800,000 payment on the internal loan in the December 2004 transaction in determining the measure of damages against Defendants;

6. Whether the district court erred in accepting the valuation of Secretary's valuation witness, Dana Messina ("Messina") because it failed to consider BAI's actual expenses and imputed hypothetical expense amounts to value BAI;

7. Whether the district court erred in accepting the conclusions of the valuations of Messina and the *Rader* Plaintiffs' valuation witness, Z. Christopher Mercer ("Mercer") regarding the BAI debt subtracted from the BAI equity value that had no factual support in the record;

8. Whether the district court erred in assessing prejudgment interest against Bruister for amounts that neither he nor BFLLC received;

9. Whether the district court's issuance of judgments against Bruister and Smith in this case and in the case consolidated for trial with it, *Rader, et al. v. Bruister,* et al., 3:13-cv-1081-DPJ-FKB (S.D. Miss.) (the "Rader Case"), without provisions for offset of recovery is reversible error; and

10. Whether, in the absence of substantial recovery, the fiduciary bar against Bruister and Smith is an abuse of discretion.

STATEMENT OF THE CASE

The trial below centered on whether Defendants breached their ERISA fiduciary duties when allegedly acting as trustees for the ESOT that purchased company stock for the Bruister & Associates Employee Stock Ownership Plan and the Bruister & Associates Eligible Individual Account Plan (collectively, the "ESOP").[1] The Secretary claimed the ESOT paid too much for the stock. ROA.25315

The ERISA context in which this dispute arose, as the district court noted, was that:

> "An employer desiring to set up an ESOP will execute a written document to define the terms of the plan and the rights of beneficiaries under it. 29 U.S.C. § 1102(a) (1976). The plan document must provide for one or more named fiduciaries 'to control and manage the operation and administration of the plan.' *Id.*, § 1102(a)(1). A trust will be established to hold the assets of the ESOP. *Id.*, § 1103(a). The employer may then

[1] The Trial exhibits, not included in the Appellate Record, are referenced herein as "J-##" for Joint Exhibits ROA.25228; "P-##" for Plaintiffs' Exhibits ROA.25257; "D-##" for Defendants' Exhibits ROA.25281; and "C-##" for Court Exhibits ROA.23511.

On December 10, 2002, BAI established the ESOT [J-121] and the ESOP [J-120]. On December 13, 2004, BAI established the EIAP [P-102]. The parties did not dispute that the ESOP is a stock bonus plan qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code"), that also constituted an "employee stock ownership plan" within the meaning of Code Section 4975(e)(7) and ERISA Section 407(d)(6); the EIAP is a stock bonus plan qualified under Code Section 401(a) that also constituted an "eligible individual account plan" within the meaning of ERISA Section 407(d)(3); and the ESOT is a trust qualified under Code Section 501(a). ROA.24955, ¶l; ROA.24957, ¶d; ROA.24958, ¶¶m-n. *See also* [604] ("Restricted" Pre-Trial Order).

> make tax-deductible contributions to the plan in the form of its own stock or cash. If cash is contributed, the ESOP then purchases stock in the sponsoring company, either from the company itself or from existing shareholders. Unlike other ERISA-covered plans, an ESOP may also borrow in order to invest in the employer's stock. In that event, the employer's cash contributions to the ESOP would be used to retire the debt. [*Donovan v. Cunningham*, 716 F.2d 1455, 1459 (5th Cir. 1983).]"

ROA.25315-ROA.25316.

BAI was a Meridian, Mississippi-based Home Service Provider ("HSP") that installed and serviced satellite-television equipment for DirecTV. ROA.27268-ROA.27272. BAI effectively had the exclusive fulfillment contract for installation and maintenance of DirecTV products for its territory. *Id.* As of December 31, 2005, BAI was one of about twelve HSPs for DirecTV that did 95% of the DirecTV installation and maintenance work. ROA.27272. Bruister began BAI in 1992, initially in Mississippi, and gradually expanded its operations to Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, and Tennessee [ROA.26505-ROA.26507] and to about 1,300 employees [ROA.27297] and, by December 2006 to over $95,000,000 in gross revenues ROA.27852.

In a three-year period from 2002 to 2005, during a period of tremendous growth, BAI's owner sold 100% of BAI's shares of capital stock to its employees through five transactions with the ESOP. In the first two transactions (2002 and 2003), Bruister owned the stock he sold, but by the time the three 2004 and 2005 transactions occurred, he had transferred ownership in the outstanding BAI stock to BFLLC, [ROA.26577], which he and his wife controlled, each being fifty percent (50%) members of BFLLC. ROA.26514; ROA.26498 (P-100).

The ESOP transactions closed on December 21, 2004 [J-37], September 13, 2005 [J-35], and December 13, 2005 [J-36] (the "Transactions"). In each instance, the ESOP acquired BAI stock through the ESOT, for which Smith and Henry served as trustees. Smith worked for BAI [ROA.26841] and Henry was BAI's outside CPA ROA.28645. Bruister was BAI's President. ROA.27264. Bruister abstained from the closings of the Transactions and from any decision-making or influencing with respect to the Transactions.

The Transactions included a combination of cash-payment closings and closings with extensions of credit from BFLLC. The December 2004 Transaction included cash plus an extension of credit from BFLLC to

the ESOT for the purchase of BAI capital stock [J-37]. BAI capital stock that was subject to a loan was held by the ESOT in a suspense account.[2] As BAI made Employer Contributions into the ESOT, those funds were used to make payments of principal and interest, and at year's end the ESOT would release a proportional amount of BAI capital stock from the ESOT loan suspense account.

The December 2004 extension of credit was refinanced in 2005 to reflect a "mirror" loan whereby BAI was substituted for BFLLC as creditor. The September 2005 closing was all cash [J-35], and the December 2005 closing was another mirror loan with no cash [J-36]. The following table, set forth in the district court's Order [ROA.25315], summarizes the amount of principal and interest the ESOT paid in the Transactions.

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[2] As further discussed below, the district court incorrectly stated that "BAI (not the owner BFLLC)" held the stock ROA.25317. This conclusion was rebutted by Henry: "Q. As a basic proposition, though, do you know whether the shares of stock are transferred into the ESOT at the time of the transaction? A [Henry]. At the time of the -- the date of the transaction? Q. Yes. A. They're transferred into that suspense account; and then as the debt is paid, they're released. Q. But is the suspense account within the ESOT? In other words, does the ESOT have the stock, whether it's in a suspense account or not, at the time the transaction is done? A. It would be all together. It's just when it's released to the participant. … Q. Did you have an understanding as a trustee about whether the shares of stock transferred into the ESOT at the time of or immediately subsequent to the transaction? A. At the time of the transaction? Yeah. And Mr. Bruister sold them to the ESOP." ROA.28816-ROA.28817. *See also* ROA.26595 (Del Nero testimony).

Transaction	Total Price	Cash Payment at Closing	ESOT Loan Amount	Amount of Principal / Interest ESOT Paid from Employer Contributions
12/21/04 ESOT acquired 100,000 shares of BAI common stock (20% of issued and outstanding stock) at $67.00 per share [J-37]	6,700,000.00	730,000	5,970,000; originally owed to BFLLC but outstanding amount restructured into mirror loan on 12/12/05. BFLLC issued note to BAI, BAI issued note to ESOT.	6,815,876.95
9/13/05 ESOT acquired 15,789.47 shares of BAI common stock (3.16% of issued and outstanding) at $76.00 per share [J-35]	1,199,999,72	1,199,999,72	None	1,199,999.72
12/13/05 ESOT acquired 134,710.53 shares of BAI common stock (26.94% of issued and outstanding) at $78.00 per share [J-36]	10,507,421.34	None	10,507,421.34 mirror loan whereby BFLLC issued note to BAI, and BAI issued note to ESOT.	761,823.63

ROA.25317. The "mirror loan" bears focus. On December 13, 2005, BAI, BFLLC, and the ESOT refinanced the loan outstanding from the December 2004 ESOT Transaction ("2004 ESOT Loan") as two mirror loans: (1) an extension of credit from BFLLC to BAI ("External Loan"), and (2) an extension of credit from BAI to the ESOT ("Internal Loan") [J-36]. Other than the identity of the creditors, the terms of 2004 ESOT Loan did not change. BFLLC extended credit to BAI for the purchase price in the December 2005 Transaction, and BAI extended the same amount of credit to the ESOT.

Trustees Smith and Henry based the purchase price for the Transactions on valuations of BAI's fair market value ("FMV") performed by Donnelly of The Business Appraisal Institute. ROA.26864 and ROA.26894 (Smith); ROA.28677 (Henry); J-100 (Donnelly Resume; over 1,300 valuations); J-39 (2004 Appraisal); J-31 (Sep. 2005 Appraisal); J-102 (Dec. 2005 Appraisal). The ESOT retained Donnelly to serve as independent appraiser and financial advisor [*e.g.*, P-15 (2004 Retainer Agreement)].[3] Donnelly utilized the services of Business

[3] Although Donnelly was convicted of a felony in 1984 under the name of Mitchell Lange, no one involved in the case below was aware of this until Secretary raised the issue during this litigation. ROA.26918:6-8 and ROA.27079:19-22 (Smith);

Equity Appraisal Reports, Inc. ("BEAR"), to assist in preparing independent appraisal and valuation reports, and FMV and fairness opinion letters.[4] Smith and Henry also relied upon ESOT counsel Steven Lifson (2002) and William Campbell (2003-2005) in order to guide them through the Transaction process. ROA.26905.

On April 29, 2010, after having conducted a three-year investigation, Secretary filed suit in the district court, raising claims for breach of fiduciary duty under ERISA §§ 404(a)(1)(A), (B), and (D); for failure to monitor under ERISA §§ 404(a)(1)(A)-(B); and for engaging in prohibited transactions under ERISA §§ 406(a)(1)(A) and 406(b)(1)-(2). ROA.91. Two plan participants, Joel Rader and Vincent Sealy filed a separate suit in the *Rader* Case. ROA.14-60186.31690. This case and the Rader Case were consolidated for trial on December 31, 2013. ROA.11887. The district court tried the matter without a jury from August 4 through August 28, 2014. ROA.26424-ROA.30626 (Trial

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ROA.28680:11-15 (Henry); ROA.27607:12-14 (Bruister). Moreover, Donnelly was not disqualified under ERISA § 411, 29 U.S.C. 1111.

[4] ROA.25311 at C-21-32 (Donnelly Deposition Transcripts); C-335-36 (Schroeder Deposition Transcripts); C-37-42 (White Deposition Transcripts). Schroeder owned and operated BEAR; White worked for BEAR. Both worked with Donnelly.

Transcripts). Over fifty deposition transcripts were submitted for the record. ROA.25311 (Court's Exhibit List).

On October 16, 2014, the district court found Defendants to have breached ERISA's fiduciary responsibility rules in connection with the Transactions. ROA.25315. The district court determined that the ESOT overpaid for its acquisition of BAI stock by $900,000.00 in the 2004 Transaction, by $236,842.05 in the September 2005 Transaction, and by $3,367,763.25 in the December 2005 Transaction, for a total overpayment of $4,504,605.30. ROA.25392. In doing so, the district court employed an averaging of the experts of Defendants, Secretary and the *Rader* Plaintiffs. Secretary's valuation expert (Messina) and the *Rader* Plaintiffs' valuation expert (Mercer) each provided an exact proposed "FMV' for each Transaction. Defendants' valuation expert (Gregory P. Range) provided a FMV range for each Transaction. The district court took Range's average for each Transaction and averaged that number with an average from Messina and Mercer to establish damages of $4,504,605.30. ROA.25392. The district court also found Bruister liable for $1,988,008.67 in prejudgment interest. Bruister and Smith were permanently enjoined from acting in the future as

fiduciaries or service providers to ERISA-covered plans." ROA.25399. In the related *Rader* Case, the Final Judgment issued identical damages against Bruister and Smith of $4,504,605.30 and $1,988,008.67 in prejudgment interest against Bruister.

SUMMARY OF THE ARGUMENT

The district court erred in the Final Judgment by making factual findings contrary to the clear evidence with respect to the influence of Bruister and others on Trustees Smith and Henry and in applying hindsight to reject the reasonable projections of Smith and Henry at the time of the Transactions. The district court's acceptance of the Range expert valuation report compels the conclusion that Defendants' satisfied ERISA's adequate consideration standard. Irrespective of any of the arguments, the damages awarded by the trial court contain both errors of law in defining the measure of damages and factual conclusions unsupported by the record. The averaging of conflicting valuation conclusions is an inappropriate methodology for determining damages under ERISA § 409. The district court also created a windfall with the inclusion of unpaid ESOP debt in its damages award and further erred in accepting the Messina valuation as credible evidence

and in accepting the BAI debt assumptions in the Messina and Mercer valuations that were contrary to the evidence presented.

ARGUMENT

I. Standard of Review

On appeal from a bench trial, this Court reviews the factual findings of the trial court for clear error and reviews conclusions of law *de novo*, including the trial court's determination of its own standard of review. *LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores, Inc.*, 298 F.3d 348, 350-351 (5th Cir. 2002). In the absence of an error of law, this court reviews the district court's award of damages for clear error only. *Lifemark Hospitals, Inc. v. Liljeberg Enters. (In re Liljeberg Enters.)*, 304 F.3d 410, 447 (5th Cir. 2002). The district court's decision to award prejudgment interest are reviewed under an abuse of discretion standard. *Whitfield v. Lindemann*, 853 F.2d 1298, 1305-06 (5th Cir. 1988)("*Lindemann*").

II. The District Court's Findings that Bruister was a Fiduciary Were Clearly Erroneous and Do Not Establish Bruister's Improper Influence on Either the Donnelly Valuations or Trustees Smith and Henry

The district court determined that Bruister was an ERISA fiduciary, that Bruister improperly influenced the Donnelly valuations, that the

Donnelly valuations were not impartial, and that Bruister improperly influenced Trustees Smith and Henry. Defendants respectfully submit that these findings are not supported by the record and constitute clear error.

The district court concluded that Bruister did not abstain as a Trustee in approving the Transactions and, therefore, was an ERISA fiduciary, holding that Bruister acted as a fiduciary because (i) he was involved in the 2002 initial meetings with Donnelly, at which a preliminary study was performed; (ii) "Bruister at least gave his blessing" to the retention of Donnelly, citing to Donnelly deposition testimony that Donnelly visited Bruister in 2002 [Donnelly Dep. [C-30] at 715]; and (iii) that Bruister "nevertheless participated, at least to some extent" by "attend[ing] many of the trustee meetings and closings and participat[ing] in what he referred to as 'informal meetings' with the other trustees." ROA.25342-ROA.25343. These findings, however, are contrary to the testimony of Smith and Henry, as detailed further below, and contrary to Bruister's trial testimony, in response to Secretary's question about why he would be a trustee if he was going to abstain from the Transactions:

> "A [Bruister]. Well, it's seems here like I'm just looking for a better word. You know, we use 'abstain.' Sometimes that sounds like you're just -- you're totally uninvolved in the total process. And there's no way you can be the trustee of the company and be the seller and just -- and never have any kind of concern of -- even on your side of the sale. So -- and I seem to be rambling a little bit there, but I can assure you -- and I know you're working hard to show that somehow I've been involved in helping manipulate prices. I didn't do that. I didn't do it here. I -- you know, this testimony was a long time ago and, you know -- but I'm just telling you right now, I did abstain. It's in the documents I abstained. And I've testified to that I can't even count the times now."

ROA.27638.

"Mere influence over the trustee's investment decisions, however, is not effective control over plan assets." *Schloegel, supra at* 271-272 (5th Cir. 1993) (citing *American Federation of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y*, 841 F.2d 658, 664 (5th Cir.1988); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991).To satisfy the "authority or control" element under subsection (i), the Plaintiffs must demonstrate that Bruister *caused* trustees Smith and Henry to relinquish their independent discretion in purchasing BAI stock for the ESOT. *Schloegel, supra at* 271-272 (citing *Sommers*, *supra* at 1460).

Bruister did not have the degree of control necessary to satisfy the definition of an ERISA fiduciary. First, contrary to the district court's

findings, Trustees Smith and Henry both testified that they had the duty to determine whether the ESOT bought BAI stock and that they made the ultimate decision to purchase BAI stock. Smith testified:

> "As a trustee, it was my job to keep the best interest of the ESOP and the employees in mind. As a member of the board, it was my obligation to also keep the best interest of the company in mind. But, to me, those two sort of melded together. The best interest of the employees is what was the best interest of the company."

ROA.26991:21-ROA.26992:7; *see also* ROA.27077:4-12[5].

Smith was aware of her ERISA fiduciary duties to the ESOP, having discussed them "thoroughly" with 2002 ESOT counsel Lifson ROA.27075 and ROA.27129 and 2003-2005 ESOT counsel Campbell ROA.27175. Smith discussed Bruister's abstention as trustee from the proposed Transactions. ROA.27170:12-ROA.27171:5. Bruister did not attend Smith and Henry's meetings with Lifson or Campbell. ROA.27161:1-21. Bruister did not try to solicit information from, or persuade, Smith or Henry. ROA.27161:22-ROA.27162:1.

[5] "Well, I think I said this earlier. My--my best interests were always in mind for the ESOP and the company. To me, the two were equally as important, but I always had the ESOP as my priority. Q. What about Mr. Bruister's interests? A. That was always, you know, on my mind as well. Q. Was it on your mind to pay Mr. Bruister as much as you possibly could for the shares? A. Absolutely not."

Smith knew she could vote against a proposed Transaction. ROA. 26933:8-9. Smith was a participant in the ESOP and did nothing to benefit Bruister at the expense of the ESOP participants. ROA.27110:3-ROA.27111:4. If she had questions about the ESOP, she sought advice. No one forced or influenced Smith to do anything she did not want to do. ROA.27147:8-22. And, Smith testified that Bruister abstained from the Transactions:

> "Q. But you do know now from looking at this memo, do you -- does that refresh your memory as to whether you actually did have discussions [with ESOT counsel Campbell] about abstention and knew the importance of Mr. Bruister refraining from votes on the actual transactions? A. Yes, sir. Q. And do you have a confidence one way or the other about whether he did that with respect to each of the three transactions that we're here about? A. Yes, sir, I do." ROA.27175.
>
> "Q. All right. If we could turn the page, please. [Referring to J-19, Minutes of BAI Board of Trustees, dated December 20, 2004.] That first paragraph, it says--this will be the last point on this memo, but the Trustee Henry questioned the reasoning behind Trustee Bruister's abstention from the ESOP transaction. Now, does this indicate to you one way or the other about whether you all had in your mind that Mr. Bruister would be abstaining from a decision about the ESOP transaction? A. Well, I mean, it made sense that as the seller he would abstain from voting. Q. Well, I mean, is that something obviously that you discussed with Mr. Campbell to understand the implications, the reasons and that sort of thing? A. Yes. Q. …Would you--or if you recall, would you have attempted to follow this directive or this advice from Mr. Campbell with respect to abstention? A. Yes,

> sir.… Q. And did Mr. Bruister abstain from the decision on the December 2004 transaction in terms of the decision of whether to do the transaction and purchase the stock on behalf of the ESOP? A. Yes, sir. MR. SILVERMAN: Objection, your Honor. Calls for a legal conclusion. THE COURT: All right. I won't consider it with respect to the legal definition of the term 'abstain,' but did he vote? THE WITNESS: No, sir, he did not. THE COURT: All right. Thank you." ROA.27171.

Henry testified that that she was uniquely positioned to be a trustee and understood her trustee role was independent of her accounting role and that she used her accounting expertise to benefit the ESOP participants. ROA.28841:13-ROA.28842:8. She and Smith always had telephone calls with ESOT counsel Campbell prior to the closings to discuss the Transactions; Bruister did not participate. ROA.28875:14-ROA.28876:19; ROA.27166:18-ROA.27167:11. Smith and Henry talked considerably and substantively about the Transactions. ROA.28872:9-17. Henry never felt pressured to vote for a proposed Transaction:

> "Q. Did you ever feel like you--you had to vote for a transaction? A. No. I never felt pressured. Q. Did you feel like you could have pulled the plug and voted against it had you felt like you should do that? A. Yes. I felt that way. Q. Did you feel like your decisions on all three of the transactions that we're here about were, in fact, your

> decisions to vote for that transaction, not a decision influenced by someone else? A. I did feel like it was my decision. Q. Did you ever feel like you were pressured in any way from anyone outside of you, whether it be Mr. Bruister or Mr. Johanson or Mr. Campbell or Mr. Donnelly to do a transaction? A. No."

ROA.28876:20-ROA.28877:10.

Henry did not believe that Johanson tried to influence her with respect to ESOP matters, including the Donnelly valuations or voting for and/or against a proposed Transaction. ROA.28877:11-24. Henry believed her relationship as trustee with ESOT counsel Campbell was not influenced by Bruister and/or Johanson. ROA.28877:25-ROA.28878:11.

Moreover, Smith and Henry sought information from others in order to inform herself about ESOP matters, including the ESOP's third-party recordkeeper Marcus Piquet, also a certified public accountant. *See* ROA.28649-ROA.28650.

Thus, as a matter of law, Bruister did not exercise any authority or control respecting management or disposition of the ESOP's assets. He did not *cause* trustees Smith and Henry to relinquish their independent discretion in purchasing BAI stock for the ESOT. He did

not act as a fiduciary with respect to the Transactions. *Schloegel, supra; Sommers, supra.*

In arriving at its conclusion that Bruister acted as an ERISA fiduciary, the district court seemed most troubled by the lack of professional trustees in the Transactions. "The initial structure of the ESOT provided three trustees—Bruister and two individuals loyal to him. There were no independent or professional fiduciaries," ROA.25346, and that Bruister's role "as a highly respected figure who was admired by his employees, clients, and even competitors.... also created influence." ROA.25343.

These findings, however, does not result in an ERISA violation. The district court was troubled by the absence of "independent or professional fiduciaries" [ROA.25346]; yet ERISA does not require independent or professional fiduciaries, nor does it preclude "inside" fiduciaries. The presence of Bruister in the business operations of BAI and, as seller only, in the ESOT Transaction process itself is not evidence of his alleged improper influence. Indeed, this analysis must fail in the context of ERISA's multiple hat rule providing that Bruister was entitled to serve as a seller, an officer and a trustee.

The reliance on the purported evidence that Donnelly was deferential to Bruister as the payor of his valuation fees and to Johanson as a source of business referrals is a clear abuse of discretion in the context of the district court's conclusion that Donnelly's valuations were issued at FMVs well less than the FMV determinations of Range, whose conclusions the district court found appropriate to accept in its findings. The evidence that Donnelly's conclusions of FMV were appropriate and Donnelly's statements that he was not influenced in his FMV conclusions [C-24] render the inference from Donnelly's obsequious and irreverent e-mails unreasonable. The district court unreasonably assumed that Donnelly's alleged lack of knowledge of certain valuation issues was the reason that he employed subcontractor BEAR. BEAR provided reports for the ESOP valuation industry for over twenty-five years; it was operated by Hans Schroeder, a knowledgeable owner with doctorate degrees from the Massachusetts Institute of Technology [ROA.26784] and served many businesses independent of Donnelly [C-35 and C-36 (Schroeder Deps.)]. Its valuation models were unassailable and not critiqued by the district court; Donnelly's use of BEAR added weight to his valuations rather than undermined them. Moreover, the

district court noted that Donnelly was not *per se* unqualified. ROA.25362.[6]

Perhaps the most significant evidence that Donnelly did not inflate his FMV determinations is the district court's acceptance of the Range valuations as appropriate, which valuations concluded that Donnelly's FMVs were squarely within the range of appropriate FMV. J-51; A-183. Indeed, Range's midpoint valuations, as the district court determined, were above Donnelly's conclusions–in December 2004, $8,350,000 to Donnelly's $6,700,000; in September 2005, $1,470,000 to Donnelly's $1,199,999.72; and in December 2005, $11,300,000 to Donnelly's $10,507,421.34. *Id.* This documents that Donnelly's conclusions of FMV were appropriate and rebuts that Smith and Henry breached their ERISA fiduciary duties in relying on Donnelly. Even if the district court's conclusions that Bruister and Donnelly influenced the valuations are correct, the influence did not cause the Donnelly conclusions to exceed FMV. The findings by the district court of an

[6] The district court's willingness to allow Donnelly's undisclosed criminal conviction under a different name as evidence when the record clearly reflected an absence of knowledge by any one involved in the Transactions. ROA.26918:6-8 and ROA.27079:19-22 (Smith); ROA.28680:11-15 (Henry); ROA.27607:12-14 (Bruister) was prejudicial and clearly tainted the findings herein.

ERISA breach of loyalty are not supported in the record and are clearly erroneous.

Finally, the district court erred in finding that Bruister failed to properly monitor Smith and Henry with respect to the Transactions. Bruister testified that he "admonished them regularly to make sure that they were doing what they were supposed to be and to make sure that they were following the instructions of their legal counsel that they had hired to help them through the process." ROA.27618. The conclusion that Smith was not sophisticated enough to understand the methods used by Donnelly was contrary to the record and Smith's outstanding career as BAI's business manager who interacted extensively with DirecTV and was careful enough to question her qualifications and to conclude that she satisfied the ERISA requirements after consultation with legal counsel. Bruister has testified that he had no knowledge of a breach and no evidence suggested that he had reason to know of a breach. *Liss v. Smith*, 991 F.Supp. 278, 311 (S.D.N.Y. 1998), cited by the district court, invokes monitoring liability in the face of gross mismanagement "involving allegations relate to the trustees' complete and total failure to take even

the most minimal and basic steps to ensure that Fund assets were invested and spent properly." *Id.* at 288. That is far from the facts presented here where the district court concedes investigation by Smith and Henry. ROA.25734. The district court suggests that the failure of the Trustees to negotiate a lesser price than the price Donnelly proposed as within the ERISA standard was the "bigger picture" in his finding of an ERISA breach of duty. ROA.25378. Yet ERISA does not mandate negotiation; it mandates that the purchase not exceed adequate consideration. The direct communication by Donnelly to Johanson was not in violation of ERISA in any manner and the queries to Donnelly by Johanson regarding relevant factual information related to BAI such as the Anderton offer and the one-time Katrina effect convey factual information; the rejection by Donnelly of the import of the Anderton offer conveys the lack of influence by Johanson over Donnelly. ROA.25374. The conclusion that Bruister failed to monitor Smith and Henry is unreasonable in the face of the record and an abuse of the discretion of the district court and should be reversed.

III. The Findings Relating to Inaccurate Projections for BAI Substitute 20/20 Hindsight for Smith's Reasoned Views at the Time of the Transactions

The district court believed that providing accurate information to the appraiser "goes to the heart of the case," finding Defendants failed in his respect. ROA.25362. The trial testimony, however, established that the Donnelly valuations used BAI revenues consistent with DirecTV reports [*E.g.*, ROA.28294 (Messina testimony)] and there was no dispute that the Donnelly valuations used BAI expenses consistent with the BAI financial statements. No discrepancies of any significance were identified in the trial that established that Donnelly relied on inaccurate financial statements.[7] Indeed, the heart of the issue regarding inaccurate information surrounds the future projections for BAI that were considered by Trustees Smith and Henry. The Trustees had a duty to consider the reasonableness of the projections and both Smith and Henry testified regarding their informed belief with respect to such reasonableness. *E.g.*, ROA.26961-ROA.26962 and ROA.27164-ROA.27166 (Smith); ROA.28823 (Henry). The district court, however,

[7] Considerable testimony related to whether the BAI financial statements were prepared in accordance with Generally Accepted Accounting Principles; it was clear, however, that they were not required under ERISA to be so prepared. ROA.28740.

permitted a sea of second-guessing to occur with respect to matters impacting these projections–from Hurricane Katrina to DirecTV policies and rates. The staggering degree of debate on these issues at trial failed to consider the fundamental standards for addressing ESOP valuations long enunciated by the courts: the evaluation of the Transactions from the perspective of the Trustees must relate to the "time of the investment decision' rather than from 'the vantage point of hindsight.'" *Katsaros v. Cody*, 744 F. 2d 270 (2d Cir. 1984). The district court failed to look at the perspective of Smith and Henry in 2004 and 2005 and substituted the views of experts and BAI competitors who added their perspective with the benefit of years of history and rumination. This is precisely the kind of 20/20 hindsight that ERISA prohibits. The Trustees' good faith determination on each of the dates of the Transactions–is the relevant inquiry. Smith and Henry reasonably viewed Hurricane Katrina as a temporary disruption to the BAI business in both the September 2005 and December 2005 Transactions and an opportunity for business to increase due to service orders ROA.27007 and ROA.27028-ROA.27029 (Smith); ROA.28667 and ROA.28832-ROA.28833 (Henry); that someone else would have had a

more pessimistic view of the impact of Katrina does not establish the unreasonableness of the views of Smith and Henry. The Trustees articulated their reasoning, they did not ignore Katrina but considered its impact and believed it would involve a temporary disruption and additional business opportunities. *Id.* The district court substituted its own judgment with 20/20 hindsight of the years that occurred after Katrina. Even so, it did not reject the Trustees' views, stating, "[t]he Court suspects that Hurricane Katrina's impact was somewhere in the middle." ROA.25371. The district court was charged with determining whether the Trustees' revenue projections to Donnelly and opinions with respect to the BAI business were reasonable in 2004 and 2005 and the district court's methodology failed to comply with this standard.

Similarly, the Trustees addressed their views regarding the DirecTV vehicle policy changes and offered concrete evidence supporting their reasonable conclusion that the vehicle policy did not require a downward trending of the projection of future BAI profits. ROA.28830. The district court acknowledged that the Trustees' expectations that the new vehicles might generate additional business "may have been reasonable." ROA.25368. The Trustees reasonably expected that

DirecTV would provide revenue protections for the added vehicle costs, and the trial court's rejection of this expectation was marred with 20/20 hindsight. ROA.25638. Indeed, DirecTV acknowledged its intent to increase rates for BAI upon the implementation of the vehicle policy and its belief that the vehicle policy would be revenue neutral to the HSPs, which Messina and Mercer failed to account for in their analysis. ROA.25556; ROA.28561; ROA.28042-ROA.28045. The basis for the district court's conclusion of unreasonableness relied upon testimony of BAI's competitors that were not based on facts known in 2004 and 2005 but after years of reflection. ROA.25638; ROA.25639. Once again, the district court ignored the views of the Trustees at the time of the Transactions and substituted its own conclusions in clear error, calling the vehicle policy a "game changer that the trustees should have explained to Donnelly." *Id.* The Trustees stated their reasonable conclusions why they did not consider the vehicle policy a "game changer" in 2004 and 2005 and it is their conclusions, not the conclusions that BAI competitors would describe with the benefit of years of hindsight experience that are relevant. In other words, the district court attempted to determine whether the Trustees were correct

or not correct in their opinions on the vehicle policy, not whether they were reasonable opinions at the time,[8] resulting in findings that the information provided to Donnelly was inappropriate.

In sum, the district court veered far afield from the directives of this Court in *Donovan v. Cunningham*, supra at 1468: "A court reviewing the adequacy of consideration...is to ask if the price paid is 'the fair market value of the asset as determined in good faith by the ... fiduciary;' it is not to redetermine the appropriate amount for itself *de novo*.... [T]his is not a search for subjective good faith—a pure heart and an empty head are not enough." *Id.* Defendants submit that the district court engaged in a *de novo* review and overlooked the informed and considered good faith of Smith and Henry. They were competent and skilled business professionals who understood the details of BAI's business. The Trustees acted in good faith and reasonably relied on ESOT counsel Campbell and upon Donnelly in approving the

[8] The same 20/20 hindsight applies to the Plaintiffs' contention at trial that DirecTV's reduction in rates was material to the Trustees' ERISA fiduciary duties. Even Messina, however, found such not to be the case: "Q. Going back to the rate card discussion, you analyzed the–I'm using a rate card as the rate schedule for DirecTV. You looked at that. Correct? A. I did. Q. Was there any information known in 2004 about the actual rate cuts that occurred in 2006? A. No." ROA.28562.

Transactions at FMVs verified as appropriate in the Range testimony and accepted as reasonable by the district court.

IV. The District Court Erred In Applying a Court Valuation Not Presented as Evidence

This Court's review of the district court's conclusions regarding both the failure of the Transactions to satisfy the FMV component of the statutory exemption from ERISA's prohibited transaction rules and the measure of damages to be awarded to the ESOP is a review of a question of law and is a proper subject for this Court's *de novo* determination. *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 91 (1981).

The Transactions were not illegal *per se*. *See Fink v. National Savings and Trust Co.*, 772 F.2d 951, 955 (D.C. Cir. 1985). They are unlawful, either as ERISA prohibited transactions or as breaches of fiduciary duty, only if the amount the ESOT paid was greater than the FMV of the shares of BAI stock acquired. *See Donovan v. Cunningham*, 716 F.2d 1455, 1465 (5th Cir. 1983).

The district court's methodology of applying an averaging technique for the adequate consideration standard and to award damages is reversible error for a multitude of reasons. First, no evidence was

introduced at trial that an averaging was appropriate. Not only is the use of this averaging of the valuation conclusions in error; it fails to honor the basic precept that a trial court issues its findings of fact based on the admissible evidence presented at trial. FRCP 52(a)(5). There was simply no evidence indicating that the averaging of the expert conclusions was appropriate. Second, the district court's acceptance of the testimony of Defendants' valuation expert, Range, as equally credible to the other experts [ROA.25390] compels the conclusion that Defendants satisfied the adequate consideration exemption under ERISA § 408(e), 29 U.S.C. § 1108(e). A sale to a plan by an ERISA party in interest is exempt under ERISA § 408(e) if the plan does not pay more than "adequate consideration" as defined in ERISA § 3(18), "the fair market value of the asset as determined in good faith by the trustee... pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary." 29 U.S.C. § 1002(3)(18). The district court did not make any findings of the absence of good faith by Defendants.

It is perplexing that a factual inquiry examined with the benefit of expert testimony could result in the trier of fact accepting as credible

evidence the conflicting conclusions of the parties' experts. If, for example, the experts are analyzing the identity of the single vehicle that sped through an intersection to cause an accident, it is simply untenable that a trier of fact would conclude that the identity of the vehicle was both the blue car suggested by the plaintiff's expert and the yellow car suggested by the defendant's expert. And, of course, it is equally untenable that the trier of fact would state that the plaintiff's expert concluding it was the blue car and the defendant's expert concluding it was the yellow car were equally convincing and thus reach outside the evidence presented at trial and reason that the vehicle that was speeding must have been a green car.

The nature of a good faith FMV determination like Henry's and Smith's is such that the district court's analysis of averaging the valuation conclusions of the conflicting experts–the court averaged the calculations of Mercer and Messina and then took that figure and averaged it with the average calculations of Range [ROA.25389-ROA.25393]–does not appear initially to be as perplexing as inventing evidence to suggest the involvement of a speeding green car. This is because the exercise of assigning a FMV is by definition an

approximation; it is conjuring a hypothetical sale. A FMV determination reasons how a willing buyer and a willing seller would act in the absence of either a willing buyer or a willing seller. Unlike the answer to the question of the color of the vehicle that speeds through the intersection, there are multiple correct answers. Credible evidence can establish different values for estimating the FMV of an asset as was found by the district court in this case, stating, "In whole no expert was more reliable than the others. They all had strengths and weaknesses. As Mercer observed, judgment calls are just that and, though he and Messina differed with Range on many of them, the Court cannot say that any one result was better." ROA.25389. The district court's conclusion, however, does not justify that the FMVs should not be averaged together into a puddle of green. Rather, the issue presented is whether the party within the burden of proof has satisfied that burden with sufficient evidence. Here, Defendants satisfied that burden with the testimony of Range. The fact that Secretary offered conflicting testimony of Messina that was not more or less reliable than Range and that the *Rader* Plaintiffs offered conflicting testimony of Mercer that also was not more or less reliable than Range does not undermine the

credibility of Range that was accepted by the district court. Defendants satisfied their burden of proof when the district court accepted Mr. Range's conclusions as appropriate indications of FMV for the Transactions. The fact that other FMVs also are viewed by the district court as appropriate indications of FMV does not impact Defendants' ability to claim the statutory exemption under ERISA § 408(e) for the ESOP Transactions.

The district court committed reversible error in reasoning that its averaging approach was appropriate. Its justification ignores its obligation to issue decisions consistent with the evidence at trial and shows a trier of fact interested in interjecting its own facts, and perhaps its own expert analysis, into the trial record. This is evident in the district court's rationale for its novel approach to reaching a valuation to be used in its damages analysis: "For the same reason it is appropriate for the appraisal community to collectively consider the differing results from various valuation methods, models, and assumptions, it is appropriate in this case to do likewise. Averaging the results mitigates the impact of those valuations that seemed less valid *on both sides*." ROA.25391 (emphasis in the original). No such approach

has ever been applied in the context of an ESOP case under ERISA and it cannot be justified by saying it is only "inappropriate in some cases---for example if one expert was more credible than another." ROA.25390. To allow this averaging will open the floodgates of litigation. Competent experts will always vary in defining the FMV of an asset. To allow those expert opinions to be disregarded in an averaging will ensure that every ESOP transaction involving valuations of closely-held corporation securities will be vulnerable under ERISA § 408(e). If an expert valuation opinion such as Range's opinion is reliable enough to be considered by the district court, as is the case here, it establishes that Defendants have sustained their burden of proof under ERISA. Courts addressing other valuation controversies have rejected the approach of the district court and this same conclusion must be reached here. *U.S. v. Easements and Rights-of-Way over a Total of 3.92 Acres of Land*, 2010 U.S. Dist. LEXIS 101181, *24 n.8 (E.D. Tenn. Sept 24, 2010)("The Court is very much aware that a mere mathematical average of the highest and lowest appraisals would be improper and an abdication by the Court of its duty to exercise its independent judgment on the issue of just compensation."); *Torres v. Torres*, 883 So.2d 839, 841 (Fla. Dist.

Ct. App., 3rd Dist. 2004)("[W]e caution the court that a valuation based on the average of the difference in the parties' valuation is not a valuation based on the evidence."); *Augoshe v. Lehman*, 962 So. 2d 398, 403 (Fla. Dist. Ct. App., 2nd Dist. 2007))("The trial court's valuation must be based on competent evidence and cannot be determined by 'splitting the difference.'")(quoting *Solomon v. Solomon,* 861 So.2d 1281, 1221 (Fla. Dist. Ct. App., 3rd Dist. 2003).

The district court accepted Range's valuation conclusions to the same extent that it accepted the valuation conclusions of Messina and Mercer, and viewed the valuation conclusions of Range as appropriate to rely upon in its analysis and thereby endorsed these conclusions as proper measures of FMV. These conclusions support Donnelly's conclusions of fair market value relied upon in good faith by Henry and Smith with respect to the Transactions as not being in excess of FMV. Even if the district court's findings challenged below regarding the prudence of the process of such valuations are accepted, the conclusion that the Transactions occurred at FMV is necessary in light of the district court's acceptance of the Range expert valuation conclusions. Thus, Defendants have carried their burden of proof regarding FMV

and have established the ERISA statutory exemption from the prohibited transaction rules. Furthermore, even if Defendants imprudently reached an appropriate conclusion of fair market value, the ESOT did not incur any damages from such imprudence and relief is not proper under ERISA § 409, 29 U.S.C. § 1109, because the ESOP did not suffer any loss from acquiring the BAI stock at an appropriate price.

V. The District Court Improperly Included Unpaid Promissory Notes Received by BFLLC in the Measure of Damages in the 2004 and December 2005 Transactions

The district court's inclusion of the unpaid ESOT debt from the 2004 and December 2005 Transactions in the damages calculations is erroneous as a matter of law and should be reviewed *de novo* by this Court. *See Northwest Airlines, Inc.*, *supra* at 91.

A. A Violation of ERISA Section 408 Does Not Compel Inappropriate Relief Under ERISA Section 409

The district court's conclusion that the debt issued to BFLLC was appropriate to include in the acquisition price for purposes of determining the inability of Trustees Smith and Henry to rely in good faith on the statutory exemption under ERISA § 408(e) for purchases not in excess of adequate consideration does not compel the district

court's conclusion that this same debt should be reflected in the calculations of the damages under ERISA § 409, 29 U.S.C. § 1109.

The first determination under ERISA § 408(e) relates to the finding that a prohibited transaction has occurred that is not entitled to the benefit of a statutory exemption. The second determination under ERISA § 409 addresses the measure of damages for the prohibited transaction, providing:

> "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary...."

29 U.S.C. § 1109.

The remedial structure of ERISA Section 409 mandates that the "losses" to the ESOP be defined to identify the measure of recovery permitted. Case law makes clear that losses should not include a windfall to the plan but also that ERISA Section 409 is intended to provide make-whole relief to place the plan in the position it would have been in the absence of the breach. This distinction can be starkly illustrated in the district court's finding of damages of $3,367,763.25 for

the December 2005 Transaction where the aggregate principal and interest that the ESOP paid to BFLLC was $761,823.63. Even accepting the district court's determination that Defendants acted imprudently and failed to establish compliance with the ERISA adequate consideration standard, which Defendants contest, the district court's award creates a massive windfall for the ESOP. In the absence of the breach found by the district court, the "court purchase price" of $7,139,658.09 would have been the permissible price for the December 2005 Transaction. ROA.25392. The payment of $761,823.63 for a sale that the district court deemed fairly priced at $7,139,658.09 does not generate a loss to the ESOP. Indeed, Defendants submit that the ESOT cannot be damaged by a loss that did not incur. The district court recognized this anomaly and was careful to note that this Court has not addressed the issue. ROA.25394. The district court was troubled enough by the economic result–of awarding over $3 million in damages for a transaction that it found properly priced at over $7 million when well less than $1 million had ever been paid by the ESOT–to footnote for this Court the amount of damages it would have awarded if it is reversed in this respect by this Court. It stated: "[i]f the full contract price should

not have been used, then the Court would order damages based on the amount overpaid on principal and interest ($1,394,268.34[9] plus prejudgment interest, explained *infra,* for a total of $2,009.598.07.)" ROA.25393 at n.27. Seldom does a district court express such a lack of confidence in its conclusions; such concern was indeed appropriate as is evidenced by a common sense examination of the economic reality of the payments and the damages awarded in the December 2005 Transaction.

The heart of the error of the district court was to focus solely on the full contract price for the two leveraged Transactions in 2004 and 2005 and not the standard under ERISA § 409 to provide make-whole relief. Doing so resolves all doubts in favor of the ESOP without granting an impermissible windfall under ERISA.

B. A Buyer Cannot Establish Contract Damages for Amounts Not Paid or Payable

The district court's opinion on this issue suggests, without citation to authority, that "[i]f a buyer finances a purchase and pays a fraudulently inflated price, it will be entitled to the amount overpaid whether or not the buyer has repaid the original loan to a third party. The same is

[9] This amount is greater than the BFLLC award because of the clearly erroneous inclusion of the $3,800,000 payment in the 2004 Transaction.

basically true here." ROA.25394. This reasoning does not comport with the Restatement Second of Contracts. Section 347 of the Restatement provides in relevant part:

> "[T]he injured party has a right to damages based on his expectation interest as measured by
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
> (c) any cost or other loss that he has avoided by not having to perform."

Rest.2d. Contracts § 347. "Under the Restatement, a party's reasonable expectations, or expectation interest, is the amount of money necessary to put the harmed party in the same position as if the breaching party had fully performed the contract." *Avante International Technology, Inc. v. Sequoia Voting Systems, Inc.*, 2011 U.S. Dist. LEXIS 22819, 2011 WL 839631 (E.D.Mo. March 7, 2011). Here, the ESOP has not been required to perform its payment obligations with respect to the unpaid debt for the 2004 and December 2005 Transactions. This cost avoided is thus appropriately considered in the ERISA remedies necessary to make the ESOP whole and not to generate a windfall recovery, as it would be in a contracts case.

C. The Inclusion of Unpaid Debt Creates Windfall Damages for the ESOP

The purpose of ERISA is restitutionary, not compensatory. *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063, 508 U.S. 248, 124 L.Ed.2d 161, (1993). To the extent that any recovery is awarded to the ESOP above and beyond the amount required to make it whole, such excess is not authorized by ERISA, as that excess would constitute compensatory, and not restitutionary, damages.

1. The Courts Have Imposed Clear Limits on Any Recovery of Damages That Creates a Windfall to a Plan

The Second Circuit Court of Appeals stated in *Henry v. Champlain Enterprises, Inc.,* 445 F.3d 610, 624 (2d Cir. 2006), that the aim of ERISA is to make plaintiffs whole, but not to give them a windfall. In *Lindemann*, *supra* at 1305-06, this Court clearly stated that "it is hornbook law that only such damages should be awarded as will place the injured party in the situation it would have occupied had the wrong not been committed. The law will not put the injured party in a better position." *See also Montgomery v. Aetna Plywood, Inc.*, 39 F.Supp.2d 915, 939 (N.D. Ill. 1998) ("ERISA plaintiffs are not entitled to receive a double recovery of damages…. Any additional recovery would be a

double recovery windfall."). A "double-recovery windfall [is a result] abhorred by ERISA." *Harms v. Cavenham Forest Ind., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993). "Clearly, the goals of ERISA to protect the rights of plan beneficiaries were not intended to extend to benefits that participants never expected." *Young v. Verizon's Bell Atl. Cash Balance Plan*, 667 F.Supp.2d 850, 899 (N.D. Ill. 2009). In this case, it requires a determination that the unpaid debt should be disregarded in the damages awarded under ERISA Section 409 if such debt does not impact the relief needed to place the ESOP in a position as if the breach had not occurred.

2. The ERISA Case Law Addressing This Issue is Distinguishable

The district court cited the statement in the Western District of Wisconsin's *Chesemore* opinion that "every court to consider it has rejected the argument that ESOP acquisition loans should be discounted below face value for purposes of calculating damages because the debt is unlikely to be paid." ROA.25394 (citing *Chesemore v. Alliance,* 948 F.Supp.2d 928, 943 (W.D. Wis. 2012)). In the limited cases that have addressed this issue, the courts declined to disregard acquisition debt where a determination of the relief needed to make the

ESOP whole had not been considered. In *Neil v. Zell*, 767 F.Supp.2d 933 (N.D. Ill. 2011) the $250,000,000 in acquisition debt incurred by the Tribune ESOP was not disregarded in the context of a summary judgment motion on the scope of damages prior to a trial. The court declined to disregard the acquisition debt as creating a windfall, stating:

> "The maximum recovery would simply put employees in the place they would have been in had the $250 million been prudently, properly, and legally invested. Plaintiffs do not specifically seek punitive, compensatory, or extra-contractual damages under § 1109, ERISA's enforcement provision. They seek only what they would have received from the plan had Defendant not been in breach.... Although the amount of loss has not yet been determined, properly calculated it (and any other remedial relief) would result in a 'make-whole' recovery, not a windfall recovery."

Id. at 949.

This same reasoning applied in *Henry v. U.S. Trust Co. of Cal, N.A.,* 569 F.3d 96, 100 n.4 (2d Cir. 2009), where the court found that the debt might be relevant in the further district court proceedings in order to make the ESOP whole. Finally, in *Reich v. Valley Nat'l Bank of Arizona*, 837 F.Supp. 1259, 1287 (S.D.N.Y. 1993), the court's rejection of the suggestion that the ESOP acquisition loan be disregarded in computing the loss to the ESOP was simply stating that such reasoning

could not override the mandate that ERISA provides relief for the loss occasioned by virtue of a fiduciary breach. This was recognized by the District Court for the District of North Dakota in the context of a summary judgment ruling, where it stated that in any subsequent trial "in shaping an award the Court must be mindful of the competing concerns—on the one hand, the 'windfall' concerns which *Tharaldson* appears to be expressing, and, on the other hand, recognition that the ESOP investment was real and represented an investment that may have resulted in foregone opportunities and/or loss to participants if more than 'adequate consideration' was paid." *Hans v. Tharaldson*, 2011 U.S. Dist. LEXIS 153504 (D.N.Dak. Oct. 31, 2011).

Defendants request this Court to consider the unpaid debt in the 2004 and December 2005 Transactions in the context of the relief that will make the ESOP whole and not to create an impermissible windfall to the ESOP. Because of the substantial amounts of the unpaid debt and the material amounts that the district court found were appropriate payments for the stock acquisitions in these two Transactions, the inclusion of any amounts that were not paid and were within the amount the district court viewed as appropriate is not a loss

recovery but a windfall. The conclusion of the district court should be reversed in this respect, and the alternative damages analysis set forth by the district court as evidence of the shaky grounds on which its damages conclusion rested should be adopted by this Court.[10]

VI. The District Court Erred in Treating the $3,800,000 Payment in the 2004 ESOT Transaction as Overpayment in the Measure of Damages Against Defendants

The district court assessed liability against Defendants by applying a "court purchase price" derived from the averaging of the Range, Mercer and Messina valuations for each transaction. The "court purchase price" was deemed to be $5,800,000.00 for the 2004 Transaction, $963,157.67 for the September 2005 Transaction and $7,139,658.09 for the December 2005 Transaction. ROA.25392. These amounts were then subtracted from the purchase prices specified in the stock purchase and loan documents for the Transactions to reach the damages award. In the case of the 2004 Transaction, this award was derived from the transaction price of $6,700,000.00 (cash in the amount of $730,000 and

[10] The district court's damages also should be decreased for the inappropriate inclusion of the $3,800,000 Internal Loan payment as creating a loss for the ESOP, as well as for the adjustments necessitated by the improper debt assumptions of Messina and Mercer, even if this Court accepts the district court's willingness to accept the Messina and Mercer valuations and averaging approach.

a promissory note in the amount of $5,970,000.00) less the "court purchase price" of $5,800,000.00 and resulted in a damages award of $900,000.00. ROA.25392.

The 2004 Transaction promissory note was restructured in December 2005 as two separate notes, described by the district court as "mirror loans." ROA.25317. This restructure meant that the promissory note from the ESOT to BFLLC was surrendered for a promissory note from the ESOT to BAI (the "Internal Loan") and a note from BAI to BFLLC (the "External Loan"). These mirror loans did not in fact operate as mirror images but allowed the Internal Loan and the External Loan to be paid at different rates and times. Significantly, the Internal Loan could be paid by the ESOT to BAI with contributions received by the ESOT from BAI. A contribution from BAI to the ESOT followed by an Internal Loan repayment by the ESOT to BAI equal to the contribution did not alter the cash position of BAI. By contrast, any payments on the External Loan from BAI to BFLLC depleted the assets of BAI and benefited BFLLC.

The district court reasoned that the $3,800,000 payment on the Internal Loan that did not benefit BFLLC should be nevertheless

included in the damages assessed against Defendants and that it represented a loss to the ESOP, [ROA.25384], reasoning that Bruister simply failed to claim the $3,800,000 that BFLLC was entitled to under its mirror loan. The district court's assumption that BFLLC had the right under the External Loan to demand a "mirror" or identical payment to the $3,800,000 payment on the Internal Loan is flatly in error. ROA.25317. The terms of the External Loan did not entitle it to such a payment. J-125; A-206. This faulty assumption by the trial court, together with the erroneous assumption that the Pledged Shares were held by BAI and not the ESOP, caused the district court to view a release of shares from suspense as creating a loss to the ESOP, and is at the core of the district court's clearly erroneous analysis to include the $3,800,000 in the damages calculation. ROA.25383-25384.

The share release occurred by virtue of the Internal Loan payment; the impact of the Internal Loan payment was to reduce the Internal Loan and to generate tax deductions for BAI. The External Loan did not allow Bruister to demand for BFLLC a comparable payment and the economics of the Internal Loan payment benefited the ESOP by

allowing BAI to reduce its tax obligation and thereby favorably impact the value of BAI stock as held by the ESOP.

The fallacy of the district court's analysis is illustrated by a hypothetical. Assume an ESOP is created for a company that holds only a single asset, a $5,000,000 certificate of deposit. Assume the ESOP sponsor had a potential tax liability of $1,000,000 that was eligible to be reduced by deductible ESOP contributions. Assume further that a leveraged ESOP sale occurs with a party in interest at a price of $6,000,000, with the seller receiving an external loan note of $6,000,000 from the sponsor and the ESOP issuing an internal loan note to the sponsor of $6,000,000 in violation of ERISA's prohibited transaction rules because the sales price exceeded adequate consideration by $2,000,000 and that the value of the stock acquired was $4,000,000; that is, the value of the $5,000,000 certificate of deposit less the $1,000,000 tax liability of the sponsor.

If the sole payment that occurs with respect to this nonexempt ERISA prohibited transaction is a tax-deductible contribution to the ESOP of $2,000,000 structured in a manner where the ESOP trustees accept the $2,000,000 to pay the internal loan to the ESOP sponsor, the

$2,000,000 is returned to the ESOP sponsor which receives the deductions to legitimately eliminate its $1,000,000 tax liability and shares are released from the ESOP suspense account. No funds are paid by the ESOP sponsor to the Seller and the ESOP then holds stock worth $5,000,000 (the value of the $5,000,000 certificate of deposit no longer reduced by the tax liability). The trustees' actions increased the value of the asset held by the ESOP and no profit or other benefit was extended to the seller. The share release does not impact the share ownership–it simply represents an internal allocation of the existing shares owned by the ESOP. The ESOP would still have its ERISA adequate consideration claim to assert as appropriate. In the absence of any payments to the Seller, however, the ESOP is not harmed by the payment on the Internal Loan. To the contrary, the ESOP has increased the value of the asset it holds because the ESOP Sponsor has legitimately reduced its $1,000,000 tax liability through a $2,000,000 contribution to the ESOP.

If the district court's analysis that the Transactions occurred at prices in excess of adequate consideration is correct, which Defendants contest, this hypothetical demonstrates that the action undertaken by

Trustees Smith and Henry to accept the $3,800,000 contribution from BAI and to use the $3,800,000 contribution to repay only the Internal Loan obligation to BAI operated to generate $3,800,000 in legitimate tax deductions for BAI and did not harm the ESOT in any manner. BAI reduced its tax liability with the additional $3,800,000 in deductions that it claimed as a result of this action. This provided further cash for the BAI business operations at a critical time in the aftermath of the Hurricane Katrina. Because BAI ran an operating business, its valuation is not as simplistic as holding a $5,000,000 certificate of deposit; however, it is indisputable that a business that is able to legitimately reduce its tax obligations and thereby conserve its cash for expenses other than taxes is financially improved as a result of such action and that financial improvements are able to favorably impact value. This is especially true in the case of BAI, because the Internal Revenue Service permitted it to elect S Corporation status in 2006 and at that time no longer incurred federal income tax liability as a 100% ESOP-owned S Corporation.[11]

[11] The ESOT funding the ESOP was exempt from federal income tax under Code § 501(a) by virtue of the ESOP's qualification under Code § 401(a). As an S corporation shareholder, any income it received from BAI was thus exempt.

A careful analysis of the $3,800,000 Internal Loan payment documents no harm to the ESOP and indeed actual benefits to the ESOP related to BAI's financial position. The district court's characterization of the release of pledged shares as harmful to the ESOP is inappropriate; the release of shares simply effects an internal accounting designation relating to shares owned by the ESOP both before and after the designation–it is not a purchase or transfer of shares. Treas. Reg. § 54.4975-7(b)(8). As a result, the inclusion of the $3,800,000 as an amount generating damages to the ESOP assessed against the Trustees is reversible error, as there is no loss related to the $3,800,000 Internal Loan payment that resulted from the breach found by the district court in the 2004 Transaction. This necessitates a reversal of the district court's $900,000 damages award for the 2004 Transaction because in the absence of the $3,800,000, the court purchase price of $5,800,000 well exceeds the amount paid by the ESOP. ROA.25392.

VII. The District Court Erred in Accepting the Messina Valuation Given That It Failed to Consider the BAI Actual Expenses and Imputed Hypothetical Expense Amounts to Value BAI

Secretary's valuation agent Messina used hypothetical information regarding BAI's expenses. ROA.28515:8-14. The district court's reliance on these reports in determining damages was clearly an abuse of discretion and merits reversal of findings that rely upon Messina. The Messina reports set forth the BAI revenues as reported by DirecTV, as did the Mercer and Range and Donnelly reports. Unlike the Mercer and Range and Donnelly reports, however, Messina did not use the BAI expenses and substituted hypothetical expense to revenue ratios derived from companies that Messina viewed as comparable to BAI. ROA.28327. Thus, Messina did not in fact attempt to value BAI based on the financial information applicable to it but to forecast a value from general market data. *Id.* The district court acknowledged this approach. ROA.25391. Range testified that the use of such hypothetical expense

information was inappropriate [ROA.29942][12] and simply was not consistent with appraisal practices:

> "It's premised–all the valuation–virtually all the valuation indications are premised upon rejecting the expense structure and the profitability of Bruister and replacing the profitability and expense structure of Bruister with some industry statistics, which I've never seen somebody do in an appraisal.... I would say it looks more like, rather than an appraisal, what an investor that wants to buy something cheap, how they would approach something, rather than saying, Here's an appraisal. Because it's just unheard of to say, I reject outright all the financial statements except for the revenue of the company that's being valued."

ROA 14-60811.29957-29958. A FMV determination must be based on the financial experience of the company being valued in order to satisfy the standard of determining what a willing buyer would pay a willing seller. No buyer would agree to set a price on assumed expenses of a seller without considering the actual expenses of a seller. While Messina's approach may address the Wall Street question of what a company's expense level should be when an investment banker like Messina tries to buy low and sell high, it fails to reflect what the company expense level is in fact. Thus, the use of the Messina valuation

[12] "A [Range]: We didn't use RMA. We used the actual financials. We didn't try to replace Bruister's profitability with somebody else's profitability. Q....[H]ow did Mr. Messina handle that subject matter? A. Messina didn't use any of the actual profitability of Bruister. He only did his view of what the appropriate level of profitability would be."

was clearly erroneous and the district court's findings in reliance on his opinion are reversible error.

VIII. The District Court Erred in Accepting the Conclusions of the Messina and Mercer Valuations That Subtracted Erroneous Levels of BAI Debt From the BAI Equity Value

The district court correctly identified at trial that the conflicting conclusions on valuation agreed on the approach that the FMV of BAI started with a determination of equity value and was then reduced by the debt of BAI. This was summarized in an exchange the district court had with Range on the witness stand:

> "THE COURT: Let me ask a question that maybe can get through this a little bit.... Mr. Messina had a demonstrative aid. He referred to different buckets... And I think what he said is consistent with what you've just said; and that is, if his debt is overstated, then it would have a corresponding effect on his bottom-line fair market value. So, in other words, for September 2005, he said, if I agree with you and disagree with him, that the fair market value he came up with should be increased by $3,791,000. Is that correct?
> THE WITNESS: That's correct.
> THE COURT: So in terms of going through each of his methods of valuation, at the end of the day his bottom-line number is going to be affected in equal proportion to the debt calculation?
> THE WITNESS: That's correct.
> THE COURT: .... I understand.... I think Mr. Range and Mr. Messina agree at least on this one point; and that is that whoever's debt number is correct, you either add it or subtract it from the other person's bottom-line fair market value."

ROA.29980-ROA.29981. Notwithstanding the district court's understanding, it made no findings of fact regarding the appropriate debt of BAI at the time of the Transactions. The debt specified in Range's reports was $2,129,710 as of the 2004 Transaction, $5,554,495 as of the September 2005 Transaction and $8,688,829 as of the December 2005 Transaction. ROA.29974 (referencing A-184 (J-51)]. By contrast, the debt specified in Messina's reports was $2,293,993 as of the 2004 Transaction, $9,345,277 as of the September 2005 Transaction and $12,850,362 as of the December 2005. ROA.28290 (referencing A-186 (P-127) and the debt specified in Mercer's reports was $2,293,993 as of the 2004 Transaction, $2,159,216 as of the September 2005 Transaction and $9,050,363 as of the December 2005 Transaction ROA.27884 (referencing A-188 (P-49); A-190 (P-50); A-192 (P-51), respectively). The impact of the materially different debt assumptions resulted in a significant portion of the different valuation conclusions. For example, if Range's debt determination of $5,554,495 for the September 2005 Transaction was correct and Messina's debt assumption of $9,345,277 for the same September 2005 Transaction was in error, the Messina valuation would increase because of the debt

overstatement of $3,791,782 ($9,345,277 minus $5,554,495, the same amount with rounding of $3,791,000 mentioned by the district court in its questioning above). E.g., ROA.28486-ROA.28491.

Notwithstanding the failure of the district court to address this issue with a specific finding of fact, the trial record supports that the outstanding debt of BAI was entirely consistent with Range's debt determinations. Range was able to identify BAI's debt on December 21, 2004, of $2,129,710 as composed of $738,327 from the 2002 promissory note [D-184 at 5 [A197]] and $1,391,383 from the 2003 ESOT Note [D-184 at 2 [A-194]]. Messina and Mercer, however, had no explanation for their debt assumption of $2,293,993 other than this was the debt used in the Donnelly valuations that they criticized as unreliable. ROA.28425; ROA.28458-28469; and ROA.29046[13] (Messina); ROA.27768:16-23[14] (Mercer).

[13] "His number is different. And then the officer note we're different on, and I don't - I didn't have the information that he had. So that's the difference."

[14] "As we'll see shortly, in September of 2005 based upon July financial statements there was about $2.2 million of debt on the balance sheet of Bruister and Associates. We move forward to November 30th, 2005, for the December appraisal, and there's more than $9 million of debt. We don't know where it came from. We don't know how it got there. It's just there. There's no disagreement among the appraisers as to the fact that it's there, but we don't know how it got there."

Range was able to identify BAI's debt on September 13, 2005, of $5,584,495 as composed of $603,550 from the 2002 promissory note [D-184 at 5 [A-197]] and $4,950,945 from the 2004 ESOT Note [D-184 at 3 [A-195]]. Messina again relied on the Donnelly debt assumption in his $9,345,277 and could not state what this debt related to and Mercer appeared to overlook the 2004 Transaction altogether in using a debt assumption of $2,159,216. ROA.28425; ROA.28458-28469; and ROA.29046 (Messina); ROA.27768:16-23 (Mercer).

Range was able to identify BAI's debt on December 13, 2005, of $8,688,629 as composed of $557,270 from the 2002 promissory note [D-184 at 5 [A-197]] and $4,831,359 from the 2004 ESOT Note [D-184 at 3 [A-195]] and $3,300,000 from a working capital loan from Bruister. ROA.28437; J-51; D-186; ROA.29045-ROA.29046 (Messina). Messina again relied on the Donnelly debt assumption in his $12,850,363 and again could not state what this debt related to and Mercer added an inexplicable $7,000,000 to his assumption of three months earlier in using a debt assumption of $9,050,363. ROA.28425; ROA.28458-28469; and ROA.29046 (Messina); ROA.27768:16-23 (Mercer).

The debt assumptions were materially impacted by the ESOP debt at the time of the Transactions and the ESOP debt was presented in a summary of the payments made by Trustee Smith that was verified through the bank records of the ESOP presented at trial in the testimony of both Smith and Henry. D-184 [A-193]; D-221; ROA.27111-ROA.27119 (Smith); ROA.28898-ROA.28902 (Henry).[15]

There was no evidence that the Range debt assumptions were in error and there was substantial evidence that the Messina debt assumptions were unsupportable. Even Messina was clear to express caution about this assumption and his concern that the debt he used was not reliable. *E.g.*, ROA.29046. Furthermore, this is not a topic where multiple answers can be correct; we return to the binary example of the cars speeding through the intersection. BAI cannot conceivably be found to owe debt in the amount of $5,554,495 on September 13, 2005, as well as to owe debt in the amount of $9,345,277 on September 13, 2005. The clear evidence supports Range's debt determinations and this reliability also shows that Range's FMV establishes with clear evidence

[15] It was clear that the Secretary never provided the correct debt information to Messina. ROA.28458-ROA.28460. Thus, his debt assumptions were entirely unsupported. The Mercer debt assumption for September 2005 of $2,159,216 wholly disregarded the 2004 ESOT debt and was facially unreliable.

that the Transactions met the FMV components of the ERISA adequate consideration standard.

The clear weight of evidence requires that the Messina and Mercer valuations to be adjusted to be consistent with the debt determinations for BAI that were proven at trial and used in the Range expert valuation reports. The failure of the district court to make a finding of fact on the appropriate debt assumptions is clear error and grounds for reversal by this Court.

IX. The District Court Erred in Assessing Prejudgment Interest Against Bruister for Amounts that He Did Not Have the Benefit of Receiving and Violated Fundamental Standards of Fairness

The review of the district court's determination to grant prejudgment interest is conducted under an abuse of discretion standard by this Court. *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 985 (5th Cir. 1991). The district court here appropriately noted the standard of fairness guiding its exercise of discretion to consider an award of prejudgment interest but failed to apply this standard to the facts of this case with its conclusory finding that "[p]rejudgment interest is appropriate in this case to fully compensate the ESOP Participants." ROA.25397. Furthermore, while the district court

declined to apply prejudgment interest against Smith and Henry "because neither received any of the funds" [*id.*], it failed to consider that neither Bruister nor BFLLC received the vast majority of the funds with respect to which prejudgment interest was assessed against Bruister. Such an approach was arbitrary and capricious and an abuse of the district court's discretion. Prejudgment interest is denied when its exaction would be inequitable. *Coxson v. Commonwealth Mortgage Co. of Am., L.P.*, 43 F.3d 189, 192 (5th Cir. 1995).

The Fifth Circuit has found that prejudgment interest "[i]s not awarded as a penalty but as compensation for the use of funds." *Lindemann*, *supra* at 1307 (quoting *Socony Mobil Oil Co. v. Texas Coastal and International, Inc.* 559 F.3d 1008,1014 (5th Cir. 1977)). It is undisputed that much of the damages awarded were never received by Bruister or BFLLC; for example, $3,367,763.25 in damages were awarded with respect to the December 2005 Transaction [ROA.25397] when BFLLC only received a total payment (including interest) of $761,823.63 ROA.25318. If BFLLC received less than one quarter of the amount assessed as damages for this December 2005 Transaction, and approximately one-tenth of the $7,139,658.09 that the district court

deemed as the appropriate "court purchase price" for the December 2005 Transaction [ROA.25397], there is no fairness or equity in the prejudgment interest award and it must be overturned or limited to funds that BFLLC actually received. This Court's citation in *Lindemann*, *supra* at 1307, of *Pension Benefit Guaranty Corporation v. Greene*, 570 F. Supp. 1483, 1503 (W.D.Pa. 1983), makes clear that both the extent to which a defendant has been unjustly enriched and the countervailing equities against a surcharge to a defendant are integral inquiries into the fairness determination regarding prejudgment interest. The district court defined the unjust enrichment of BFLLC as the amount of $885,065.25. ROA.25397. This is the maximum amount that can be considered as appropriate for assessing prejudgment interest against Bruister because Bruister's sole recovery was limited to the payments to BFLLC. Furthermore, the countervailing equities of the failure of BFLLC to receive millions of dollars in the 2004 and December 2005 Transactions that the district court deemed fair as the appropriate "court purchase price" [ROA.25392], documents the absolute lack of fairness of applying any prejudgment interest against Bruister (or BFLLC).

Finally, the compensatory recovery of the ESOP needs to address the specific facts of this case. In *Lindemann*, this Court looked to the Pension Plan and the absence of "proof of the rate of income it received on its investments." *Lindemann*, *supra* at 1307. Here, it is undisputed that the ESOP ultimately lost all value in the BAI stock when BAI "ceased to exist in August 2008." ROA.25336. No compensatory earnings are appropriate relating to an investment that had no earnings and the district court failed to weigh this consideration in its analysis of fairness. The failure of the district court to address these issues underscores the arbitrary and capricious nature of the prejudgment interest award that should be reversed by this court.

X. The Issuance of Judgments with Identical Damages in this Case and the *Rader* Case without provision for Offset is Reversible Error

The district court consolidated this case for trial with the *Rader* Case. ROA.14-60816.31690. The damages award against Bruister and Smith in this case was $4,504,605.30 plus $1,988,008.67 in prejudgment interest against Bruister. ROA.25392. In the related *Rader* case, the Final Judgment issued identical damages against Bruister and Smith of $4,504,605.30 and $1,988,008.67 in prejudgment interest against

Bruister. The failure of the district court to specify in its separate judgments in this case and in the *Rader* case that the recoveries in this case operate to diminish and satisfy the *Rader* judgment and that the recoveries in the *Rader* judgment operate to diminish and satisfy that the judgment in this case was reversible error and creates a potential unintended windfall that Bruister and Smith have no protection to address absence a reversal by this court to address the need to correct this duplicate remedy. The district court could have issued a single judgment as a result of the consolidated action but did not do so. *See, e.g., Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.,* 746 F. 2d 278, 287-88 (5th Cir. 1984). The error by the district court was not the issuance of two judgments but the issuance of two judgments providing duplicate recovery, with no provision ensuring that recovery authorized in the Order is collected only once such as would have occurred with a single judgment with respect to Bruister and Smith, parties to both cases. A "double-recovery windfall [is a result] abhorred by ERISA." *Harms v. Cavenham Forest Ind., Inc.*, 984 F.2d 686, 693 (5th Cir. 1993) and requires the reversal of the Judgment.

XI. In the Absence of Substantial Recovery, the ERISA Fiduciary Bar Against Bruister and Smith is an Abuse of Discretion by the District Court

The remedies order issued by the district court barring Bruister and Smith from serving as ERISA fiduciaries or service providers is reviewed by this Court under an abuse of discretion standard. The limited degree of overpayments found by the district court in the 2004 transaction and September 2005 Transaction–suggests that this is a case in which the ERISA fiduciary shortfalls are insignificant in magnitude. The district court's conclusions regarding the December 2005 Transaction are fraught with improper substituted judgment with respect to Hurricane Katrina and the DirecTV policies, as is the improbable conclusion of multi-million dollar liability to recover losses where the ESOP payments were well under a million dollars for a Transaction that the district court viewed as properly priced at over seven million dollars. The equities in this case fail to merit the injunctive relief ordered against Smith and Bruister and should be reversed by this Court.

CONCLUSION

The district court's judgment should be reversed in light of the numerous errors of law and its abuse of discretion regarding clearly erroneous factual findings. This Court should conclude that Defendants adequately complied with ERISA. Irrespective of this Court's resolution of these errors, this Court should reject the remedies awarded by the district court as unsupportable and impose solely such damages permitted by ERISA to make the ESOP whole. This should result in no liability to Defendants or a markedly reduced liability and no liability for prejudgment interest.

Dated: June 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin E. Largent

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,722 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii). The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 2011 in 14 and 12 point Century font.

Dated: June 26, 2015

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