No. 14-60811

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS E. PEREZ, Secretary of Labor, U.S. Department of Labor,
Plaintiff-Appellee Cross-Appellant,

v.

HERBERT BRUISTER; AMY SMITH,
Defendants-Appellants Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi, Northern Division
The Honorable Daniel P. Jordan III (D.C. No. 3:13cv1001-DPJ-FKB)

BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary requests oral argument. The factual background is substantial and the record is voluminous, this matter having proceeded through extensive discovery and a four-week bench trial. The Secretary believes that oral discussion of the facts and applicable precedent will benefit the Court's consideration of this case.

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STATEMENT OF JURISDICTION

The Secretary of Labor brought this action under sections 502(a)(2) and (a)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (a)(5). The district court had subject matter jurisdiction over the action pursuant to ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1), and entered a final judgment on October 16, 2014. The appeal by Herbert Bruister, Amy Smith and Jonda Henry was timely filed on November 13, 2014, and the Secretary's cross-appeal was timely filed on December 12, 2014.[1] This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

As restated by the Secretary, the issues raised by Herbert Bruister and Amy Smith are:

1. Whether the district court clearly erred in finding that Bruister, a plan trustee who sold all of his company's stock to the pension plans for his employees, was an ERISA fiduciary with regard to these sales.

2. Whether the district court clearly erred in finding that Bruister and Smith, the two trustee defendants in this appeal, violated their fiduciary duties by acting disloyally and failing to make a good faith determination of the fair market value of the employer stock prior to approving the purchase of the stock by the ERISA

[1] Pursuant to a settlement, Henry was dismissed from this appeal on June 18, 2015.

pension plans, thereby causing the plans to significantly overpay Bruister for the stock.

3. Whether the district court clearly erred in including both cash paid and debt incurred by the plans in calculating the overpayment remedy and in relying in part on testimony from the Secretary's expert in averaging fair market value of the stock at the time of each sale, or otherwise abused its discretion in ordering prejudgment interest and injunctive relief.

The Secretary, in his cross-appeal, raises the following issue:

1. Whether in light of its findings of fact on liability, the district court erred in relying on defendants' expert in calculating damages.

STATEMENT OF THE CASE

I. Factual Background

Bruister and Associates, Inc. ("BAI") was a privately-held DirecTV installation company. ROA.25316. BAI set up a trust to purchase stock for two ERISA defined contribution pension plans for its employees, the Bruister & Associates Employee Stock Ownership Plan and the Bruister & Associates Eligible Individual Account Plan (collectively, the "Plans"), which were both employee stock ownership plans ("ESOPs"). ROA.25315-16, 25357. In a series of five transactions from 2002 to 2005, the Plans bought all of BAI either directly from Herbert Bruister (who owned and ran BAI and was also a trustee to the Plans), or

through the Bruister Family, LLC ("BFLLC"), an entity controlled by Bruister and his wife. ROA.25316-17. As relevant to this appeal, the final three stock transactions occurred on December 21, 2004, September 13, 2005, and December 13, 2005. Id. The Plans' three named trustees during the time of these transactions were Bruister, Amy Smith (a BAI employee), and Jonda Henry (BAI's outside CPA). ROA.25316-17. In each instance, the price the Plans paid for the stock was based on valuations prepared by Matthew Donnelly, an appraiser who was retained by the trustees. ROA.25318-19. In August 2008, the stock became worthless when BAI went out of business. ROA.25334-36, 25388.

Following an investigation, the Secretary filed a complaint on April 29, 2010, alleging that Bruister, Smith, and Henry breached their fiduciary duties and engaged in prohibited transactions in violation of ERISA when they caused the ESOPs to buy stock from Bruister without an adequate investigation into the worth of the stock and for more than fair market value. ROA.91-109. Two Plan participants, Joel Rader and Vincent Sealy, filed a separate suit based on the same transactions, which was consolidated for trial, but is now on separate appeal. ROA.25319; Rader, et al. v. Bruister, et al., No. 14-60814 (5th Cir.).

II. Legal Background

The ERISA Plans here are ESOPs, which, like all ERISA retirement plans, are designed to secure "financial benefits (such as retirement income) that trustees

who manage investments typically seek to secure for the trust's beneficiaries" and to "maximize retirement savings for participants" in the ESOP. Fifth-Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2467-68 (2014). The Plan fiduciaries are held to stringent fiduciary obligations of loyalty and care under ERISA section 404(a). 29 U.S.C. § 1104(a). These fiduciary duties are the "highest known to the law." See, e.g., Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 294 (5th Cir. 2000). The duty of loyalty requires fiduciaries to act with "complete and undivided loyalty to the beneficiaries of the trust" and with an "eye single to the interests of the participants and beneficiaries." See, e.g., Leigh v. Engle, 727 F.2d 113, 123 (7th Cir. 1984); 29 U.S.C. § 1104(a)(1)(A).

The term "fiduciary" is liberally construed in keeping with the remedial purpose of ERISA. Am. Fed. of Unions Local 102 Health & Welfare Fund v. Equitable Life Assurance Soc'y of the U.S., 841 F.2d 658, 662 (5th Cir. 1988). Trustees, such as defendants in this case, are fiduciaries who are either identified in the trust documents or appointed by a "named fiduciary;" they "have exclusive authority and discretion to manage and control the assets of the plan." 29 U.S.C. § 1103(a). In addition to trustees and named fiduciaries, ERISA makes a "functional fiduciary" of any person "to the extent" that "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29

U.S.C. § 1002(21)(A)(i). Moreover, those who have or exercise the discretionary authority to appoint and remove plan fiduciaries are themselves fiduciaries, with an attendant duty to appropriately review and monitor the actions of their appointees. See Am. Fed. of Unions, 841 F.2d at 665. All fiduciaries also have liability for the breaches of their co-fiduciaries if, among other things, they know of breaches by their co-fiduciaries and do not attempt to remedy them. 29 U.S.C. § 1105(a).

ERISA section 406, 29 U.S.C. § 1106, supplements the statute's exacting fiduciary standards of prudence and loyalty "by categorically barring certain transactions deemed 'likely to injure the pension plan.'" Harris Trust & Sav. Bk. v. Salomon Smith Barney, Inc., 530 U.S. 238, 241 (2000) (citation omitted); Donovan v. Cunningham, 716 F.2d 1455, 1464-65 (5th Cir. 1983). ERISA section 406(a)(1), 29 U.S.C. § 1106(a)(1), prohibits a wide range of transactions between plans and related parties (referred to as "parties in interest," 29 U.S.C. § 1002(14)), who could otherwise take advantage of their insider status to benefit themselves at the plans' expense. As relevant here, section 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A), prohibits the sale or exchange of property between the plan and a party in interest, such as the Plans' purchases of stock from Bruister, a Plan trustee.

ERISA section 408, 29 U.S.C. § 1108, provides limited exemptions from this and other prohibitions, but the burden is on the fiduciary to prove that an otherwise prohibited transaction falls within the terms of an exemption.

Cunningham, 716 F.2d at 1467-68 & n.27; Fish v. GreatBanc Trust Co., 749 F.3d 671, 686 (7th Cir. 2014) (section 408 is an affirmative defense that must be proven by the party asserting it). One such exemption is found in ERISA section 408(e), 29 U.S.C. § 1108(e), for purchases by a plan of employer stock for no more than "adequate consideration." Cunningham, 716 F.2d at 1465. ERISA defines "adequate consideration" for securities, such as BAI stock, that are not publicly traded as the "fair market value of the asset as determined in good faith by the trustee or named fiduciary." 29 U.S.C. § 1002(18).

III. Decision Below

On October 16, 2014, following a 19-day bench trial, the district court entered judgment for the plaintiffs, concluding that defendants breached their duties of loyalty and prudence codified in ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1), and engaged the Plans in non-exempt prohibited transactions under ERISA section 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A). ROA.25315-98.

A. Bruister's Fiduciary Status

The court first addressed whether Bruister, a trustee and named fiduciary of the Plans, was a fiduciary for purposes of the stock sales. Despite Bruister's claim that he abstained from all votes pertaining to his sale of stock to the Plans, the court concluded that he was a fiduciary for purposes of the Secretary's and Rader plaintiffs' claims because he exercised authority and control over the disposition of

the Plans' assets during the stock transactions. ROA.25340-45 (citing 29 U.S.C. § 1002(21)(A)).[2] The court relied on the fact that Bruister admittedly "participated in many of the trustee meetings and closings and participated in . . . 'informal meetings' with the other trustees." ROA.25342. Moreover, the court noted that Bruister not only was "the driving force behind BAI," but also was a respected figure with close personal relationships with Smith and Henry, and thus had influence over them. ROA.25342-43. In addition, the court concluded that "the strongest evidence that Bruister exercised fiduciary authority" were the actions of his personal attorney, David Johanson, to affect and increase Donnelly's valuations in Bruister's favor – and to the ESOPs' detriment. ROA.25343-44.

B. Defendants' Liability

Turning to liability, the district court explained that "an ERISA fiduciary must avoid conflicts of interests," and the presence of such conflicts requires fiduciaries "to take precautions to ensure that their duty of loyalty is not compromised," including "at minimum, undertak[ing] an intensive and scrupulous independent investigation of the fiduciary's options." ROA.25346 (quotations and citations omitted). The court concluded that the trustees failed to do so; instead,

[2] It is undisputed that Smith and Henry were fiduciaries with regard to the transactions. ROA.25340.

ERISA's "duty of loyalty was breached [by defendants] from start to finish." ROA.25346.

The court pointed out that the Plans were structured to provide "no independent or professional trustees," but instead to provide "three trustees – Bruister [the seller] and two individuals loyal to him." ROA.25346. Moreover, although the trustees retained and relied on an appraiser and attorneys in setting up the stock sales, the court found that the trustees' "actions with respect to these individuals and the transactions reveal split loyalties." ROA.25346-47. For instance, Bruister, "the seller – acting through an agent [attorney Johanson] – terminated the buyer's [the Plans'] independent counsel" for being "too thorough and expensive." ROA.25347. Likewise, the court concluded that "Bruister (usually through Johanson) had undue influence over Donnelly [the appraiser]." Id. And "Donnelly was clearly more loyal to Bruister and Johanson" than to the Plans. ROA.25348. As the Court explained, Donnelly, "the independent appraiser was sending valuation drafts to [Bruister] before sending them to the [Plans] to whom he owed his sole allegiance," behavior that "fiduciaries acting in the best interest of the ESOP would not have countenanced." ROA.25349 (emphasis in opinion). Finally, the court noted that "both Smith and Henry testified that they were always concerned about Bruister's interests." ROA.25356. On these bases, the court concluded that the Plans' stock purchases from Bruister "were not arms-

length transactions" and defendants "failed to discharge their 'duties with respect to a plan solely in the interest of the participants and beneficiaries.'" ROA.25356-57.

The court also held that defendants engaged in non-exempt prohibited transactions in violation of ERISA section 406. ROA.25357-79. Because the Plans purchased stock in the three transactions at issue from one of the trustees, Bruister, these transactions were prohibited unless defendants could prove that the stock was purchased for no more than "adequate consideration," under ERISA section 408(e), 29 U.S.C. § 1108(e). ROA.25357.

To prove adequate consideration, the court held that, because BAI stock was not publicly traded, defendants were required to prove that they made a good faith determination of the stock's fair market value at the time they entered into the transactions. ROA.25357-59. Moreover, in order to rely on an expert's valuation of the fair market value of the stock, the court noted that fiduciaries must: (1) investigate the expert's qualifications; (2) provide the expert with complete and accurate information; and (3) ensure that reliance on the expert is reasonably justified. ROA.25359 (citations omitted). The court found that none of these criteria were met. First, defendants failed to investigate Donnelly's background and qualifications, which would have revealed that he lacked a college degree and might have led them to uncover his prior felony conviction for embezzling over $2.5 million from several entities, including two trusts, P-64 ¶ C, and use of an

assumed name. ROA.25360-62. Second, much of the information in the financial statements given to Donnelly was by Donnelly's own account "mysterious," and did not comply with Generally Accepted Accounting Principles ("GAAP"), nor did defendants give Donnelly critical negative information about BAI, but instead painted a "rosy picture" for Donnelly of the company that "conflicted with their internal emails and communications" at the time. ROA.25362-25373. Third, knowing "that Johanson was communicating directly with Donnelly in an effort to increase the valuations," Smith and Henry simply "abdicated their responsibilities and deferred to Johanson regarding Donnelly" and were themselves "ill equipped to exert independent judgment." ROA.25373-79. Instead, the "purchase price was always Donnelly's number." ROA.25378. Given all these shortcomings and others, the court concluded that the fiduciaries failed to show a good faith determination of the stock's fair market value for purposes of the section 408(e) exemption. ROA.25379.

Based on the foregoing findings, the court also concluded that Bruister and Smith, as members of the BAI's board of directors, breached their fiduciary duties to monitor the ESOPs' trustees and that all three defendants were liable as co-fiduciaries for the others' actions. ROA.25379-81.

C. Remedies

The district court noted that, in this case, the "remedies questions are more difficult than the liability questions." ROA.25381. Turning to those questions, the court first flatly rejected defendants' argument that the Plans suffered no loss because Bruister purportedly retained for BAI some $3.8 million paid by the trusts for the Plans to purchase stock rather than pay it to BFLLC, the corporation he set up for the stock sales. ROA.25383-84. The court reasoned that "Bruister controlled both BAI and BFLLC" and "[i]f . . . Bruister elected to keep the $3.8 million in BAI, that would not alter the fact that the ESOP expended assets to release the shares." ROA.25384. The court also rejected defendants' argument that the Plans' losses in two of the transactions were limited because the Plans only partially paid with cash and mostly paid with loans on which the Plans only made relatively small principal payments. ROA.25393-94. The court relied on the unanimous case law and the fact that whether loans are repaid does "not affect the fact that [the Plans] purchased [stock] at an inflated price." Id.

The court turned next to the Secretary's request for an order of rescission, noting the "appealing argument that rescission avoids the difficult factual findings regarding BAI's true [fair market value] at the time the transactions occurred." ROA.25388. The court concluded, however, that fair market value "can be determined without 'speculation or guess,'" and further concluded that the

considerably larger return of the $8.77 million paid for the now-worthless stock under a rescission remedy would be a windfall because the participants understood that the purpose of the ESOPs was to purchase BAI stock, albeit at a fair price. ROA.25388-89. Given this, the court determined that the correct measure of damages was the amount the ESOPs overpaid – i.e., the difference between the Plans' purchase price in the transactions and the fair market value of the stock at the time of the transactions. ROA.25382, 25388.

To determine the fair market value, the district court turned to the three valuation experts who testified at trial (Dana Messina for the Secretary, Christopher Mercer for Rader plaintiffs, and Gregory Range for defendants). ROA.25389-93. Because the court concluded that "no expert was more reliable than the others," and the three reports "were of similar value," the court averaged the fair market value numbers arrived at by the three experts. ROA.25390-91.

To do so, the court first averaged the value from Rader plaintiffs' expert with that of the Secretary's expert for each year in question, and then averaged these numbers with values offered by defendants' expert. ROA.25392. The court then subtracted this value from the price the ESOPs paid for BAI shares and concluded that the total overpayment was $4,504,605.30. Id. In addition, the court awarded $1,988,008 in prejudgment interest. ROA.25392, 25395-97. Finally, the court granted "injunctive relief prohibiting all Defendants from acting in the future as

fiduciaries or service providers to ERISA-covered plans, as they engaged in egregious misconduct." ROA.25397.

STANDARD OF REVIEW

"In the appeal of a bench trial," the Fifth Circuit will "review findings of fact for clear error and conclusions of law and mixed questions of law and fact de novo." Dickerson v. Lexington Ins. Co., 556 F.3d 290, 294 (5th Cir. 2009). A factual finding is only "clearly erroneous" if there "is no evidence to support it, or if the reviewing court, after assessing all of the evidence, is left with the definite and firm conviction that a mistake has been committed." Baldwin v. Taishan Gypsum Co., Ltd., 742 F.3d 576, 584 (5th Cir. 2014). Bruister and Smith's challenges to the district court's liability determinations are primarily, if not exclusively, challenges to factual findings that fall under this very deferential "clearly erroneous" standard.

Defendants and the Secretary also challenge the court's remedial holdings. Whether to apply a particular equitable remedy is "entrusted to the discretion of the district court," which this Court reviews "only for an abuse of discretion." Burkhart Grob Luft und Raumfahrt GmbH & Co. KG v. E-Systems, Inc., 257 F.3d 461, 469 (5th Cir. 2001). This Court has also specifically addressed the standard of review for a trial court's determination of fair market value of closely held stock in a tax case and stated that "[t]he mathematical computation of fair market value

is an issue of fact [reviewable under a clear error standard], but determination of the appropriate valuation method is an issue of law that we review de novo." Dunn v. CIR, 301 F.3d 339, 348 (5th Cir. 2002).

SUMMARY OF THE ARGUMENT

Defendant Bruister sold all of his stock in a series of transactions to two pension Plans that he set up for his employees. After conducting a month-long trial, the district court, in a thoughtful and lengthy decision, concluded that Bruister and the two other Plan trustees violated their duties of loyalty "from start to finish" and engaged in illegal transactions with regard to three of these transactions because they failed to determine in good faith the true value of the stock and instead caused the Plans to spend a great deal more money for the stock than it was worth. These findings are unassailable, and defendants' scattershot arguments to the contrary are nothing more than an attempt to retry the case.

1. Defendants first contend that the district court erred in concluding that Bruister was acting as a fiduciary in the transactions. As a Plan trustee and thus an indisputable fiduciary to the Plans, the burden under this Court's decision in Cunningham was on Bruister to prove that he removed himself from all consideration of the transactions. Despite Bruister's self-serving assertions that he abstained from the transactions, the court correctly concluded that the weight of the considerable evidence, including Bruister's own prior testimony, showed

otherwise. Not only did Bruister participate in the actual trustee meetings in which the sales were discussed, but he used his considerable influence over the other trustees, over the plan attorneys and over the supposedly independent appraiser to ensure that the transactions were favorable to himself. For these reasons, among others, Bruister was a fiduciary with the obligation to ensure that the interests of the Plans were protected in the stock transactions.

2. Bruister and the other trustees, however, entirely failed to live up to their duties as Plan fiduciaries, as detailed at great length in the district court's decision. They acted disloyally in encouraging or at least allowing Bruister's lawyer to work with the appraiser to come up with higher and higher values for the stock based on faulty or incomplete information, even as it became apparent that the company's value had declined. And, by causing the Plans to purchase stock from Bruister, a plan sponsor and one of the trustees, without making a good faith determination of the value of the stock, they engaged in prohibited transactions.

3. The court also correctly concluded that the Plans vastly overpaid for the stock. Although defendants complain that the court included both the cash paid and the debt incurred by the Plans in calculating the amount that the Plans paid for the stock, this treatment of debt is consistent with the uniform case law and with the realities of what occurred. For the most part, the trustees' remaining arguments are little more than complaints that the trial court somehow treated them unfairly.

In fact, despite correctly concluding that they breached their fiduciary duties from "start to finish" and engaged in "egregious misconduct," the court bent over backwards to be fair to them and, as discussed next, gave great (and in fact insupportable) weight to their expert and refused to rescind the transactions.

4. Although the court's liability determinations are unassailable, the court's determination of the fair market value of the purchased stock, and thus the amount of the overpayment, was in clear error. The court rejected a rescissionary remedy in favor of awarding compensatory damages based on the amount of the overpayment. To do so, the court averaged the fair market value calculations of all three experts and without explanation gave greater relative weight to defendants' expert, Range. Given the incompatible underlying assumptions about the company (e.g., whether the company was a growth company or in financial trouble) and the widely divergent resulting numerical values between Range, and the experts for the Secretary and the private plaintiffs, the court clearly erred in this approach. Indeed, because the court had already found that the appraiser at the time of the transactions was fundamentally flawed in his optimistic view of the company and worked with Bruister's attorney to purposefully inflate the value, the court erred in relying to any extent on Range, whose assumptions and resulting calculations were even more optimistic than the flawed appraisals done at the time of the sales. The court instead should have based its overpayment calculation on the fair market

value calculations of the Secretary's expert or, if it considered that testimony too uncertain, it should have rescinded the illegal and abusive transactions.

ARGUMENT

I. The District Court Committed No Clear Error in Concluding That Bruister, a Plan Trustee, Acted as a Fiduciary With Regard to the Sale of his Stock to the ERISA Pension Plans

A. Bruister Was a Fiduciary as a Plan Trustee and Failed to Establish that he Abstained From the Stock Transactions

There is no dispute that Bruister served as a named trustee, and thus was a fiduciary of the Plans with control over the Plan assets, during the three transactions in which he sold his stock to the Plans. ROA.25316; ROA.25341; see 29 U.S.C. §§ 1102(a)(2), 1103(a). Indeed, the Plans' Trust Agreements identified Bruister as a trustee with control over the ESOPs' assets for purposes of these stock sales. J-121 ¶¶ B, C (Sec'y R. Excerpts 1-3). On appeal, however, Bruister rehashes the argument, rejected by the district court as unsupported by the evidence, that despite his role as trustee, he completely "abstained" from his fiduciary role during these transactions and therefore lacks any fiduciary liability. Defs.' Br. 1, 14-21. Instead, after a lengthy trial and review of "an enormous record," ROA.25319, the district court concluded that Bruister in fact acted as a fiduciary with regard to the transactions, but failed to live up to his responsibilities as such. ROA.25340-57. Bruister cannot show clear error in this regard.

Indeed, this Court's decision in Cunningham directly supports the district court's conclusion. In Cunningham, the defendant served as an appointed trustee, but argued he did not participate in the vote or decision concerning the ESOP's purchase of stock and thus was not liable as a fiduciary. 716 F.2d at 1459. This Court noted that although the defendant did not vote in the transaction, the unrefuted testimony showed that "he did participate in the fiduciaries' decision to pay" for ESOP stock, and therefore did not meet his burden of establishing abstention. Id. at 1468. Cunningham therefore requires a named trustee claiming abstention to remove himself completely from all fiduciary decision-making. Id.; see Lowen v. Tower Asset Mgmt., 829 F.2d 1209, 1219 (2d Cir. 1987) (fiduciary must "avoid any connection with that transaction" and "unequivocally cease to serve in [fiduciary] position . . . before playing any role in transactions denied to fiduciaries by Section 406" because "fiduciary obligations may not be turned on and off like running water"). The Secretary has issued formal guidance consistent with Cunningham. See 29 CFR § 2550.408b-2(e)(2) ("mere approval of the transaction by a second fiduciary does not mean that the first fiduciary has not used any of the authority, control or responsibility which makes such person a fiduciary"); DOL Adv. Op. No. 99-09A, 1999 WL 343508, at *4 (May 21, 1999) ("recusal would be sufficient only if the Committee member recuses him or herself

from all consideration by the [Plans] of whether or not to engage in the transaction").

The district court correctly found that Bruister simply failed to make the showing necessary under Cunningham and the Secretary's guidance to establish that he removed himself from all consideration of the transactions.[3] The court correctly noted that Bruister's own "prior statements" revealed that he "participated, at least to some extent" in the transactions. ROA.25342. Bruister testified that he "attended many of the trustee meetings and closings and participated in what he referred to as 'informal meetings' with the other trustees." ROA.25342-43. Bruister "explained his role further during sworn testimony," stating that he could not say that he "had absolutely no input." ROA.25343. Instead, Bruister testified that he "never walked out of the room," and he made sure to give the other trustees his input and opinion. Id. In claiming clear error, Bruister simply ignores the court's reliance on this evidence.

Bruister likewise ignores the district court's conclusion that he utilized his

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[3] Defendants' reliance on Schloegel v. Boswell, 994 F.2d 266 (5th Cir. 1993), and similar cases is misplaced. Defs.' Br. 16. Schloegel addressed whether a non-fiduciary insurance salesman became a fiduciary by influencing an ERISA fiduciary, and concluded that he did not. 994 F.2d at 271-72. Unlike the salesman in Schloegel, there is no question here that Bruister, as a trustee of the Plans, was a fiduciary. The only question, as in Cunningham, was whether, despite his fiduciary status, Bruister abstained from any involvement in the stock sales at issue.

position as founder, owner and "the driving force behind BAI," to ensure that "Smith, Henry, and Donnelly were aware of [his] preferences." ROA.25343. The court reasoned that Bruister may have been "a good boss and a highly respected figure who was admired . . . [b]ut these attributes also created influence." Id. Smith worked for Bruister "and "she was clearly devoted to him." Id. "Henry considered Bruister a friend, and he was a major client of her CPA firm," so she discussed the ESOPs' transactions with Bruister. Id. The court credited "Smith and Henry['s] testi[mony] that they were always concerned about Bruister's interests," even when purportedly acting for the ESOPs. ROA.25356. The Plans' interests were therefore represented by three trustees who lacked independence: Bruister "and two individuals loyal to him," ROA.25349, ROA.25351, 25356, and their actions "reveal[ed] split loyalties. ROA.25346-47. In short, the whole arrangement enabled Bruister to exert fiduciary authority over his sale of stock to the Plans he created for his employees. ROA.25351, 25356.

Bruister also ignores the district court's findings that his own attorney, David Johanson, was "deeply involved with Bruister's personal finances and various business interests," and "clearly the driving force behind the ESOP and each transaction." ROA.25343-44. "Johanson acted with apparent – if not actual – authority as Bruister's agent." ROA.29344. Indeed, from the start, Johanson acknowledged: "[w]e represent the seller, Herb Bruister, in this deal," id. (citing P-

166), which "matches Bruister's trial testimony that he generally viewed Johanson as his attorney," and "coincides with Donnelly's testimony that he viewed Johanson as attorney for BAI and Bruister." Id. (citation omitted). Johanson's intent was clearly to convey to the appraiser, Donnelly, Bruister's expectations of a higher valuation, because his firm "represents the seller, so we are looking for the highest FMV possible within reason." ROA.25350 (emphasis in opinion). Importantly, "the record evidence is undisputed that Johanson copied Bruister on emails to Donnelly and others" in which Johanson, used his authority to "advance[ ] Bruister's personal interests." Id. (citation omitted); see ROA.25346-57. Johanson was "clothed with authority to act on Bruister's behalf regarding [plan] matters," and "his actions provide the strongest evidence that Bruister exercised fiduciary authority" at the time of the stock transactions. ROA.25344-45.

Defendants likewise do not identify any error with the court's findings that Bruister's control over the Plans extended to the Plans' supposedly independent counsel and appraiser. The first plan counsel, Steve Lifson, was fired by Bruister for being "too thorough and expensive;" put another way, "the seller . . . terminated the buyer's independent counsel." ROA.25347. Lifson was replaced with one of Johanson's former law partners, William Campbell, whose "role in the transactions was far more limited than Lifson's." Id.

As for the appraiser, "Bruister (usually through Johanson) also had undue

influence over Donnelly," who, "[d]espite the presumed loyalty to the [Plans], . . . was clearly more loyal to Bruister and Johanson." ROA.25347-48. Bruister "essentially decided to hire Donnelly," ROA.25360, even though "a proper investigation [of Donnelly's background and qualifications] was lacking." ROA.25362. Donnelly had also initially "work[ed] directly for the seller," Bruister, to prepare a feasibility study, which "cemented" Donnelly's loyalty to Bruister and compromised his independence "from the beginning." ROA.25348. Early on, Donnelly wrote Bruister that he "look[ed] forward to working with you as you extract millions from your company tax free. That's my idea of fun," and that "Dave [Johanson] and I will see that your trust has not been misplaced." Id. (citations omitted; emphasis in opinion). Similarly, in 2004, Donnelly emailed Bruister "[i]sn't this a great way to get tax free dollars." ROA.25349. Donnelly "sen[t] valuation drafts to [Bruister] before sending them to the [trustees] to whom [Donnelly] owed his sole allegiance" so that Johanson could make changes, which further "evidence[d] coercion" by Bruister and his agent, Johanson. Id. (emphasis in opinion). Bruister and Johanson willingly interfered with Donnelly's valuations, and Donnelly was eager to please them to the exclusion of the Plans and their representatives. ROA.25356.

Overall, Bruister built the framework for a "pattern that continued into the Subject Transactions," whereby he and Johanson influenced the valuations in

Bruister's favor; Smith and Henry knew about Donnelly's "allegiance" to Bruister and Johanson, and permitted Bruister to advance his own agenda. ROA.25348 n.15, 25349, 25351. For example, when Donnelly discovered, a few months after the 2004 transaction closed, that he erroneously overstated BAI's value by more than $6 million, he raised the issue only with Johanson but not the Plan's trustees or counsel. ROA.25351.

Bruister's and Johanson's influence over Donnelly continued unabated through the final transaction. Id. Because Donnelly "lacked knowledge of some fairly standard valuation issues," he used a separate company called Business Equity Appraisal Reports, Inc. ("BEAR") to input data that Donnelly supplied into its software to generate a report. ROA.23551. During preparations for the final transaction, Donnelly received a draft report from BEAR showing a significant drop in BAI's value from the prior transaction. ROA.25352. Donnelly asked BEAR to adjust certain data to increase the valuation because Bruister "needs to get his fair share or the ESOP will get it all." Id. (emphasis in opinion). Donnelly also advised only Johanson – but not Campbell or the plan trustees – that he was "working on [the report] to see what I can tweak" to increase the valuation. Id. Bruister's concerns were not eased, because "[o]nce informed about the lower value, Johanson immediately admonished Donnelly, in large-font, bolded letters" to consider other factors that would increase the value. ROA.25352-53.

Donnelly's "tweaks" increased BAI's FMV in the next draft valuation, but "Johanson was dissatisfied [and] pressed harder" in a series of emails – that now included Smith and Henry – for Donnelly to make further adjustments that would increase BAI's FMV. ROA.25353-54. Donnelly followed Johanson's orders and asked BEAR to make further changes that would increase BAI's FMV. ROA.25354-55. At this late juncture, Johanson finally included the ESOPs' counsel, Campbell, in the email exchanges. ROA.25355. Campbell asked for a draft valuation, but Donnelly responded that it was not yet ready for him. Id. The court found that: "[W]hile Donnelly had already provided drafts to Johanson and attempted to incorporate Johanson's value-increasing recommendations, he declined to provide the drafts to [the Plans'] counsel, promising instead to provide one at the same time he sent it to the seller." Id. (emphasis in opinion). Donnelly's final valuation showed a $39 million value – more than $9 million above his initial number from days earlier and higher than any prior BAI valuation even though there was "no legitimate reason this appraisal was higher than the previous appraisals." ROA.25355-56. The court considered this clear evidence that Bruister (through Johanson) successfully increased Donnelly's valuations. ROA.25356, ROA.25347, ROA.25351.

Defendants simply fail to identify any error with these factual findings, which, certainly cumulatively, clearly establish Bruister's fiduciary authority and

control at the time of the three stock transactions.

Defendants narrowly attack two of the district court's factual findings: (1) that Bruister attended trustee meetings and the closings and also participated in "informal meetings" with the other trustees for the stock sales at issue; and (2) that he was involved with and approved the Plans' retention of Donnelly as their appraiser. Defs.' Br. 15-21. But even for these limited challenges, Bruister relies on one-sided snippets of trial testimony, lacking even a single citation to contrary deposition testimony or contemporaneous documents. Id. Thus, Bruister's approach ignores the district court's decision to place "greater emphasis on documents and sworn deposition testimony, which occurred several years before trial," than on the less credible testimony of the same witnesses because of faded memories and reconstructions of the events in the decade following the stock sales. ROA.25342 n.11. "[T]he burden of showing that the findings of the district court are clearly erroneous is heavier if the credibility of witnesses is a factor in the trial court's decision." French v. Allstate Indem. Co., 637 F.3d 571, 577 (5th Cir. 2011). Defendants' few trial excerpts do not carry this heavy burden.

Bruister's citations to his own trial testimony concerning his abstention are misleading. Bruister's conclusory insistence at trial that he abstained, Defs.' Br. 16, is contrary to earlier testimony that the lower court credited, ROA.25342-45, and conflicting documents. See, e.g., J-82 (Bruister on emails influencing December

2005 transactions); P-101 (Bruister sends 2004 valuation to Smith). Bruister also selectively quotes Smith's trial testimony to support his argument that Bruister abstained from the decision making, Defs.' Br. 17-19, but this is contradicted or at least tempered by her admission that she discussed valuations with Bruister to get his approval, ROA.26928:12-17, and that her main concern with the December 2005 transaction was Bruister's comfort level. ROA.27046:13-20. And while defendants state that "Smith knew she could vote against a proposed Transaction," Defs.' Br. 18, Smith's testimony to this effect is contradicted by her earlier deposition testimony that the court found more believable. ROA.25375-76 ("her prior testimony suggests that she may have thought she was obligated to go forward with the transactions at Donnelly's price"); ROA.26932:19-26933:3. Similarly, Smith's testimony that she knew her ERISA fiduciary duties and discussed them with the ESOPs' counsel, Defs.' Br. 17-18, contrasts with her own emails that show that she "never viewed herself as qualified to serve as a trustee." ROA.25375 (citing P-146, P-121). The Court properly concluded that Smith did not carry out her independent fiduciary duties. ROA.25374.

Bruister's references to Henry's testimony are similarly misrepresentative. Defs.' Br. 19-20. The court correctly concluded that, like Smith, Henry was clearly not independent and interacted with Bruister with respect to her decisions on these transactions. E.g., ROA.25343 (Henry considered Bruister a friend, he was a

major client of her firm, and "at minimum" she testified to discussing the ESOPs' transactions with him); ROA.25356 & J-117 (Henry acquiesced to Johanson's influence on the transactions in Bruister's favor, and "testified that [she was] always concerned about Bruister's interests," which demonstrates "divided loyalties"); ROA.25375 ("Smith and Henry abdicated their responsibilities and deferred to Johanson regarding Donnelly") (citing P-29, P-101); id. (Smith and Henry were "simply ill equipped to exert independent judgment"); ROA.25376 (Henry relied on Campbell, who "denied any responsibility for checking the valuations [or] providing any opinions on valuation."). Bruister's excerpts do not accurately characterize the decision below or the record, much less provide "a definite and firm conviction" that the district court's findings, mostly unchallenged, in support of Bruister's fiduciary status were clearly erroneous. French, 637 F.3d at 577.[4]

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[4] Bruister also suggests that the court's conclusion that he acted as a fiduciary is somehow undercut by the fact that he served multiple roles at BAI. Defs.' Br. 21. No one suggests that serving in multiple roles violates ERISA. "ERISA does require, however, that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions." Pegram v. Herdrich, 530 U.S. 211, 225 (2000). In circumstances where a fiduciary has multiple roles and conflicting loyalties with respect to a transaction, the burden is on the fiduciary to establish that he was acting solely in the plan's interest. Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982). Thus, far from helping Bruister, the fact that he played multiple, conflicting roles heightens – not lessens – Bruister's burden to show that he was not exercising his fiduciary authority during the transactions.

B. Bruister Was Also A Fiduciary Because He Appointed the Other Trustees

Whether or not Bruister acted as a fiduciary with regard to the three stock sales at issue, as a member of BAI's Board of Directors, Bruister (and Smith for that matter) appointed and had the power to remove the plan Trustees. ROA.25379-80; see ROA.24271, 24287 (Order, Dec. 20, 2013). For this reason alone, Bruister was a fiduciary with the well-established duty to appropriately review and monitor the actions of their fellow trustees. See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 418 (5th Cir. 1990); 29 C.F.R. § 2509.75-8 (D-4; FR-17).

Moreover, contrary to defendants' argument, Defs.' Br. at 24-25, the district court properly concluded that Bruister breached his duties as an appointing fiduciary. ROA.25379-80. Bruister allowed Smith to be a trustee even though Smith acknowledged that she was "unqualified to serve as a trustee," ROA.25380 (citing P-146); see P-145, and "Bruister was aware of her concerns about her qualifications." Id. Bruister watched as Henry and Smith blindly relied on Donnelly's FMV valuations, which Bruister influenced, and he knew that Smith and Henry "never negotiated." ROA.25378. Bruister also knew that Smith and Henry were copied on emails showing Johanson's efforts to increase Donnelly's valuations. ROA.25380. As the district court explained, and as discussed further in the next section of the brief, "[d]ealing directly with the seller to the exclusion of

the buyer is an obvious breach, and fiduciaries acting in the best interest of the ESOP would not have countenanced this procedure." ROA.25349. Thus, Bruister "remained idle while the seller [Bruister] communicated directly with the ESOT's independent appraiser . . . to elevate the price at the participant's expense. Bruister was aware of these breaches but did nothing." ROA.25380.

II. The District Court Committed No Clear Error In Finding that Bruister and Smith Acted Disloyally From Beginning to End and Committed Prohibited Transactions in Selling Bruister's Stock to the Plans For More than Adequate Consideration

A. The District Court Properly Concluded that Bruister and Smith Violated Their Duties of Loyalty Throughout the Transactions

As detailed above, the district court found that from the beginning, Bruister cemented Donnelly's loyalty to him (rather than the ESOPs), and leveraged Donnelly's loyalty to influence his valuations, supra at 23-26, 30-31. And, as detailed in the district court's decision, all the trustees, including Smith, were copied on the email exchanges in which Johanson and Donnelly cynically worked together to come up with a faulty appraisal that showed a significant increase in the value of the company following Hurricane Katrina, rather than the drop in value that even defendants' expert recognized. ROA.25351-56. As the court quite rightly found, this "demonstrates their divided loyalty and made it "unreasonable to rely on an appraiser who so obviously lacked independence." ROA.25356. Moreover, the court also noted that "both Smith and Henry testified that they were

always concerned about Bruister's interests." Id. On the extensive record, the court correctly concluded that the "duty of loyalty was breached from start to finish." ROA.25346-57.

Although defendants make a half-hearted attempt to argue that the evidence was somehow insufficient to show "Donnelly was deferential to Bruister," and that the weight of the evidence actually shows that Donnelly acted properly in doing the stock valuations, Defs.' Br. 22-24, this is far from sufficient to establish clear error given the overwhelming evidence of misfeasance. Moreover, defendants' fiduciary breaches turn on their own well-documented failures to act solely in the interest of the ESOPs, not whether Donnelly was per se unqualified, whether Donnelly used BEAR's valuation software, or Donnelly's valuation conclusions. The district court held that "Donnelly's reports . . . are not credible" and noted that at trial "Defendants made no real effort to validate his work." ROA.25392. Defendants' belated attempt now to prop up Donnelly's work is inapposite and untimely. See Bender v. Brumley, 1 F.3d 271, 275 (5th Cir. 1993).

B. The District Court Properly Concluded that Defendants Were Not Entitled to the Prohibited Transaction Exemption in Section 408(e)

The district court properly held that defendants could not carry their burden of proving the "adequate consideration" exemption under ERISA section 408(e), and therefore they engaged in non-exempt prohibited transactions in violation of ERISA section 406. ROA.25357-79. Defendants relied on Donnelly for purposes

of showing that they met the exemption's requirement of a "good faith" investigation of the stock's value, but failed to meet the three criteria for doing so: (1) investigating the expert's qualifications; (2) providing the expert with complete and accurate information, and (3) making certain that reliance on the appraiser is reasonably justified. ROA.25359-79 (citing Bussian, 223 F.3d at 301). On appeal, defendants contend that the district court clearly erred in faulting the trustees for relying on BAI's financial information and projections. Defs.' Br. 14-31. However, at most, this goes to whether they met the second criterion (complete and accurate information), ROA.25352, and so would not be a basis for reversal even if defendants were correct because they fail to dispute the district court's conclusions that they did not meet the other two criteria (investigation into Donnelly's background and reasonable reliance on his appraisals). See Bussian, 223 F.3d at 300-01 (fiduciaries "must" fulfill three criteria); see also ROA.25360-61, 70 (addressing defendants' failure to meet these criteria). In any event, defendants fail to establish clear error with respect to the court's ruling that they failed to meet the second criterion by showing that they provided Donnelly with complete and accurate information.

C. Donnelly Received Inaccurate and Incomplete Information

The district court correctly concluded the trustees failed to provide complete and accurate information to Donnelly. ROA.25362. As to accuracy, defendants

wrongly contend that no inaccuracies were identified by the court. Defs.' Br. 26. In fact, the district court identified "a threshold problem regarding the reliability of BAI's financial statements," which Donnelly had difficulty "decipher[ing]," and which defendants acknowledged issues with. ROA.25363 (citations omitted). Indeed, even defendants' expert "counsel[ed] caution," stating that BAI's financial data "should be viewed with caution" due to "known accounting inaccuracies and divergences" from established accounting principles; the data does "not necessarily [contain] actual economic results." ROA.25363 (citing J-52).[5] For this reason, neither the Secretary's nor defendants' expert used the financial statements that Donnelly did. See ROA.25364 ("Range worked around" inaccuracies); ROA.25391 (Messina assumed "BAI financial statements were unworkable [and] ignored most of it").

As to completeness, defendants nowhere contest (much less identify "clear error" with) the district court's conclusion that Donnelly was not provided complete information about BAI's relationship with DirecTV. That information

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[5] Defendants cite Messina's supposedly supporting testimony regarding BAI's revenue, Defs.' Br. 26, but fail to mention the list of problems Messina identified in other areas of the financial statements. See, e.g., ROA.28280:14-24 (overstated book value); ROA.28281:18-28282:19 (debt levels); 28318:19-28319:1 (missing cash flow statement); ROA.28320:12-19, 28326:17-24 (EBITDA, profitability); ROA.28329:12-20 (return on invested capital); ROA.28333:16-28337: (items missing, impossibly low accrued expenses and accounts payable results in overstatement of net income, inaccurate inventory) (Sec'y R. Excerpts 8-14, 16-21).

showed that BAI faced "risks [that] flowed from BAI's singular reliance on DTV as basically its only client and the lopsided leverage DTV enjoyed." ROA.25364. For example, DirecTV's contract with BAI granted it a unilateral right of cancellation, which made BAI unsellable to outside investors, but Donnelly was unaware of this information. ROA.25364-65. Defendants also failed to advise Donnelly about other important risk factors:

a. Rate reductions: DirecTV had the exclusive right to reduce the rates it paid BAI, but Donnelly was unaware of this. ROA.25365-67. In fact, Donnelly was completely unaware how DirecTV paid BAI or whether the pay rates were negotiable. Id. In 2004, DirecTV announced that it would reduce these rates, thus lowering BAI's profit margins, but defendants did not convey the rate changes to Donnelly even though it is "patently obvious that a legitimate appraiser would want to know that the company's sole client had begun slashing rates on the bulk of the company's services with the promise of more to come." Id.

b. Inventory: Donnelly was unaware that DirecTV implemented a new policy requiring installers like BAI to purchase the installation equipment (rather than receive it on consignment), which negatively affected BAI's profit margins and altered its financial statements. ROA.25367.

c. Vehicle Policy: In 2004, DirecTV announced a new policy requiring

installers like BAI to own or lease service vehicles, starting in 2005. Id. This policy "was a game changer that the trustees should have explained to Donnelly" because it "had a dramatic impact on BAI" by significantly increasing expenses and altering the way BAI paid its workers to a costlier and riskier hourly pay model. ROA.25367-68.

d. Cash Flow Issues: As a result of the foregoing, BAI experienced cash-flow problems in 2004 and 2005. ROA.25370. "[T]he picture Defendants painted for Donnelly . . . conflicted with their internal emails and communications in December 2005," which expressed alarm about the company's cash flow. ROA.25371-73.

The district court concluded that "Donnelly was generally oblivious to these dramatic shifts." ROA.25369. "There is no dispute that BAI and others knew about the potential for decreased rates and increased expenses in 2004, saw them happen in 2005, and were already complaining about them before the Subject Transactions." ROA.25369. Bruister knew that DirecTV "was trying to 'squeeze' as much profit out of them as possible," to the point that Bruister thought the DirecTV installers like BAI " could only make a 'sustenance living.'" ROA.25368-69. Defendants "knew these risk factors, openly discussed them among themselves, and had an obligation to make full disclosures to [Donnelly] so that he could determine whether they would affect FMV. Instead, the trustees continued

to paint a rosy picture and stood by silently as Johanson coaxed Donnelly to" come up with ever higher valuations. ROA.25373 (emphasis in original). In short, Donnelly's receipt of inaccurate and incomplete data "demonstrates the lack of quality information" from defendants, and precluded Donnelly from accurately analyzing BAI's value. ROA.25369-70. The district court's findings in this regard are fully supported.

Defendants also argue that the court's criticisms of defendants' reliance on BAI's financial projections were unsupported. Defs.' Br.26-31. Defendants conflate two different concepts in discussing the use of projections: prudent investigation and hindsight. As the district court explained in its summary judgment opinion, prudence "is an objective standard, and a fiduciary's subjective good faith 'is not a defense to a claim of imprudence.'" ROA.24294 (citing In re Dynegy, Inc. ERISA Litig., 309 F. Supp. 2d 861, 875 (S.D. Tex. 2004); Reich v. Lancaster, 55 F.3d 1034, 1046 (5th Cir. 1995); Cunningham, 716 F.2d at 1467); see 29 U.S.C. § 1104(a)(1)(B). When considering the use of projections or any other financial information, courts must "objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate [and] evaluate" the information. Bussian, 223 F.3d at 299 (citation omitted). Defendants complain that the district court engaged in improper hindsight analysis, Defs.' Br. 26-31, but in fact the district court determined that defendants failed to meet the fiduciary

standard based on information available at the time of the ESOP transactions. ROA.25373-79. "All three Defendants knew the problems facing BAI in 2004 and saw them materialize in 2005, yet they did not fully disclose those problems to Donnelly or ask whether he had accounted for them." ROA.25374.

Defendants' contention that they reasonably relied on projections concerning BAI's business prospects, Br. at 26-31, fails for three reasons. First, their repeated assertion that they had a subjective "good faith" belief in the projections is legally irrelevant. Cunningham, 716 F.2d at 1467 ("a pure heart and an empty head are not enough"). It is also factually inaccurate and baseless. ROA.25371-73 ("picture Defendants painted for Donnelly (and again at trial) conflicted with their internal emails and communications" from the time of the transactions); ROA.26862:6-13 (Smith "relied on [Bruister's] knowledge of our relationship with DirecTV and where things were going"); ROA.28683:25-28684:3, 28732:5-28733:25 (Henry lacked information from DirecTV, instead relying "on what Mr. Bruister or Amy would tell me."). Second, there was no objective basis for relying on the treatment of the financial projections in the valuations given the inaccuracy of the financial statements and defendants' knowledge that Donnelly "had not been informed about dramatic changes in BAI's business model that threatened its very existence." ROA.25362-73. Third, even if accurate information had been provided, Smith lacked the tools to meaningfully review the valuations, ROA.25375-76, and failed

to critically analyze the reports – including the impact of the undisclosed DirecTV information on projections. ROA.25373-79. Accordingly, the district court rightly held that defendants failed to meet ERISA section 408(e)'s "good faith" exemption. ROA.25357-58, 25373-74.[6]

D. Defendants' Failure to Appeal Bruister's Co-Fiduciary Liability Gives Rise to a Distinct, Undisputed Basis for Bruister's Fiduciary Liability

Defendants do not appeal Bruister's co-fiduciary liability under ERISA section 405(a), 29 U.S.C. § 1105(a), and therefore that ruling (ROA.25381) can be affirmed independent of all other issues raised. United States v. Martinez, 263 F.3d 436, 438 (5th Cir. 2001); see also Fed. R. App. P. 28(a)(9)(A). There is no dispute that Bruister was always an ESOP; he never resigned, he merely claimed to abstain from the stock transactions at issue. Accordingly, he always faced potential co-fiduciary liability for Smith and Henry's breaches, which are established: Henry has withdrawn her appeal of the court's decision, and defendants' appeal hardly defends Smith. Bruister's liability as a co-fiduciary is distinct from his breaches in acting imprudently himself and in engaging in the

[6] Defendants contend that "good faith" was established because the district court credited the valuation of their expert, Range, whose fair market value calculations were higher than Donnelly's. Defs.' Br. 37-38. However, as discussed in Section IV, infra, at 53-61 (Section IV.A.), the district court's partial reliance on Range's calculations was not justified and cannot be squared with the court's factual findings on liability.

prohibited transactions, as well duties as an appointing fiduciary, because co-fiduciary liability includes an obligation to remedy any harm to the Plans caused by a known breach of duty by one's co-fiduciaries. 29 U.S.C. §1105(a); ROA.25381. Defendants do not seek review of that ruling, and it should be summarily upheld.

III. Defendants' Arguments Regarding Remedies Lack Merit

A. The District Court Properly Considered the ESOPs' Debt in Determining Losses

For the December 2004 and 2005 transactions, the district court properly measured the overpayment based on the difference between the purchase price and BAI stock's FMV at the time of sale. ROA.25393-94. The stock purchase agreements at the time of the transactions state the ESOP paid $6.7 million in 2004 and $10.5 million in 2005 for ownership of the BAI stock. ¶¶ 1, 2 of J-20, J-22 (Sec'y R. Excerpts 4-7). In order to pay these purchase prices, the ESOP incurred substantial debt. Defendants correctly note that the ESOP did not fully pay off this debt, Defs.' Br. 38-40, but they err in their belief that the ESOP's losses stemming from there two transactions are limited by the ESOP's debt payments, Defs.' Br. 41-47.[7]

[7] The September 2005 transaction was all cash and defendants therefore do not challenge the calculation of losses for that transaction on this basis. ROA.25393.

As the district court correctly summarized, every court to consider the issue has included the full purchase price (including the full value of any debt incurred at the time of the transaction to pay that purchase price) as the basis for calculating an ESOP's losses where the ESOP overpaid for closely-held company stock. ROA.25394 (citing Chesemore v. Alliance Holdings, Inc., 948 F. Supp. 2d 928, 943 (W.D. Wisc. 2013); Henry v. U.S. Trust Co., 569 F.3d 96, 100 n.4 (2d Cir. 2009); Neil v. Zell, 767 F. Supp. 2d 933, 941 (N.D. Ill. 2011); Reich v. Valley Nat'l Bank of Ariz., 837 F. Supp. 1259, 1287 (S.D.N.Y. 1993)); see also Horn v. McQueen, 215 F. Supp. 2d 867, 889-90 (W.D. Ky. 2002).[8] When an ESOP assumes debt in order to finance the purchase price the "debt contracted as part of a leveraged ESOP transaction 'represents actual consideration with concrete financial implications as well as forgone employee benefits.'" Chesemore, 948 F. Supp. 2d at 943-44. Indeed, as the Second Circuit has aptly stated, there is "no legal authority for [defendants'] contention that only repayments of debt, and not the assumption of indebtedness itself, constitute a loss." Henry, 569 F.3d at 100 n.4.

The courts uniformly reach this conclusion due to "the obvious fact that the assumption of indebtedness has immediate legal and economic consequences even

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[8] Hans v. Tharaldson, 2011 WL 7179644 (D.N.D. Oct. 31, 2011), cited by defendants, Defs.' Br. 46, did not address the debt issue presented here, except to say that in "analyzing the proposed methods of calculating damages . . . [n]o one in this litigation has claimed that the debt financing should not be considered." Id. at *10.

before the borrower begins to repay the debt." Henry, 569 F.3d at 100 n.4; accord Chesemore, 948 F. Supp. 2d at 943-44 (citation omitted). Thus, future payments on the debt used to finance the purchase price are irrelevant to the loss caused by the overpayment. See Horn, 215 F. Supp. 2d at 889-90. To illustrate this point, one court found it useful to analogize these ESOP transactions to a home purchase. An ESOP that purchases stock in a leveraged transaction, as in this case, is like "the purchaser of a home [who] borrows, from the seller himself, [money] with which to buy that home." Neil, 767 F. Supp. 2d at 941. Under those circumstances, "[n]o one would seriously contend that the buyer did not purchase the home . . . even if he borrowed the money for the transaction." Id. If the buyer purchases a house with a $100,000 loan even though the house's FMV is only $50,000, the buyer still overpaid by $50,000; whether loan payments were made is inapposite. See id. Similarly, here, the ESOP overpaid for BAI stock at the time of the transactions; whether the stock subsequently lost its value or whether the ESOP ever fully repaid the debt incurred to pay for the stock is irrelevant. "The fact that the money to purchase the [now worthless] stock was borrowed does not mean that the money was not lost." Id.; see id. at 941-43 (rejecting argument to "view the [leveraged] purchase as an apparition"); accord Chesemore, 948 F. Supp. 2d at 944; Valley Nat'l Bank, 837 F. Supp. at 1287.

Lacking any supporting authority, defendants' position rests on a series of self-serving misconstructions. First, defendants assert that the only payments the ESOPs made for BAI stock were the debt repayments, Defs.' Br. 40, ignoring the fact that under the Stock Purchase Agreements, the ESOP was required "[a]t the Closing . . . [to] deliver the Purchase Price to the seller," ¶¶ 1, 2 of J-21, J-22, and it did so in the two disputed transactions. Defendants' own actions, moreover, belie their argument that the only payment they received was in the form of debt repayments; instead, they reaped "immediate tax benefits for BAI" and Bruister after closing based on the purchase price. ROA.25393.

Defendants also cite the Restatement (Second) of Contracts section 347, Defs.' Br. 42, which states that "[a]ny cost or other loss that [an injured party] has avoided by not having to perform" can be subtracted from the loss caused by a contractual breach. The contract at issue here is the prohibited transaction that exchanged Bruister's stock for a combination of cash and promissory notes from the Plans. The Secretary does not allege that the contract was breached, so the Restatement of Contracts is inapplicable. The issue here is not damages from a contractual breach but rather injury caused by the trustees' approval of these prohibited and completed transactions. Governing case-law uniformly holds that the injury in such cases includes both the cash paid and the indebtedness incurred to purchase the stock, because the Plans, for example, could have leveraged this

debt and cash for other non-prohibited and more productive purposes.
ROA.25394.

Thus, defendants are misguided in focusing on what they say happened to these promissory notes after the transactions. Indeed, they ignore the fact that the Plans did repay over $7.5 million on the two loans (most on the earlier), ROA.25317-18, part of which constitutes very real and substantial losses even under defendants' post hoc view of the transactions. Though the ESOP stopped paying down the loans years after the transactions, ROA.25332-36, it was not because of defendants' generosity in "forgiving" the loans, or the ESOP's neglect, but rather because the struggling company was no longer financially able to make contributions, as it became clear that the company was going out of business and the stock in the company was becoming worthless. See ROA.25334. Defendants cannot now seek credit for having agreed to take notes as part of the purchase price and then forgiving the loans when they became worthless.

These post-transaction events surrounding the promissory notes constitute an independent contractual relationship. Whether that contract remained unfulfilled does not eliminate the Plans' injury caused by the prohibited transactions. Even if post-transaction events surrounding the promissory notes somehow relate to the stock purchase transactions for damages purposes, the Restatement of Contracts still does not support defendants' argument. The Restatement is clear that "[l]oss

avoided is subtracted only if the saving results from the injured party not having to perform rather than from some unrelated event." Restatement (Second) of Contracts § 347 (1981). In undisputed findings, the court found that the Plans' debt payments were tied to BAI's contributions to the Plans, as BAI was obligated to do. ROA.25317, ROA.25316 (quoting Cunningham, 716 F.2d at 1459); ROA.25393 (citing D-225 at 109 (BAI "will make contributions to the ESOT in amounts which . . . will be sufficient to enable the ESOT to make" payments on the note)). BAI's post-transaction deterioration caused the "complete discontinuance of contributions," and, hence, the cessation of the Plans' debt payments on the notes. ROA.25336. These post-transaction events were not an effort to "avoid" the loss caused by the initial prohibited transaction; the Plans' failure to fulfill the notes was caused by an unrelated event.

Finally, defendants argue that the proper remedy under ERISA makes the plan whole by returning the ESOP to where they would have been had the wrong not been committed. Defs.' Br. 42-43. As set forth in more detail infra, at 64-72 (Section IV.C.), one such "make whole" remedy in this case would be rescission, which the Secretary supports. Alternatively, the district court properly held that the ESOP is made whole by returning the amount that the ESOPs overpaid for BAI's shares in the stock transactions, which includes amounts paid with incurred debt.

B. Defendants' Remaining Arguments Lack Merit

1. The ESOPs' $3.8 Million Payment on the December 2004 Promissory Note Caused a Loss to the Plan

The district court saw through defendants' smoke and "mirror loans" argument when it correctly concluded that the only question for purposes of calculating losses is what the ESOPs paid, which was $3.8 million to BAI on the refinanced December 2004 loan to release shares from the suspense account. ROA.2538-84.[9] To be crystal clear, nobody disagrees with the district court's finding that that the ESOPs made this $3.8 million payment. See Defs.' Br. 48-53 (referring to the ESOP's payment).

Nevertheless, defendants contend that the ESOPs suffered no loss because BAI, through Bruister, never paid the $3.8 million it received from the ESOPs to BFLLC, the corporation set up by Bruister for the transactions, and therefore BFLLC did not benefit from the ESOPs' $3.8 million payment. Defs.' Br. 48-53. This argument was succinctly rejected by the district court: it "emphasizes the wrong issue . . . [t]he fact that BAI did not pay BFLLC is of no moment." ROA.25384. ERISA remedies fiduciary breaches by, among other things, restoring "losses to the plan," which is a function of money paid out of the plan

[9] The Court only needs to reach this issue if it reverses the lower court's calculation of damages based on the full contract price. ROA.25393-95.

assets – not third-party receipts. 29 U.S.C. § 1109.[10] Accordingly, whether Bruister elected to keep the $3.8 million that BAI received or pay it to another entity that he controlled does "not alter the fact that the ESOP expended assets to release shares;" this undisputed payment is all that matters for purposes of measuring the ESOP's overpayment loss. ROA.25383.

2. The District Court did not Abuse its Discretion By Using Messina's Report to Calculate Losses

Defendants contend that the district court erred in using Messina's report to calculate losses because their expert, Range, disagreed with: (a) Messina's expense calculations; and (b) Messina's treatment of debt. Defs.' Br. 54-61. As is often the case, however, "[m]uch of this trial was a familiar battle of experts. 'The credibility determination of witnesses, including experts, is peculiarly within the province of the district court.'" League of United Latin Am. Citizens #4552 (LULAC) v. Roscoe Indep. Sch. Dist., 123 F.3d 843, 846 (5th Cir. 1997) (citation omitted). "When reviewing a district court's factual findings, this court may not second-guess the district court's resolution of conflicting testimony or its choice of which experts to believe." Grilletta v. Lexington Ins. Co., 558 F.3d 359, 365 (5th Cir.

[10] Defendants' hypothetical in support of this argument has too many erroneous assumptions to address. Defs.' Br. 50-52. Fundamentally, it rests on the entirely incorrect and unsupportable premise that a company's receipt of tax benefits somehow eliminates the injury to the ESOP caused by an initial overpayment for shares.

2009). With respect to both issues, Range and Messina provided ample testimony criticizing each other's expense calculations and debt levels, and they were cross-examined for days regarding their methods and alleged errors. ROA.25321.

Defendants' argument that Messina's expense and debt calculations were erroneous is based solely on Range's own opinions about Messina's methods. Defs.' Br. 54-61. At trial, Messina repeatedly testified that BAI's financial statements, including the purported "actual expenses" contained therein, were inaccurate and could not be relied upon for valuing BAI, and that he handled the problem by extrapolating expenses based on more reliable industry data. ROA.28326:17-28327:12, 28333:16-28337:1, 28386:17-28387:9, 28422:16-24, 28425:9-16, 28434:9-28436:11, 28514:15-25, 28515:22-28516:5 (Sec'y R. Excerpts 14-15, 17-21, 32-40). Messina likewise explained that the debt levels in the financial statements were unreliable, so he determined BAI's debt in a manner most consistent with the available information. ROA.28282:14-19, 28343:18-28344:24, 28351:16-28356:25, 28357:13-28358:18 (Sec'y R. Excerpts 10, 22-31).

The district court's finding that Messina provided an "adequate explanation" for his methods, such as dealing with the expense and debt issues, certainly is not clear error – particularly where the asserted error is based on the thin reed that the opposing expert disagrees. See Grilletta, 558 F.3d at 365; Fed. R. Evid. 702, Adv. Committee's Note (one expert's reliability "does not necessarily mean that

contradictory expert testimony is unreliable"); Kuhn v. Wyeth, Inc., 686 F.3d 618, 625 (8th Cir. 2012). That Range "worked around" problems with BAI's financials differently, ROA.25363-64, does not make Messina's approach unreliable. Indeed, under defendants' rationale, the lower court should not have considered Range's report merely because Messina believed Range was in error as to, for example, his debt assumptions, see, e.g., ROA.29045:7-29048:9, 29051:3-13, weighted average cost of capital, ROA.28303:23-28304:20, and revenue growth rate, ROA.28321:6-25. This argument obviously fails.[11]

Lastly, Range and Messina's disagreements on these two points are the byproduct of the inaccurate financial statements for which defendants were responsible. ROA.25363. If the financial statements had been reliable, the experts could have at least agreed on the appropriate underlying data. See ROA.29051:3-13 (noting that it is "very unusual" for experts not to agree on debt number, which speaks to unreliability of financial statements). Defendants' own neglect in authorizing the transactions despite unreliable financial data at the time is precisely what created the uncertainties, and these types of uncertainties should be resolved against defendants so that they do not benefit from their failures at the expense of

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[11] Defendants are also incorrect that the court was required to issue a specific factual finding on each expert dispute. See Pipitone v. Biomatrix, Inc., 288 F.3d 239, 249 (5th Cir. 2002) (quoting Fed. R. Evid. 702, Advisory Committee Notes).

the ESOP participants they were supposed to protect. See infra, at 61-64 (Section IV.B.).

3. The District Court Acted Within its Discretion in Ordering Prejudgment Interest

Defendants correctly acknowledged that a district court's award of prejudgment interest that is assessed "as compensation for the use of funds," Whitfield v. Lindemann, 853 F.2d 1298, 1307 (5th Cir. 1988), is subject to abuse of discretion review. See Defs.' Br. 61-62. The district court correctly observed that prejudgment interest is used to compensate the ESOPs' participants, the victims of the prohibited transactions. ROA.25396; see Ford v. Uniroyal Pension Plan, 154 F.3d 613, 620 (6th Cir. 1998) (recognizing that prejudgment interest under ERISA is used to compensate plan participants' "lost opportunity to use or invest the benefit payment"). Defendants improperly focus, once again, on the supposed unfairness to the breaching fiduciaries. See, e.g., Defs.' Br. 63. When viewed from the ESOP participants' perspective, they incurred massive debt to pay Bruister (or BFLLC) for overvalued stock that ultimately lost all its value in a prohibited transaction. In consideration for their stock, Bruister and BFLLC received promissory notes from the company on behalf of the ESOP at the time of the transactions. See, e.g., Ackerman v. F.D.I.C., 973 F.2d 1221, 1222 (5th Cir. 1992) (buyers' promissory note is "consideration for their interests" in limited partnership). Rather than enter into disloyal and prohibited transactions, the

trustees for the ESOP could have avoided this debt load or used debt for a different investment. See Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 697 (7th Cir. 1991) (prejudgment interest is used to compensate the unnecessary incurrence of debt and impairment of credit).

On the other side, Bruister and BFLLC (but not Smith and Henry) received the tax and other benefits of the purchase at an inflated value over the same time period, which Bruister and BFLLC accepted as equivalent value for the stock they sold to the ESOP at the time of the transaction. The court acted within its discretion in determining that the ESOP should not be penalized by Bruister and BFLLC's choice to accept and hold the promissory notes instead of cash as consideration for BAI stock; whether that choice, in hindsight, resulted in a promissory note that lost value over time or did not produce its expected return does not affect the interest needed to compensate the victims of the initial overpayment. Cf. Klepeis v. J & R Equip., Inc., 2012 WL 2849390, at *2 (S.D.N.Y. May 31, 2012), adopted by 2012 WL 2849750 (S.D.N.Y. July 11, 2012) (rejecting attempts to calculate prejudgment interest based on negative returns on what defendants allege to be the plaintiffs' alternative investments in hindsight); Novella v. Westchester Cnty., 661 F.3d 128, 150 (2d Cir. 2011).[12]

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[12] Defendants' argument (Defs.' Br. 64-65) that the district court somehow erred in entering two judgments – one in the Radar suit and one in the Secretary's suit – is

4. The District Court Properly Issued a Fiduciary and Service Provider Bar

The Secretary's claims were brought pursuant to ERISA sections 502(a)(2) and (a)(5), both of which authorized the district court to impose injunctive or other "equitable relief" to remedy Bruister's and Smith's substantial violations, described above. ROA.3685-3744 (Second Am. Compl.); 29 U.S.C. §§ 1132(a)(2), (a)(5). Contrary to defendants' argument, which lacks any supporting authority, Defs.' Br. 66, ERISA authorizes a court to issue injunctive relief to remedy ERISA violations irrespective of the magnitude of harm. See Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993). In any event, given the extent of violations here, which the court described as "egregious misconduct," ROA.25397, there is no basis for concluding that the district court's fiduciary and service provider bars against Bruister and Smith were an abuse of discretion. Compare Chao v. Merino, 452 F.3d 174, 185-86 (2d Cir. 2006); Beck, 947 F.2d at 641-42; Martin v. Feilen, 965 F.2d 660, 673 (8th Cir. 1992).

"frivolous." Beck v. Levering, 947 F.2d 639, 642 (2d Cir. 1991). Two judgments in parallel ERISA suits filed by the Secretary and private plaintiffs are commonplace. See Herman v. S.C. Nat'l Bank, 140 F.3d 1413, 1424 (11th Cir. 1998) (listing cases). In such cases, as here, it is clear that "the judgment here is concurrent, and appellants are not subject to double recovery because the judgment merely decreases the amounts recouped by the Plans by the sums recovered by the private plaintiffs." Beck, 947 F.2d at 642.

IV. Given the District Court's Factual Findings on Liability, the Court Clearly Erred in Relying on Defendants' Expert in Part in Calculating the Amount of the Overpayment

As described above, the district court correctly concluded that defendants, as fiduciaries to the ESOPs, acted disloyally and engaged in prohibited transactions by completely failing to ascertain the true value of the stock purchased by the ESOPs prior to the purchase transactions, thereby causing the ESOPs to significantly overpay for this stock. The court recognized two potential remedies for the disloyal and prohibited transactions: (1) compensatory damages based on the amount of the overpayment for the stock; or (2) rescission of the stock transactions through return of the (now-worthless) stock to Bruister, the seller, and refund of the purchase price to the ESOPs (the buyer). ROA.25388-89.

The court selected the compensation remedy, measured by "'the difference between the price paid and the price that should have been paid.'" ROA.25386 (citations omitted). To make this calculation, the court had to determine, based on the evidence, what "should have been paid" - i.e., the stock's fair market value at the time of sale. ROA.25386-87. The court abused its discretion in doing so, however, by averaging the fair market value estimates of the three experts (and without explanation giving greater relative weight to the testimony of defendants' expert), particularly given the flaws in defendants' data and Range's conclusion that

the price paid by the ESOP was within the range of the stock's FMV and, therefore, no loss occurred.

Range's testimony was in contrast to the district court's own conclusion that the valuations performed at the time of the transactions were not performed in good faith in large part because they were based on overly optimistic views of BAI's prospects. Rather than crediting and indeed giving great weight to Range's testimony, the court should have resolved any doubts against the breaching fiduciaries and in favor of the innocent plan participants who were harmed in the illegal transactions. Accordingly, the court should either have relied on the expert for the Secretary and Rader plaintiffs' expert (whose numbers were quite close despite some differences in methodology) in assessing an overpayment remedy, or, to the extent that this Court concludes that fair market value cannot be assessed with any degree of certainty, ordered rescission of the transactions.

A. The District Court's Reliance on Range's Fair Market Value Calculations Cannot Be Squared With the Court's Factual Findings

"Clear error" occurs if there is an internal inconsistency in the district court's credibility findings. See Anderson v. City of Bessemer, N.C., 742 f,3D 576, 575 (1985). Thus, while a trial court's "decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error," this does not mean that "the trial

judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness." Id. (emphasis added). For instance, "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." Id. In such circumstances, "the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." Id. (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 396 (1948)). The district court here committed just such error by crediting and indeed giving great weight to Range's conclusions even though they were inconsistent in significant respects with the district court's well-supported findings in the case. Estate of Jameson v. C.I.R., 267 F.3d 366, 372 (5th Cir. 2001) (reversing tax court decision on fair market value due to "internally inconsistent" analysis of expert testimony on discount rates and investment strategy).

1. Range's Assumptions about BAI Conflicted with the Court's Findings

The district court credited Range's fair market value calculations even though these valuations relied on assumptions that conflicted with the court's own findings. The court concluded that "no expert was more reliable than the others," and observed that many of the differences between plaintiffs' experts and defendants' expert, Range, "turned on whether the appraiser saw BAI as a growth

company" or a "no-growth company." ROA.25390-91. Range viewed BAI's prospects favorably, Messina and Mercer negatively; the court's resolution was that "the issues offset." ROA.25391. However, Range's assumption that BAI was a "growth company" conflicts fundamentally with the court's own findings about what the trustees knew about the company at the time of the transactions.

For example, the district court found that BAI faced risks from its "singular reliance on DTV as basically its only client [with] lopsided leverage." ROA.25364. This allowed DirecTV to unilaterally terminate BAI's contract and to modify or take away its service areas. ROA.25364-65. The district court found that, prior to the stock sales at issue, DirecTV announced or implemented plans to reduce BAI's payment rates, to impose costlier inventory requirements, and to institute a new vehicle policy. ROA.25365-68. The court determined that the latter policy resulted in such a "substantial and permanent" increase in BAI's expenses that it was a "game changer." ROA.25367-68. The court viewed these as "dramatic changes in BAI's business model that threatened its very existence." Id.

Moreover, when Hurricane Katrina made landfall in August 2005, BAI lost its ability to repay loans, and the court explained that, by December 2005, "[e]very expert, including defendants' expert Gregory Range, opined that the value dropped between September and December 2005." ROA.25356. BAI was in trouble because BAI "incurred lots more debt between the two appraisal dates," and the

court stated that the "added debt should have raised questions." ROA.25352 (internal quotations and citations omitted). The court also noted that BAI was leasing its vehicles, and "an ongoing lease requirement would hurt EBITDA margins and presumably decrease the valuation." ROA.25354. The district court even credited Johanson's candid "conclu[sion] that '[g]iven these circumstances, it is a wonder that Bruister has made anything [in 2005.]'" ROA.25354 (citation omitted). The court concluded that, "most significantly," defendants' own internal communications emails from this period reflect BAI's declining prospects. ROA.25371-72 (referring to BAI's "downturn"); ROA.25373 (defendants painted a too "rosy picture"). These findings are inconsistent with Range's assumption that BAI was a "growth company."

Compounding this problem, Range relied on information gathered from interviews with defendants during the litigation, which the district court had determined "was not entirely consistent with the record (especially the emails from that period) and overestimated the company's projected EBITDA margins and long-term prospects." ROA.25390; cf. U.S. Gypsum Co., 333 U.S. at 396 ("[w]here such testimony is in conflict with contemporaneous documents we can give it little weight").

In other words, the court's own findings concerning BAI's business prospects at the time of the stock sales at issue were unequivocally pessimistic.

These factual findings clearly undermine Range's assumption that the company was a "growth" company and support plaintiffs' experts' assumption that the company was not. ROA.25391. Given all of this, the court clearly erred in concluding that Range's values, which were based fundamentally on false assumptions about the company's growth prospects at the time of the transactions, were entitled to equal weight in "offsetting" the estimated values given by the plaintiffs' experts.

2. Range's Calculations Were Inflated Based on the Court's Own Findings

The court's factual findings further confirm that Range's values were inflated. The district court found that Donnelly was "motivated to inflate the valuations and [he] did so," ROA.25392, and that Donnelly's numbers were inflated as result of his receipt of incomplete information regarding BAI. See supra, at 33-39 (Section II.B.). For these reasons, the court determined that "Donnelly's reports will not be included [in the damages calculation] because they are not credible. Indeed Defendants made no real effort to validate his work." ROA.25392. The district court's substantial (and unappealed) findings that Donnelly was loyal to Bruister, who (often through Johanson) pushed Donnelly to issue ever higher valuation reports, as well as its conclusion that defendants failed to advise Donnelly of the litany of "dramatic changes in BAI's business model that

threatened its very existence" led it to conclude that Donnelly's values were inflated and thus not credible. See supra, at 23-26, 30-31, 33-39.

Yet, when one compares Range's values to Donnelly's inflated values, Range's values are consistently higher than Donnelly's overstated figures:

Transaction	Donnelly Total Price for Shares Purchased	Range FMV for Shares Purchased
December 2004	$6,700,000	$7,700,000 to $9,000,000
September 2005	$1,199,999.72	$1,350,000 to $1,590,000
December 2005	$10,507,421.34	$10,400,000 to $12,200,000

ROA.25392; J-51 (Defs.' R. Excerpts, at 183). The magnitude of this difference was increased by the court's use of the average between Range's high and low values:

Transaction	Average of Range's FMV Range for Share Purchased	Amount Higher Than Donnelly's Price (absolute and percentage)
December 2004	$8,350,000	$1,650,000 (or 24.6% higher than Donnelly's Price)
September 2005	$1,470,000	$270,000.28 (or 22.5% higher)
December 2005	$11,300,000	$792,578.66 (or 7.5% higher)

Id.

Defendants also note that Range's values were consistently above Donnelly but draw exactly the wrong conclusion from this, asserting that the district court's "acceptance of the Range valuations" is "the most significant evidence that Donnelly did not inflate his [fair market value] determinations." Defs.' Br. 23. In fact, this is perhaps the strongest reason that the district court clearly erred in

relying on Range's higher values when it had already found that Donnelly's "inflate[d]" values were based on his lack of complete information about BAI's dire straits and his erroneous assumption that it was a growth company.[13] ROA.25392-93.

3. The Court's Weighting of the Three Experts Was Also in Error

For these reasons, the court's factual findings concerning the flaws in Donnelly's calculation logically support giving no weight to Range's even higher estimates. The district court, however, did the exact opposite and weighted Range's conclusions twice as heavily (50%) as each of plaintiffs' experts (25% each). Cf. Dunn, 301 F.3d at 357 ("[i]rrespective of whether . . . the assignment of relative weights to the results of the different valuation approaches is deemed to be an issue of law or a mixed question of fact and law, we review it de novo). The court's unbalanced weighting further undermined by the district court's own rationale that all of the experts were qualified, that "no expert was more reliable than the others," that "they all had strengths and weakness," and that "the various

[13] Indeed, it was also illogical for the court to "check" its fair market value numbers against Donnelly's "initial" fair market value numbers before he "'tweaked' the numbers to further increase value." ROA.25392-93. The fact that Donnelly's pre-tweaked numbers were "comparable" to the court's determination of fair market value should have been an indication that the court's estimate was far too high, not that it was "what one would expect," because the court already determined that Donnelly did not have the information necessary about the company's true financial picture. See supra, at 33-39 (Section II.B.).

reports were of similar values." ROA.25320-21, 25390-91. If the three experts' opinions were indeed equally reliable, their reports should have – at a minimum – been weighted equally (one-third weight to each valuation expert). Instead, the court took the unusual approach of giving greater weight to the expert whose testimony was internally inconsistent with the court's own factual findings. This was an abuse of discretion See Henry v. Champlain Enterprises, Inc., 445 F.3d 610, 622 & n.4 (2d Cir. 2006) (Sotomayor, J.) (rejecting contention that the district court's valuation was justified because it fell between the values advanced by each side where court found both sides "incredible" and did not adequately explain how it reached its number) (citations omitted).

B. The District Court Should have Resolved Uncertainties Regarding Fair Market Value in the Plans' Favor, and Not in Favor of the Breaching Fiduciaries

Even setting aside the inconsistencies between the factual findings and Range's conclusions, the court should have favored plaintiffs' experts in its calculations of damages if the experts had equally credible valuation conclusions. As the district court noted, the "'[a]ppraisal of closely held stock is a very inexact science' with a 'level of uncertainty inherent in the process.'" ROA.25389 (quoting Cunningham, 716 F.2d at 1473). The court recognized that "[t]he truth of that statement is evident" in this case, where the three experts each "employed several valuation approaches that included different methods and models," none of the

methods were "clearly correct or incorrect," and "each method within the experts' valuations involved a large number judgment calls." ROA.25389-91. Despite these variations, the court concluded that the "reports were of similar value." ROA.25391. Under such circumstances, uncertainties about the calculation of damages should be resolved in favor of the innocent plan participants who were harmed by the transactions and against the breaching fiduciaries who acted disloyally and imprudently and engaged in prohibited ERISA transactions. See Kim v. Fujikawa, 871 F.2d 1427, 1430-31 (9th Cir. 1989) ("In determining the amount that a breaching fiduciary must restore to the [ERISA plan] as a result of a prohibited transaction, the court 'should resolve doubts in favor of plaintiffs'"); Secretary of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002); Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599, 602 (8th Cir. 1995); Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985); Leigh, 727 F.2d at 138-39.

While the district court acknowledged this established principle, it failed to apply the principle to this case. The district court concluded that the experts' different "methodologies were not clearly correct or incorrect," although the court identified no specific flaws with the Secretary's and Rader plaintiffs' experts (but just assumed that their opinions were infected with 20/20 hindsight). ROA.25391. The court found that "judgment calls are just that, and though [Mercer] and Messina differed with Range on many of them, the court cannot say that any one

result was better." ROA.25390. In each instance where the court identified uncertainties concerning the correctness of the experts' approaches, it never resolved the doubts in plaintiffs' favor. Rather, the court resolved doubts in defendants' favor by averaging the numbers provided by all three experts and incongruously giving greater weight to defendant's expert.

If the experts were equally credible on these "judgment calls," the court should have resolved the uncertainty in the favor of the innocent plan participants by relying solely on plaintiffs' experts' judgment calls, their assessment of BAI as a "no-growth" company, and their methodologies concerning adjustments to certain valuation methods and the use of financial data, particularly given the problems described above with relying on Range's values. This principle is especially apt here where there were in fact significant uncertainties about the company's fair market value stemming from the company's failure to keep accurate financial records and the fiduciaries' failure to determine the fair market value before they purchased all the stock in the company for the pension plan. Likewise, it has long been recognized in ERISA as in trust law that the "burden of proof in an accounting is on the fiduciary to show that he derived no unfair advantage from his relationship." Bierwirth, 754 F.2d at 1056.[14] Based on these principles, this Court

[14] Policy considerations also weigh against the district court's averaging approach. The district court expressed understandable concern that experts in this

should reject Range's flawed estimates for all the reasons we have described, and instead rely on the determination of fair market value provided by the Secretary's expert, Messina (whose independently derived numbers were remarkably close to the numbers proposed by Rader plaintiffs' experts). Cf. Dunn, 301 F.3d at 357 (reviewing de novo the relative weights to be given to different valuation approaches).

C. Alternatively, if Fair Market Value Cannot be Calculated With Certainty, Rescission is the Most Appropriate Remedy

Alternatively, if the fair market values simply cannot be determined based on the testimony and evidence presented at trial with a sufficient level of certainty, given the faulty contemporaneous financial records, this Court should order rescission of the transactions – which were flatly prohibited under ERISA section

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kind of case will, on the defendants' side, inflate their numbers as much as possible, and experts on the plaintiffs' side will deflate their numbers as much as possible. ROA.25391 ("at the risk of appearing jaded, it was not surprising that Plaintiffs' experts achieved low values and Defendants' expert achieved a high value"). But its approach – to simply accept numbers provided by each side's experts and average them without resolving whose numbers are more supported and credible – exacerbates rather than solves this problem by signaling to experts on each side that their approach will be taken into account even where, as here, their assumptions and numbers are far apart. This is inconsistent with precedent from this Court which has stressed that averaging valuations "cannot be resorted to to reconcile greatly divergent estimates." See Lake Charles Harbor & Terminal Dist. v. Henning, 409 F.2d 932, 936-37 & n.7 (5th Cir. 1969) (citations omitted). Because the estimates provided by Range, on the one hand, and Messina and Mercer on the other, were far apart numerically and incompatible as a matter of methodology, averaging was inappropriate under Lake Charles.

406 and the result of imprudent and disloyal conduct by the fiduciaries – and return to the ESOPs the amount it paid in the prohibited stock transactions.

As this Court has recognized, "[w]hen considering equitable remedies, '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.'" Whitfield, 853 F.2d at 1305–06. Rescission is an equitable remedy that seems ideally suited to that task in this case. "The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract." Jones v. Saxon Mortgage, Inc., 537 F.3d 320 (4th Cir. 1998) (citing Invengineering, Inc. v. Foregger Co., 293 F.2d 201, 204 (3d Cir.1961); Rosenfield v. HSBC Bank USA, 681 F.3d 1172 (10th Cir. 2012). In ERISA stock transactions such as the ones at issue here, rescission returns the entire consideration paid for the stock to the ESOP. See In re SeaQuest Diving, LP, 579 F.3d 411, 419 (5th Cir. 2009); Lindy Investments v. Shakertown Corp., 209 F.3d 802, 804 (5th Cir. 2000). Cf. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 463-64 (1939) (court may order trustees to "take back" improper investments and "restore the amount expended for them to the trust estate").

1. Trust Law Supports Rescission

The trust law treatises confirm that, in the context of the breach of a trustee's investment duties, "the general rule [is] that the object of damages is to make the

injured party whole. Stated otherwise, the goal is to put injured parties in the same condition in which they would have been had the wrong not been committed." G. Bogert & G. Bogert, The Law of Trusts and Trustees § 701 (2014) ("Bogert"); see Unif. Trust Code § 1002(a) (2000); Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992).

Here, the fiduciaries entered the Plans into transactions prohibited by ERISA. ROA.25357-60. The most appropriate remedy would put the injured Plans in "the same condition in which they would have been had the wrong not been committed." Bogert, § 701. Because the stock purchases were prohibited, a rescission of the purchases most appropriately returns the Plans to a condition before the transactions. See Dan B. Dobbs, Law of Remedies § 4.3, p.255 (1973); James v. Home Constr. Co. of Mobile, Inc., 621 F.2d 727, 730 (5th Cir. 1980) (citation omitted) ("[T]he purpose of the rescission remedy is to restore the parties, as much as possible, to the status quo ante."); In re GWI PCS 1 Inc., 230 F.3d 788, 796 n.14 (5th Cir. 2000). This Court and other courts, including the district court here, ROA.24302-03, 25387, rightly recognize rescission as an available remedy under ERISA. See Provident Life & Acc. Ins. Co. v. Sharpless, 364 F.3d 634, 639-40 (5th Cir. 2004); Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1463 (5th Cir. 1986).

Under the law of trusts, rescission is used especially in cases of self-dealing transactions, such as the stock sales here from Bruister to the Plans for which he was a trustee. Compare Cunningham, 716 F.2d at 1460 (discussing similar transactions). Here, the district court correctly held that, "[t]he duty of loyalty was breached from start to finish." ROA.25346. Under the law of trusts, "a self-dealing transaction itself constitutes an injury vel non, the undoing of which is an available remedy. A fiduciary's self-dealing transaction is not void per se, but is instead voidable at the election of the beneficiary." Fisher v. Miocene Oil and Gas Ltd., 335 F. App'x 483, 487 (5th Cir. July 2, 2009) (emphasis in original) (citation omitted). If the "trustee in breach of trust sells his individual property to himself as trustee, and the price paid by him as trustee was more than the value of the property at the time of the sale, . . . the beneficiary can set aside the purchase and compel the trustee to repay the amount of the purchase price with interest thereon." Restatement (Second) of Trusts § 206 & cmt. c (1959).

2. ERISA Supports Rescission as an Appropriate Remedy Where Fiduciaries Have Engaged in Prohibited Transactions and Difficulties in Determining What The Plans Should Have Paid is Directly Tied to Their Breaches

Even aside from trust law principles, Congress's explicit prohibition of self-dealing transactions, such as the ones here, favors rescission as an appropriate remedy. "Congress enact[ed] ERISA § 406(a)(1), [to] categorically bar [ ] certain transactions deemed 'likely to injure the pension plan.'" Harris Trust, 530 U.S. at

241-42 (quoting C.I.R. v. Keystone Consol. Indus., Inc., 508 U.S. 152, 160 (1993)). For example, "transaction[s] between a pension plan and its sponsor . . . provided an open door for abuses such as the sponsor's sale of property to the plan at an inflated price." Keystone, 508 U.S. at 160. Bruister's sale of BAI stock for millions more than it was worth is precisely the type of harmful transaction that Congress and the Supreme Court have identified as "entail[ing] a high potential for abuse," and is therefore "illegal per se" under ERISA section 406(a)(1). Cunningham, 716 F.2d at 1464-65; Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 82 (3d Cir. 2012).

ERISA's text and legislative history confirm that Congress understood that rescission was available to remedy these prohibited transactions. Specifically, ERISA Title II defines "correction of [a] prohibited transaction," 26 U.S.C. § 4975(h), to mean "undoing the transaction to the extent possible." 26 U.S.C. § 4975(f)(5); see 26 C.F.R. § 53.4941(e)-1(c)(3) ("correction" requires "rescission of the sale where possible"). In addition, ERISA's legislative history explains that the Secretary is permitted to "void[ ]" prohibited transactions. H.R. Conf. Rep. No. 93-1090, 120 Cong. Rec. 29942 (Aug. 22, 1974).

ERISA's remedial scheme is therefore consistent with the established principle that a statutory prohibition renders a transaction "voidable" through rescission. Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 386-88 (1970) (transaction

prohibited by federal securities law is "voidable" so as to protect the victims of the transaction); see Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (contract rescission available under Investment Advisers Act of 1940, Section 215, 29 U.S.C. 80b-15). For example, section 12 of the 1933 Securities Act grants a buyer the right to rescind a stock purchase agreement containing material misrepresentations made by sellers in violation of the Act. Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 567 (1995); Rosenzweig v. Azurix Corp., 332 F.3d 854, 861 (5th Cir. 2003); see Pinter v. Dahl, 486 U.S. 622, 642 (1988) (Section 12 "was adapted from common law (or equitable) rescission) (citations omitted).

Accordingly, courts have long recognized that rescinding an ERISA section 406 prohibited transaction is inherent in remedying the transaction's deleterious nature. See Smith v. Sydnor, 184 F.3d 356, 363 (4th Cir. 1999) (rescission of preferred stock sale among remedies that are "precisely what ERISA § 409 provides"); Reich v. Stangl, 73 F.3d 1027, 1030-31 (10th Cir. 1996) (quoting with approval language from Nieto v. Ecker, 845 F.2d 868, 874 (9th Cir. 1988) (noting courts' equitable power to "undo such illegal [406(a)] transactions")); Landwehr v. Dupree, 72 F.3d 726, 734 (9th Cir. 1995) (same); Compton, 57 F.3d at 286 (same); Reich v. Rowe, 20 F.3d 25, 33 (1st Cir. 1994) (similar). And rescission is especially appropriate in a case such as this because it would allow the Plan participants, as victims of the prohibited stock sale to their pension plans, to

recover exactly the amount of employee compensation that was used in these self-serving and prohibited stock transactions, and reconstructing the amount of overpayment is difficult precisely because of defendants' misconduct in failing to make a good faith determination of the stock's value at the time of the transactions.

3. The District Court Was Wrong that Rescission Would Constitute a Windfall for the Plans

In this case, the district court concluded that, despite the difficulties of determining the fair market value of the stock at the time of each of the contested sales, rescission would be a windfall to the Plans because the stock is now worthless. ROA.25388. Under the trust law, however, breaching fiduciaries and not the innocent beneficiaries should bear the risk of the intervening decline. See Restatement (Second) of Trusts, § 214 (1959) ("if the property has fallen in value the court will charge the trustee with the amount of the trust funds expended in the purchase rather than merely require him to account for the property so purchased").

Likewise, in the securities context, this Court has explained that rescission applies "to cases involving . . . some specific fiduciary duty owed" to the customer. Huddleston v. Herman & MacLean, 640 F.2d 534, 554 (5th Cir. 1981) modified on other grounds by 459 U.S. 375 (1983). Under those circumstances, "the rescissional measure permits the defrauded securities buyer to place upon the defendant the burden of any decline in the value of the securities between the date of purchase and the date of sale even though only a portion of that decline may

have been proximately caused by the defendant's wrong." Id.; Randall v. Loftsgaarden, 478 U.S. 647, 659 (1986) (victim of securities fraud may "demand rescission upon tender of the security[;] Congress shifted the risk of an intervening decline in the value of the security to defendants, whether or not that decline was actually caused by the [defendants' conduct]").

This is true even where, as here, the plan language contemplates an investment in company stock. Eaves v. Penn, 587 F.2d 453, 463 (10th Cir. 1978) (where stock became worthless, thereby undermining the plan participants' "legitimate expectations of cash distributions upon retirement or termination," this "intervening decline" should be borne by the fiduciaries who violated their ERISA duties rather than the participants whose interests section 406 is designed to protect); cf. 29 U.S.C. § 1104(a)(1)(D) (fiduciaries must follow plan documents only if otherwise consistent with ERISA's requirements). For these reasons, the district court erred in considering it a windfall to return to participants and beneficiaries pension contributions the trustees wasted on now-worthless stock in a transaction that was prohibited in the first place.

Here, there are certainly reasons to think that determining fair market value is a very uncertain proposition given the district court's findings that the financials were almost wholly unreliable, were not compliant with GAAP, as required in the plan documents, and were furnished by plan fiduciaries who were found by the

court to have violated their ERISA duties from start to finish. These factual findings of the district court underscore the appropriateness of a rescission remedy in this case.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's holding that Bruister and Smith acted disloyally and engaged in prohibited transactions that caused the Plans to purchase stock from Bruister for more than adequate consideration. The Secretary also requests that this Court reverse the district court's calculation of damages and either recalculate the loss without reliance on defendants' expert or order rescission of the illegal transactions.

July 29, 2015

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES 28.1 & 32 and 5TH CIR. R. 28.1 & 32.3

1. This brief complies with the type-volume limitation of FED. R. APP. P. 28.1(e) and 32(a)(7)(B) and Fifth Cir. R. 28.1 and 32.2 because: this brief contains 16,474 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. 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 2010 in 14-point, Times New Roman font.

/s/ Stephen Silverman
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July 29, 2015

CERTIFICATE OF SERVICE

I, undersigned attorney for the Secretary, do hereby certify that I have this day, July 29, 2015, filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, and in accordance with Fed. R. App. P. 25, which sent notification and caused service of such filing to all counsel of record.

Dated: July 29, 2015

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