**Docket No. 14-60816**

*In the*

# United States Court of Appeals

*For the*

# Fifth Circuit

VINCENT SEALY,

*Plaintiff-Appellee,*

v.

HERBERT C. BRUISTER, AMY O. SMITH and
BRUISTER FAMILY LIMITED LIABILITY COMPANY,

*Defendants-Appellants.*

*Appeal from a Decision of the United States District Court for the Southern District of Mississippi (Northern (Jackson)), No. 3:13-CV-1081 · Honorable Daniel P. Jordan, III*

# BRIEF OF APPELLANTS

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# CERTIFICATE OF INTERESTED PERSONS OF APPELLANTS HERBERT C. BRUISTER, AMY O. SMITH AND BRUISTER FAMILY LIMITED LIABILITY COMPANY

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 | Present or Former Counsel |
|---|---|
| • Herbert C. Bruister<br>• Amy O. Smith<br>• Bruister Family Limited Liability Company, Delaware limited liability company ("BFLLC")<br>• Jonda C. Henry (Defendant and former Appellant-Cross-Appellee)<br>• J. Michael Bruce (former Defendant below in related action here on appeal, No. 14-60811) | • David R. Johanson, Esq. Douglas A. Rubel, Esq.<br>• Hawkins, Parnell, Thackston & Young, LLP<br>• C. Maison Heidelberg, Esq.<br>• Heidelberg Harmon, PLLC<br>• Christopher J. Rillo, Esq.<br>• Susan J. Luken, Esq.<br>• Nicole S. Magaline, Esq.<br>• Schiff Hardin, LLP<br>• Jason M. Stein, Esq.<br>• Rene E. Thorne, Esq.<br>• Jackson Lewis, P.C.<br>• William B. Wahlheim, Esq.<br>• Ollie A. Cleveland, III, Esq.<br>• John David Collins, Esq.<br>• Peter S. Fruin, Esq. |

| | |
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| Plaintiff - Appellee | Present or Former Counsel |
| • Joel D. Rader (Plaintiff below)<br>• Vincent Sealy | • Charles P. Yezbak, Esq.<br>• The Yezbak Law Offices<br>• Gary D. Greenwald, Esq.<br>• Gary A. Gotto, Esq.<br>• Juli E. Ferris, Esq.<br>• Michael D. Woerner, Esq.<br>• Keller Rohrback PLLC<br>• Louis H. Watson, PLLC<br>• Robert Nicholas Norris, Esq.<br>• Watson & Norris, PLLC |
| Plaintiffs - Appellee and Cross-Appellant in Consolidated District Court Action | Present or Former Counsel |
| Thomas E. Perez, Secretary of the United States Department of Labor in related appeal in this Court, No. 14-60811 | • Timothy Hauser, Esq.<br>• Dane L. Steffenson, Esq.<br>• Leslie C. Perlman, Esq.<br>• Michael Schloss, Esq.<br>• Angela Faye Donaldson, Esq.<br>• Anna O. Crowell, Esq.<br>• Peter B. Dolan, Esq.<br>• Stephen A. Silverman, Esq.<br>• Thomas Tso, Esq.<br>• Pshon Barrett, Asst. U.S. Attorney |

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

## STATEMENT REGARDING ORAL ARGUMENT

Herbert C. Bruister ("Bruister"), Amy O. Smith ("Smith") and Bruister Family Limited Liability Company ("BFLLC") (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, Smith, a resident of the Florida, BFLLC, a Delaware limited liability company and Vincent Sealy.

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.48270. 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.48271. 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 made unsupported determinations of liability against BFLLC;

2. Whether the district court's determinations of liability against BFLLC improperly included interest payments;

3. Whether the district court erred in holding Sealy could seek awards for all participant accounts in the Bruister & Associates Employee Stock Ownership Plan ("ESOP");

4. 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");

5. 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");

6. Whether the district court erred in averaging the conclusions of the conflicting valuation reports 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;

7. 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;

8. 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;

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

10. Whether the district court erred in accepting the conclusions of the valuations of Z. Christopher Mercer ("Mercer") and Messina regarding BAI debt subtracted from the BAI equity value that had no factual support in the record;

11. Whether the district court's issuance of judgments against Bruister and Smith in this case and in the case consolidated for trial with it, *Perez v. Bruister, et al.*, 3:13-cv-1001-DPJ-FKB (S.D. Miss.) the ("*Perez* Case"), without provisions for offset of recovery is reversible error; and

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

## STATEMENT OF THE CASE

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

[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].

debt. [*Donovan v. Cunningham*, 716 F.2d 1455, 1459 (5th Cir. 1983).]"

ROA.25315-ROA.25216.

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 [e.g., ROA.26577], which he and his wife controlled, each being fifty percent (50%) members of BFLLC. [*e.g.*, 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 named trustees. Smith worked for BAI [ROA.26841] and Henry was BAI's outside CPA [ROA.28645]. Bruister was BAI's President. ROA.27264. Although a named trustee, as a representative of selling shareholder BFLLC, Bruister abstained from the closings of the Transactions and from any decision making or influencing with respect to the Transactions. BFLLC, a named Defendant, was a party in interest under ERISA [ROA.25381].

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.

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 a mirror loan with no cash [J-36]. The following table, set forth in the lower court's Order [ROA.25315], summarizes the amounts of principal and interest the ESOT paid in the Transactions:

| 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-ROA.25318. The "mirror loan" bears focus. On December 13, 2005, BAI, BFLLC, and the ESOT refinanced the loan outstanding from the December 2004 ESOT Transaction (the "2004 ESOT Loan") as two mirror loans: (1) an extension of credit from BFLLC to BAI (the "External Loan"), and (2) an extension of credit from BAI to the ESOT (the "Internal Loan") [J-36]. Other than the identity of the creditors, the terms of the 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)]. Donnelly utilized the services of Business Equity Appraisal Reports, Inc. ("BEAR"), to assist in preparing independent appraisal and valuation reports and FMV and fairness opinion letters.[2] 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.26847; ROA.26905.

On January 27, 2010, the Joel Rader and Vincent Sealy ("Rader Plaintiffs") filed suit in the U.S. District Court for the Eastern District of California, raising claims for breach of fiduciary duty under ERISA §§ 404(a)(1)(A), (B), and (D); for failure to monitor under ERISA §§

[2] ROA.25311 at C-21-32 (Donnelly Deposition Transcripts); C-35-36 (Hans Schroeder Deposition Transcripts); C-37-42 (White Deposition Transcripts). Schroeder owned and operated BEAR; White worked for BEAR. Both worked with Donnelly.

404(a)(1)(A)-(B); and for engaging in prohibited transactions under ERISA §§ 406(a)(1)(A) and 406(b)(1) and (2). ROA.31690. The Secretary of the United States Department of Labor filed the *Perez* Case on April 29, 2010.This case and the *Perez* Case were consolidated for trial on December 31, 2013. ROA.14-60811.11887; ROA.48220. The *Rader* Plaintiffs purported to seek relief on behalf of the ESOP as a whole. ROA.31690. The district court tried the matter without a jury from August 4 through August 28, 2014. ROA.26424-ROA.30626 (Trial Transcripts). Over fifty deposition transcripts were submitted for the record. ROA.25319; 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, the Secretary and the *Rader* Plaintiffs. The Secretary's valuation witness (Messina)

and the *Rader* Plaintiffs' valuation witness (Mercer), each provided an exact proposed "FMV' for each Transaction. Defendants' valuation witness (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. The district court also found BFLLC jointly and severally liable with Bruister and Smith for $885,065.25 and jointly and severally liable with Bruister for $390,604.12 in prejudgment interest. ROA.48270. In the related *Perez* Case, the Final Judgment issued damages against Bruister and Smith jointly and severally in the same amount of $4,504,605.30. Bruister was also found 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.

## SUMMARY OF THE ARGUMENT

The district court erred in the Final Judgment by assessing equitable relief against BFLLC based on a percentage of every dollar received by BFLLC as an overpayment without regard to the actual amount of funds received by BFLLC. Furthermore, a substantial portion of the funds received by BFLLC in the 2004 and December 2005 Transactions represented interest appropriately paid to BFLLC for which no equitable relief is appropriate. By permitting the recovery by Plaintiffs on behalf of the ESOP to apply to the accounts of all ESOP participants, notwithstanding the failure of Rader and Sealy to take any representative action with respect to the other ESOP participants, the district court erred as a matter of law. 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 these

arguments, the damages awarded by the trial court are unsupportable and 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 at trial. The district court awarded duplicate recoveries in this case and the *Perez* Case and abused its discretion in awarding prejudgment interest against Bruister and BFLLC.

# 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 is reviewed under an abuse of discretion standard. *Whitfield v. Lindemann*, 853 F.2d 1298, 1305-06 (5th Cir. 1988) ("*Lindemann*").

## II. The District Court Made Unsupported Determinations of Liability Against BFLLC

The district court determined that the "amount for which BFLLC shares liability is $885,065.25. This figure represents the overpayment on amounts actually received by BFLLC and does not include the overpayment on the $3.8 million that the ESOP paid to BAI but BAI never paid to BFLLC." ROA.25397-ROA.25398. The district court,

however, failed to explain the evidence supporting this finding of fact and leaves this calculation to be deciphered without any explanatory references to the record. An examination of two charts used by the district court that are separated in its Order by a full 75 pages is needed to attempt to interpret the district court's reasoning for this finding of fact. The trial court appears to be applying the percentage overpayments in the column labeled "Difference (overpayment)/percent overpaid" on page 78 of the Order [ROA.25392] to the column labeled Amount of Principal/Interest ESOT Paid from Employer Contributions beginning on page 3 of the Order [ROA.25317] as follows:

| ESOT Transaction | Total Payments [ROA.25392] | Adjustment [ROA.25317 -ROA.25318 | Percentage Overpayment [ROA.25317-ROA.25318] | Apparent Portion of the $885,065.25 Attributed to Transaction [ROA.25397-ROA.25398] |
|---|---|---|---|---|
| 2004 | $6,815,876.95 | $3.8 M | 13.4% | $404,127.51 |
| Sept. 2005 | $1,199,999.72 | N/A | 19.7% | $236,399.95 |
| Dec. 2005 | $761,823.63 | N/A | 32.1% | $244,545.39 |

This methodology, however, is flawed. By applying an overpayment percentage to each dollar that BFLLC received and ignoring that BFLLC did not receive payment on a substantial portion of the debt issued in the 2004 Transaction and the vast majority of the debt issued in the December 2005 Transaction the district court created a windfall for the ESOT and ignored the economic realities of BFLLC's receipt of limited funds in the 2004 and December 2005 Transactions. The district court agreed that $5,800,000.00 was an appropriate value for the 2004 Transaction [ROA.25392] and that the payments BFLLC received totaled $3,015,876.95 after the exclusion of the $3,800,000.00 from the $6,815,876.95 paid in the 2004 Transaction [ROA.25317]. Yet the court deemed a payment of $404,127.51 to be appropriate equitable relief against BFLLC even though BFLLC received nearly $2.8 million less in the 2004 Transaction than the amount that the trial court considered appropriate (*i.e.*, it received $3,015,876.95 when $5,800,000.00 was endorsed as the "court purchase price"). ROA.25317. The December 2005 Transaction is even more striking evidence of the inequities of the district court's damages order, where it ordered that 32.1% of the $761,823.63 paid or $244,545.39 was appropriate equitable relief when

BFLLC received over $6 million less than the $7,139,658.09 that the trial court deemed appropriate. ROA.25392. The trial court had no precedent or evidence in the trial court record for deeming a percent of each dollar received by BFLLC as an overpayment when the amount BFLLC actually received was less than the appropriate price of the Transaction, as determined by the district court's "court purchase price." ROA.25317. Equitable relief must be granted for the purpose of making the ESOP whole and should not provide a windfall to the ESOP. *Lindemann*, *supra* at 1305-06. 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).

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 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). Deeming a portion of each dollar paid to BFLLC in the 2004 and December 2005 Transactions to be disgorged as equitable relief is necessarily flawed where the aggregate dollars paid to BFLLC include only permissible levels of payment approved by the district court for the Transactions under ERISA in the "court purchase price." ROA.25317. The equitable relief with respect to the September 2005 Transaction will not be altered by this argument, but the awards of equitable relief with respect to the 2004 and December 2005 Transactions are eliminated. This Court should accordingly reduce the equitable relief issued against BFLLC to $236,399.95 based on this argument alone.

## III. The Inclusion of Interest in the Overpayment Calculations is in Error

Even if this Court rejects Defendants' arguments that the BFLLC liability was incorrectly determined by using a percentage of each dollar paid by the ESOT as an overpayment, the inclusion of the interest payments in these computations is reversible error. Defendants submit that this is an error of law, to be reviewed under a *de novo* standard. *In re Liljeberg Enters., supra* at 447.

The district court determined the amount of the overpayments for the 2004 and December 2005 Transactions by including all of the interest payments made by the ESOT or BAI to BFLLC in the payments that BFLLC was ordered to restore to the ESOT as equitable relief. The district court gave short mention of this issue in its 84-page Order: "Defendants base their argument on the principal payments while ignoring the ESOT's substantial interest payments. If the price per share was inflated then so was the interest that the ESOT paid." ROA.25383. This general statement ignores the fact that the district court found in each of the 2004 and December 2005 Transactions an appropriate level of payments it labeled the "court purchase price"

[ROA.25392] for which interest payments were clearly permissible under ERISA.

A loan between a plan and a party in interest is a separate prohibited transaction under ERISA § 406(a)(1)(B) from the prohibited transaction involving a sale between a plan and a party in interest under ERISA § 406(a)(1)(A). 29 U.S.C. § 1106(a)(1). Such a loan to an ESOP is permitted if it complies with the statutory exemption found in ERISA § 408(b)(3), requiring that the loan be primarily for the benefit of participants of the plan and at a reasonable rate of interest. 29 U.S.C. § 1108(b)(3). In this context, the bootstrapping of the interest payments to be included in the amount BFLLC was paid is unsupportable and must be reversed by this Court. Defendants urge this Court to thus exclude the $588,710.07 in interest paid in the December 2005 Transaction [ROA.27111-ROA.27113; D-184][3] from the equitable relief ordered against BFLLC (a reduction in the award of $188,975.93 ($588,710.07 multiplied by the trial court's 32.1% overpayment amount) and to exclude the $685,229.65 in interest paid in

[3] See Page 4 of Defendants' Exhibit D-184, a copy of which is included in Defendants' Appendix as A-162.

the 2004 Transaction[4] from the equitable relief ordered against BFLLC (a reduction in the damages of $91,820.77 ($685,229.65 multiplied by the trial court's 13.4% overpayment amount)).

At a minimum, this Court should reduce the amount of the equitable relief to be assessed against BFLLC to exclude $535,474.36 of the $586,710.07 in interest paid by the ESOT to BFLLC on the 2005 Transaction in 2006. This amount is the annual interest that would have been permissible in 2006 at the appropriate "court purchase price" of $7,139,658.09 for the December 2005 Transaction [ROA.25392], using the 7.5% per annum interest rate specified in the Loan and Pledge Agreement [J-36 [A-178]; J-125 [A-172]]. The district court included 100% of the $586,710.07 interest payments in its calculation to determine the 32.1% overpayment. Again, this gives a windfall to the ESOP because it does not assess equitable relief against BFLLC based on the position the ESOP would have been in absent a breach. It treats a portion of the appropriate interest payments received by BFLLC as a breach and in doing so inflates the recovery beyond ERISA's mandate for granting appropriate equitable relief.

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[4] See Page 3 of Defendants' Exhibit D-184, a copy of which is included in Defendants' Appendix as A-161.

Similarly, the interest paid in 2005 at the same 7.5% rate specified in the Loan and Pledge Agreement that relates to the permissible "court purchase price" of $5,800,000.00 should not be recovered against BFLLC. This amount is $380,250.00 of the total $427,320.31 interest actually paid in 2005 (assuming a reduction in the note amount that would be permissible under the "court purchase price" of $5,800,000 between the $730,000 cash payment and a $5,070,000 note). In 2006, the $257,909.34 of interest paid would have all been permissible, after reducing the permissible note of $5,070,000.00 by the 2005 principal payments because it is less than the interest payable on the remaining court purchase price. The payment of 7.5% interest on the amounts deemed acceptable by the district court is permissible as computed below and the inclusion of these amounts in the equitable relief awarded against BFLLC is clearly erroneous and should be reversed.

If this Court excludes all the interest received by BFLLC, the BFLLC liability is reduced from $404,127.51 in the 2004 Transaction to $312,306.74.[5] If this Court excludes interest in excess of the interest on

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[5] Total payments of $6,815,876.95 less $3,800,000 that BFLLC did not actually receive less $685,229.65 or $2,330,647.30 multiplied by 13.4% overpayment percentage.

the "court purchase price," the BFLLC liability is reduced to $318,614.16.[6] If this Court excludes all the interest received by BFLLC, the BFLLC liability is reduced from $244,545.39 in the December 2005 Transaction to $56,211.45.[7] If this Court excludes interest in excess of the interest on the "court purchase price," the BFLLC liability is reduced to $72,658.12.[8] The total equitable relief against BFLLC should be reduced to $604,918.14 (or to $627,672.22 in the event the permissible interest received is limited to interest based on the "court purchase price").

## IV. The District Court Erred in Permitting the Actions of Sealy on Behalf of the ESOP to Apply to Accounts of Other Participants and Beneficiaries in the Absence of a Class Certification

The district court's determination that Rader and Sealy may serve as representatives for the ESOP is a question of law to be reviewed by this Court under a *de novo* standard. *LeTourneau Lifelike Orthotics &*

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[6] Total payments of $6,815,876.95 less $3,800,000 that BFLLC did not actually receive less $638,159.34 (the sum of $380,250 plus $257,909.34) or $2,377,717.61 multiplied by 13.4% overpayment percentage.

[7] Total payments of $761,823.63 less $586,710.07 or $175,113.56 multiplied by 32.1% overpayment percentage.

[8] Total payments of $761,823.63 less $535,474.36 or $226,349.27 multiplied by 32.1% overpayment percentage.

*Prosthetics, Inc., supra* at 350-351. The district court acknowledged that Plaintiffs had taken no actions in such representative capacity with respect to notifying or engaging other ESOP participants [ROA.14-60811.25336], but nonetheless found Plaintiffs, or at least Sealy, to be properly acting for all ESOP participants. This is an impermissible broadening of the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Assoc.,* 128 S.Ct. 1020, 1026 (2008).

Ordinarily, an ERISA plan participant may bring an action "for appropriate relief under section 409" of ERISA. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Any such recovery inures to the benefit of the plan as whole, and not to the benefit of a particular beneficiary. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). A defined contribution plan participant may bring an action, pursuant to ERISA § 502(a)(2), to "recover for fiduciary breaches that impair the value of plan assets in a participant's individual account." *LaRue*, *supra* at 1026. As post-*LaRue* case law specifies, however, "[o]ne defined contribution plan participant has no pecuniary interest in the accounts of another. If a defined contribution plan participant sues for a breach of fiduciary duty, his financial recovery must be entirely to his own accounts."

*Bendaoud v. Hodgson,* 578 F.Supp.2d 257, 266 (D.Mass. 2008). Thus, the claims of Rader and Sealy are representative in nature, on behalf of the ESOP in the terminology of *LaRue,* however, applicable solely to the accounts of Rader and Sealy under the ESOP. As stated by the District Court in *Jones v. NovaStar Financial, Inc.*, 2009 U.S. Dist. LEXIS 30247 (W.D. Mo. 2009):

> "Before *LaRue*, recovery under ERISA § 502(a)(2) was recognized to be on behalf of a plan—individuals could not recover for their own losses. . . . *LaRue* did not overrule that widely-accepted tenet of ERISA law.... *LaRue* simply expanded the relief available under § 502(a)(2), so that recovery can now be had when a participant demonstrates that fiduciary misconduct affected his individual account. . . .Of course, a fiduciary's breaches can affect more than one defined contribution plan participant. In that situation, though, the proper approach is joinder of the affected participants or the certification of a class.')."

*Id.* at *24-25.(citations omitted).

Allowing Plaintiffs to proceed on behalf of all ESOP participants, without any necessary procedural safeguards, would create "significant practical difficulties and opportunities for abuse." *Bendaoud, supra* at 261. Every time that the Secretary filed a claim for breach of an ERISA fiduciary duty in an ESOP case, an attorney could convince a single participant such as Sealy to pursue a claim in hopes of recovering

attorneys' fees related to a claim for multiple ESOP participants. These scenarios would result in "an unsatisfactory result of the dispute as a whole." *Id.* at 262. In sum, Plaintiffs' "failure to do anything" in a representative capacity "rendered specious [their] claim to be acting on behalf of others." *Id.* at 261 (internal citations omitted). This does not undermine the conclusion that *LaRue* broadens the relief available under ERISA § 502(a)(2) with respect to participants bringing a claim. It simply rejects an interpretation of *LaRue* that allows one participant to claim the rights for the accounts of thousands of other participants in the absence of the safeguards of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). This attorney-driven case, where Plaintiffs Rader and Sealy did not even attend trial, documents how the interpretation of *LaRue* rendered by the district court fuels the dangers of attorney-driven, and not participant-driven claims, and casually delegates to a single participant the authority statutorily entrusted to the Secretary under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), to pursue claims on behalf of an entire plan. This is particularly true given the absence of a directive by the Supreme Court that this was the intention of the *LaRue* case. *LaRue* clearly only addressed Mr. LaRue's 401(k) plan account

and not the accounts of other participants in the plan in which Mr. LaRue was a participant. *LaRue*, *supra* at 123.

The Second Circuit decision of *Coan v. Kaufman,* 457 F.3d 250 (2d Cir. 2006) reinforces this conclusion. In *Coan,* the Second Circuit found, in affirming a grant of summary judgment for defendants on an ERISA breach of fiduciary duty claim,that the plaintiff participant in a defunct 401(k) plan had failed to "take... steps to become a bona fide representative of other interested parties." *Id.* at 259. The *Coan* analysis is wholly consistent with the Supreme Court's later decision of *LaRue*. Nothing in *LaRue* can be read to permit circumvention of ERISA § 502(a)(2)'s mandate that a plaintiff act in a representative capacity, whether via Rule 23 or other method insuring the interests of those they purport to represent are effectively protected. This is demonstrated by the favorable citation of, and reliance upon, *Coan* in several cases decided after *LaRue* as well as the many post-*LaRue* cases alleging the right to relief under ERISA § 502(a)(2) relating to the valuation of employer securities that have proceeded as class actions or with respect to which the intricacies of the requirements of Rule 23 have been examined. In *Fish v. GreatBanc Trust Company*, 667

F.Supp.2d 949 (N.D. Ill. 2009), *reversed on other grounds*, 749 F.3d 671 (7th Cir. 2014), four individual plaintiffs sought to bring a representative action on behalf of an ESOP pursuant to ERISA § 502(a)(2). In denying their motion to proceed without obtaining class certification pursuant to Rule 23, Judge Shadur held that to permit the action to go forward without the type of procedural protections afforded by Rule 23 "would be overly myopic." *Id.* at 951.

Similarly, in *Abbott v. Lockheed Martin Corporation*, 2010 U.S. Dist. LEXIS 11721 (S.D. Ill. 2010), plaintiffs again sought to bring a "direct action" under ERISA §§ 409 and 502(a)(2), following that court's denial of class certification under Rule 23 for certain claims. The *Abbott* court, citing *Fish*, held that such claims could not proceed as a "direct action" because "there are no procedural safeguards that the Court can put in place to protect absent members and to prevent redundant suits." *Id.* at *12.

The same result is mandated here. Plaintiffs took no steps to adequately protect the interests of the non-party ESOP participants that they purport to represent. Had class certification had been pursued by Plaintiffs, given that there are three Transactions in this case, the

use of subgroup classes, as has been applied in ERISA class actions, would have been likely considered by the district court. *See Chesemore v. Alliance,* 948 F.Supp.2d 928, 945-46 (W.D. Wis. 2012)). The Third Circuit addressed the issues of whether class actions may proceed under ERISA § 502(a)(2) and noted the complexity of the issue and how *LaRue* clearly cannot be viewed as eliminating the need for a careful analysis under Rule 23 of the merits and dangers of such representational claims, stating:

> "Although the Supreme Court's decision in *LaRue* established the fact that a participant in a defined-contribution plan may sue under ERISA section 502(a)(2) for damages to the plan, even if the only place those damages are reflected is in his or her own account, there is much that *LaRue* does not resolve. Importantly, *LaRue* was an individual case, and so it does not answer the question whether, or when, the kind of suit it was addressing may proceed as a class action."

*Spano v. Boeing*, 633 F.3d 574, 591 (7th Cir. 2011). The *Spano* court's analysis makes clear that a plaintiff's rights to bring a representative claim on behalf of absent participants cannot occur by blindly avoiding the application of the class action rules of Rule 23 as Rader and Sealy did here. The district court's citations to *Blankenship v. Chamberlain*, 695 F.Supp.2d 966, 972 (E.D. Mo. 2010) and *Huizinga v. Genzink Steel Supply & Welding Co.* No., 2013 U.S. Dist. LEXIS 119942, 2013 WL

4511291 (W.D. Mich. Aug. 23, 2013), are not persuasive as these cases expressly note the ability of a participant to avoid Rule 23 is conditioned on the plan at issue being in existence. The *Huizinga* court noted "[b]ecause the Plan is still in existence, it is not likely there will be any serious problems disbursing the money back into the Plan and among its participants according to the Plan's terms." *Id.* at *8. In contrast, the *Blankenship* court noted favorably the *Coan* hazards that could apply in a terminated plan:

> "The court would likely be required to issue an order mandating that the now defunct... 401(k) plan be temporarily resuscitated, funds restored to it, its participants located, their entitlements calculated, and distributions disbursed to them. Without the benefit of a procedural mechanism for the protection of interested parties, it is unclear how the court could satisfy itself that their interests were in fact being taken into consideration without a great deal of improvisation, effort, and expense."

*Blankenship v. Chamberlain*, *supra* at 973 n.5 (citing *Coan*, *supra* at 261-62). The ESOP is a terminated plan and the safeguards associated with disbursements of any judgment proceeds are likely to be significant in this case as is evidenced by the concerns expressed by the district court regarding Rader's ability to seek relief in this action. ROA.25326-ROA.25336. The district court's conclusion that the Rader

and Sealy claims extend on behalf of the ESOP for the accounts of participants other than Rader and Sealy is in error and should be reversed. Given the judgment in the *Perez* Case, this will have no impact whatsoever on the ESOP participants. It will likely have a material impact on any award of attorneys' fees that is deemed appropriate in this case.

The district court's determination that Rader and Sealy continually advanced the interests of the ESOP over their own is simply in error. Even Sealy acknowledges in a separate lawsuit arising out this litigation that they sought to settle this litigation for themselves and without the Secretary. *See* Complaint in *Sealey v. Johanson, et al.*, Paragraph 114, Civil 3:15-cv-157-DPJ-FKB (S.D. Miss.). The district court's determination that the *Rader* Case allows damages and equitable relief on behalf of participants other than Rader and Sealy is an error of law and should be reversed by this Court.

## V. 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 a 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. ROA.25342-ROA.25343. "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).

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. ROA.26991:21-ROA.26992:7; *see also* ROA.27077:4-12[9].

Smith was aware of her 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.14-60811.27161:1-21. Bruister did not try to solicit information from, or persuade, Smith or Henry. ROA.27161:22-ROA.27162:1.

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 to 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 didn't want to do. ROA.27147:8-22. And, Smith testified that Bruister

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[9] "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."

abstained from the Transactions. ROA.27175:4-12; *see also* ROA.27171:10-21. Henry testified that that she was uniquely positioned to be a trustee and understood her duty to the ESOP. ROA.28841:13-ROA.28842:8. She and Smith always had telephone conference calls with ESOT counsel Campbell prior to the closings to substantively 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. 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.

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. This "finding," however, does not result in an ERISA violation. 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. One cannot reasonably argue that because Bruister "was by all accounts a good boss and a highly respected figure who was admired by his employees, clients, and even competitors," that "these attributes also created influence." ROA.25346. 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. There is nothing in

ERISA that precluded Bruister from serving as an ESOT trustee. As a member of seller BFLLC, Bruister did nothing other than to indicate his willingness to proceed with a sale where the ERISA standards were met and the ESOT did not pay more than fair market value, which Range concluded it did not.

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.[10]

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-149. 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. J-51; A-149. This documents that Donnelly's

[10] 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 anyone 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.

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.

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 relating 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 on Donnelly. 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.

## VI. 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 this 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.[11] 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

[11] 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.

to such reasonableness. *E.g.*, ROA.26961-ROA.26962 and ROA.27164-ROA.27166 (Smith); ROA.28823 (Henry). The district court, however, 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: it is not proper to apply 20/20 hindsight to the good faith determination of Trustees Smith and Henry. The test to be applied is the evaluation of the Transactions from the perspective of the Trustees at the "time of the investment decision' rather than from 'the vantage point of hindsight.'" *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984). Smith and Henry reasonably viewed Hurricane Katrina as a temporary disruption to the BAI business in both September 2005 and December 2005 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 to the BAI business in both the September 2005 and December 2005 Transactions and an opportunity for business to increase due to service orders. *Id.* The district court failed to examine the reasonableness of these views and 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. It is a clear error of law to apply the district court's own analysis to these issues and ask how the district court would have exercised ERISA fiduciary discretion with the benefit of years of further information and analysis.

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. The basis for the district court's conclusion of unreasonableness addressed deposition testimony of BAI's competitors that were not based on facts known in 2004 and 2005 but after years of reflection. *Id.* 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 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, and reasonably relied on ESOT counsel Campbell and upon Donnelly in approving the Transactions at FMVs verified as appropriate in the Range testimony accepted by the district court.

## VII. 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 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. There was

simply no evidence indicating that the averaging of the expert conclusions was appropriate and Defendants are entitled to challenge the sufficiency of the evidence supporting these findings. FRCP 52(a)(5). Second, the district court's acceptance of the testimony of Defendants' valuation expert (Range) as equally credible to the other experts compels the conclusion that Defendants established that the adequate consideration exemption for a party in interest sale to the ESOP was satisfied 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. The district court concluded that Defendants' valuation expert testimony that the Transactions were priced at not greater than FMV was equally credible with the conflicting testimony of the Secretary's and the Rader Plaintiffs' experts. This finding compelled the district court to conclude that Defendants satisfied their burden of proof

under Section 408(e). The district court's findings that the experts of the Secretary and the Rader Plaintiffs were equally credible does not alter this conclusion.

The nature of a good faith FMV determination like Henry's and Smith's is subjective. The trial 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. The exercise of assigning a FMV is by definition an approximation; it is conjuring a hypothetical sale. A good faith 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. There are multiple correct answers. Credible evidence can establish different values for estimating the FMV of an asset as the district court found 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 change that the relevant issue presented is whether the party with the burden of proof has satisfied

that burden with sufficient evidence. Defendants satisfied their burden of proof when the district court accepted Range's conclusions as appropriate good faith 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 Transactions as Henry and Smith made good faith determinations of FMV here.

The district court committed reversible error in reasoning that its averaging approach (which created completely new "*de novo*" valuations for the Transactions of its own) 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. No such approach has ever been applied in the context of an ESOP case under ERISA. 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). 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. 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. 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. 2003).

The district court accepted Range's valuation conclusions to the same extent that it accepted the valuation conclusions of Messina and Mercer, and thereby endorsed Range's conclusions as proper measures of FMV. These conclusions support Donnelly's conclusions of FMV 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.

## VIII. The District Court Improperly Included The Portion of the Promissory Notes Received by BFLLC That Was Not an Overpayment by the ESOT in the Measure of Damages in the 2004 and December 2005 ESOT 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.

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 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 remedial structure of 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 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 the ESOT paid was $761,823.63. Even accepting the district court's determination that Defendants acted imprudently and failed to establish compliance with the adequate consideration standard, 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 was reversed. 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[12] 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 2005 Transaction.

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

The heart of the error of the district court was to focus solely on the full contract price for the two leveraged Transactions and not the standard under ERISA § 409 to provide make-whole relief. Focusing on make-whole relief resolves all doubts in favor of the ESOP without granting an impermissible windfall under ERISA. *Accord,* Rest.2d. Contracts § 347. A failure to determine that the unpaid debt should be disregarded in the damages awarded under ERISA § 409 will create an impermissible windfall if such debt does not impact the relief needed to place the ESOP in a position as if the breach had not occurred.

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, supra* at 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, where it might be relevant to the "'make-whole' recovery, not a windfall recovery." *Id.* at 949. *See also Henry v. U.S. Trust Co. of Cal., N.A.,* 569 F.3d 96, 100 n.4 (2d Cir. 2009). 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 that the ESOP acquisition loan be disregarded in was simply stating that such reasoning could not override the mandate that ERISA provides relief for the loss occasioned by 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 cautioned that at s 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, 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.

## IX. 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. ROA.25392. These amounts were then subtracted from the price specified in the stock purchase and loan documents for the Transactions to reach the

damages award. In the case of the 2004 Transaction, this approach 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. 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 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-172. This faulty assumption, 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 analysis to include the $3,800,000 in the damages calculation. ROA.25383-ROA.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.

A careful analysis of the $3,800,000 Internal Loan payment documents no harm to the ESOP and indeed potential 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); ROA.26595; *see also* ROA.28642 (Henry testimony). 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.

## X. 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

The Secretary's expert's valuation reports, that the district court relied upon in its analysis under ERISA §§ 408(e) and 409, were utterly unreliable because Messina used hypothetical information regarding BAI's expenses. 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 appraise 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.29954] and simply not consistent with appraisal practices. ROA.29957-ROA.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, it fails to reflect what the company expense level is in fact. Thus, the use of the Messina valuation was

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

## XI. The District Court Erred in Accepting the Conclusions of the Messina and Mercer Valuations That Subtracted BAI Debt From the BAI Equity Value That Had No Factual Support in the Record

The district court correctly identified at trial that the conflicting expert 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. 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 J-51 at 51 (A-150)]. 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 P-127 at 16 (A-152)] 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

[ROA.27884 (referencing P-49 at 58 (A-154), P-50 at 52 (A-156), and P-51 at 52 (A-158), respectively)]. The impact of the materially different debt assumptions resulted in a significant portion of the experts' different 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).

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 [A-163]] and $1,391,383 from the 2003 ESOT Note [D-184 at 2 [A-160]]. 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 they criticized as unreliable. ROA.28425;

ROA.28458-ROA.28469 and ROA.29046[13] (Messina); ROA.27768:16-23[14] (Mercer).

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-163]] and $4,950,945 from the 2004 ESOT Note [D-184 at 3 [A-161]]. Messina again appeared to rely 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-ROA.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-163]] and $4,831,359 from the 2004 ESOT Note [D-184 at 3 [A-161]] and $3,300,000 from a working capital loan from Bruister. ROA.28437; J-51; D-186; ROA.29045-ROA.29046 (Messina). Messina

[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."

again appeared to rely 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-ROA.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-159]; D-221; ROA.27111-ROA.27119 (Smith); ROA.28898-ROA.28903 (Henry).

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. The clear evidence supports Range's debt determinations and this reliability further shows that Range's

FMV establishes with clear evidence that the Transactions met the FMV components of the ERISA adequate consideration standard.

Even if this Court accepts the district court's averaging approach to damages endorsed, the clear weight of evidence requires 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 appraisals. 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, significantly overstating both the damages determination and the equitable relief awarded against Defendants.

## XII. The Issuance of Judgments with Identical Damages in this Case and the *Perez* Case Without Provision for Offset is Reversible Error

The district court consolidated this case for trial with the *Rader* Case. ROA.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 *Perez* 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 *Perez* Case that the recoveries in this case operate to diminish and satisfy the *Perez* judgment and that the recoveries in the *Perez* judgment operate to diminish and satisfy 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 trial court's judgment.

## XIII. The District Court Erred in Assessing Prejudgment Interest Against Bruister and BFLLC for Amounts That Neither He Nor BFLLC Had 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. Further, while the court declined to apply prejudgment interest against Smith and Henry "because neither received any of the funds" [*id.*], it failed to consider that Bruister and BFLLC did not receive the vast majority of the funds with respect to which prejudgment interest was assessed against them. Such an approach was arbitrary 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. (In re Coxson)*, 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 a total payment (including interest) of $761,823.63 was received by BFLLC as a result of the December 2005 Transaction [ROA.25318]. If BFLLC received less than one quarter of the amount assessed as damages for this Transaction, and approximately one-tenth of the $7,139,658.09 that the district court deemed as the appropriate "court purchase price" for this Transaction [ROA.25397], there is no fairness or equity in the prejudgment interest award and it must be overturned or limited to funds actually received by BFLLC. 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 the receipt of funds attributable to Bruister is limited to the funds received by 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 as the appropriate "court purchase price" for the Transactions [ROA.25392], documents the absolute lack of fairness of applying any prejudgment interest against Bruister or BFLLC.

Finally, as noted in *Lindemann*, *supra*, the compensatory recovery of the ESOP needs to be assessed in 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 district court's failure to address these issues underscores the arbitrary and capricious nature of the prejudgment interest award that should be reversed by this Court. The district court cited factors of fully compensating ESOP Participants and alluded to the receipt of funds by BFLLC as determinants of its fairness analysis and yet failed to relate such factors to the circumstances of this case where ESOP Participants would have received no earnings on the BAI Stock because of the later demise of BAI and where BFLLC was not unjustly enriched and further where Bruister did not receive any recovery in excess of the amount received by BFLLC. This failure to apply a fairness analysis to the facts of this case renders the exercise of discretion by the district court reversible error.

## CONCLUSION

The district court committed reversible error in this case by permitting the recovery of Sealy on behalf of the ESOP to apply to the accounts of all participants in the ESOP, notwithstanding the failure of Sealy to take any representative action with respect to the other participants. The interests of the other participants in the ESOP were

fully addressed by the Secretary in the *Perez* Case and allowing Sealy to claim on behalf of accounts of other participants fails to protect the participants and is not contemplated by the Supreme Court's opinion in *LaRue.* The methodology of the district court in assessing equitable relief against BFLLC by assuming that a percentage of every dollar received by BFLLC represented an overpayment without respect to the actual amount of funds received by BFLLC is not equitable and creates an impermissible windfall for the ESOP. Furthermore, a substantial portion of the funds that BFLLC received in the 2004 and December 2005 Transactions represented interest appropriately paid to BFLLC for which no equitable relief is appropriate. In addition to these errors, the district court committed clear error in its findings of fact and in its legal conclusions with respect to liability and the measure of damages in this case and in the *Perez* Case that compel reversal of its judgment.

This Court should conclude that Defendants adequately complied with ERISA. Irrespective of how this Court rules in this respect, 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 Defendants - Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii). The undersigned also 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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