

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MARTIN J. WALSH, *Secretary of
Labor, United States Department of
Labor,*

Plaintiff,

v.

ROBERT N. PRESTON, et al.,

Defendants.

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1:14-CV-04122-ELR

ORDER

This case came before the Court on a seven (7)-day bench trial beginning February 22, 2022. [Doc. 115]. The Court’s Findings of Fact and Conclusions of Law are set out below.

I. Background

On December 30, 2014, Plaintiff Martin J. Walsh, the United States Secretary of Labor (the “Secretary”),¹ filed this action pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”) against Defendants Robert N. Preston and

¹ The Court notes that when this action was filed Thomas E. Perez was the Secretary of Labor, followed by Eugene Scalia. The Court substitutes the current Secretary of Labor Martin J. Walsh as Plaintiff in this action.

TPP Holdings, Inc (“TPP” or “the Company”). See Compl. [Doc. 1]. Additionally, the Secretary named the TPP Holdings, Inc. Employee Stock Ownership Plan (hereinafter, the “ESOP”) as a nominal Defendant pursuant to Federal Rule of Civil Procedure 19(a). See id. ¶ 8. In the Complaint, the Secretary alleges the following claims: (1) breach of fiduciary duties pursuant to 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D) and (2) engaging in prohibited transactions pursuant to 29 U.S.C. §§ 1106(a)(1)(A) and (D). See id. ¶ 40. The Secretary alleges that Defendants are liable both for losses stemming from their own breaches of fiduciary duties and, pursuant to 29 U.S.C. § 1105(a), for losses stemming from each other’s breaches of fiduciary duties as co-fiduciaries. See id. ¶¶ 40–41. The Secretary’s claims relate to two (2) separate transactions between Robert Preston and the ESOP, which occurred on October 1, 2006 (the “2006 Transaction”) and February 29, 2008, respectively (the “2008 Transaction” and, together with the 2006 Transaction, the “Transactions”). Id. ¶¶ 17, 19, 40–41.

Following the close of discovery, the Parties filed a proposed Consolidated Pretrial Order on March 24, 2021. [See Doc. 98]. Thereafter, the Court specially set a bench trial to begin on October 5, 2021, which, upon a motion by Defendants, was later continued to February 22, 2022. [See Docs. 99, 107, 113, 115]. In an Order dated November 15, 2021, the Court ruled on various motions *in limine* [Docs. 100, 101, 102, 103] and denied the Secretary’s “Motion for Leave to file a Motion

for Partial Summary Judgment” [Doc. 116]. [See Doc. 119]. Thereafter, the Secretary filed a “Motion for Sanctions for Defendants’ Spoliation of Relevant Electronically Stored Information.” [Doc. 127]. The Court, in an Order dated January 14, 2021, granted in part and denied in part the Secretary’s motion for sanctions. [See Doc. 137]. Specifically, the Court granted the Secretary’s request for sanctions pursuant to Federal Rule of Civil Procedure 37(e)(1) in connection with Defendants’ failure to suspend the automatic deletion program on the Company’s server before November 2018, almost four (4) years after this case was filed. [See id. at 21]. As sanctions, the Court permitted the Secretary to present evidence at the bench trial concerning Defendants’ failure to preserve electronically stored information from the Company’s server and precluded Defendants from offering testimony as to the content of any unpreserved electronically stored information from the Company’s server. [See id.] However, the Court denied the Secretary’s request for sanctions related to Gmail accounts and associated emails Defendants allegedly deleted or otherwise lost access to, request for an adverse inference or entry of default judgment against Defendants pursuant to Rule 37(e)(2), and request for attorney’s fees. [See id.]

The bench trial in this matter began on February 22, 2022. Following the seven (7)-day bench trial, each Party submitted proposed findings of fact and conclusions of law [Docs. 177, 178] and responses to the opposing Party’s

submissions. [Docs. 179, 180]. The Court has reviewed these filings and considers them in ruling in this matter. Additionally, on May 13, 2022, Defendants filed their instant “Motion to Supplement Trial Record” with two (2) proposed defense exhibits, labeled D-20 and D-21, which are the unredacted versions of joint trial exhibits J-11 and J-10, respectively. [See Doc. 181]. Plaintiff does not oppose Defendants’ motion. [See Doc. 182 at 1]. Therefore, upon review, the Court grants Defendants’ “Motion to Supplement Trial Record” and considers exhibits D-20 and D-21 in its below findings of fact and conclusions of law.² [Doc. 181].

After independently examining and considering the testimony and evidence of record and weighing the credibility of the witnesses, the Court enters the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).

II. Findings of Fact

A. Background and Creation of the ESOP

1. TPP, an architectural firm, is a Georgia corporation formed in 2004 with its principal place of business in Atlanta, Georgia. See Trial Tr. Vol. 4 at 760:8–

² The Court notes that Exhibits D-20 and D-21 were not attached to Defendants’ motion, nor have they been filed on the docket. Instead, they were emailed to the Court because they are large Excel files that Defendants found “not practical to convert . . . to PDF format.” [See Doc. 181 at 1 n.1]. The Court directs Defendants to work directly with the Clerk’s office to add Exhibits D-20 and D-21 to the record in this case.

17, 854:18–23 [Doc. 173]; Trial Tr. Vol. 6 at 1161:14–19 [Doc. 175]; see also Parties’ Stip. Facts (“Stip. Facts”) ¶ 4 [Doc. 98 at 43–46].

2. TPP was at all relevant times the sponsor and the administrator of the ESOP. See Stip. Facts ¶ 5.
3. The majority owner of TPP is Defendant Robert Preston. Defendant Preston was at all relevant times the sole Trustee for the ESOP. See id. ¶¶ 2, 4.
4. During the time period relevant to this litigation, TPP’s corporate officers included Chief Executive Officer Defendant Preston, Chief Financial Officer Andrew Preston, and Chief Operating Officer Steven Byerly. See Trial Tr. Vol. 5 at 982:20–24 [Doc. 174]; Trial Tr. Vol. 6 at 1158:21–23, 1163:14–17. The members of the board of directors of TPP included Defendant Preston, Andrew Preston, and Richard Kilpatrick. See Trial Ex. J-5 § V [Doc. 161-5].
5. Andrew Preston is Robert Preston’s brother. See Trial Tr. Vol. 2 at 276:21–277:1. As Chief Financial Officer, Andrew Preston created budget spreadsheets each month with financial projections for TPP. See id. at 277:2–4.
6. In 2004, TPP established the ESOP. See Stip. Facts ¶ 5.
7. The ESOP was established to “benefit the employees” of TPP and give employees an ownership interest in the Company as an incentive to motivate them in their work, as well as to give Robert Preston some liquidity for his

interest in TPP. See Trial Tr. Vol. 4 at 757:5–7, 770:18–21, 823:12–17, 907:16–18; Trial Tr. Vol. 5 at 1006:3–8, 1160:4–8.

8. The ESOP was also a tool to recruit and retain employees. See Trial Ex. P-16 at 3 [Doc. 157-14] (“The ESOP was created to give added incentive to his employees to stay with the [C]ompany.”).
9. Defendants retained Michael Jacobs and his company, Jacobs Capital, LLC (“Jacobs Capital”), in 2004 to provide a valuation of TPP for purposes of an initial transaction to create the ESOP. See Trial Tr. Vol. 6 at 1171:6–16.
10. Defendants investigated the experience, reputation, and credentials of Michael Jacobs prior to retaining his company. See Trial Tr. Vol. 4 at 789:9–12; Trial Tr. Vol. 6 at 1171:20–1172:13.
11. In the process of determining TPP’s value in 2004, Jacobs Capital met extensively with TPP’s management team, including Robert Preston and Andrew Preston, and obtained information and materials about TPP’s business and finances. See Trial Tr. Vol. 4 at 941:23–944:12; Trial Tr. Vol. 5 at 1172:18–1174:12.
12. On July 5, 2004, Jacobs Capital issued a draft valuation of the Company as of May 31, 2004 (the “2004 Draft Valuation”), in which it valued the company at \$10.3 million. See Trial Ex. J-4 at 7 [Doc. 161-4].

13. In the 2004 Draft Valuation, Mr. Jacobs applied a twenty-three percent (23%) minority discount because the ESOP was to purchase a non-controlling minority interest in TPP from Defendant Preston. See id. at 26–27.
14. The minority discount was the largest discount applied in the 2004 Draft Valuation. See id. at 30; see also Trial Tr. Vol. 2 at 301:14–15 [Doc. 171].
15. After receiving the 2004 Draft Valuation, Defendant Preston emailed Jacobs Capital on July 9, 2004, inquiring as to “how much of the minority interest discount” could be eliminated if certain control mechanisms he proposed were provided to the ESOP. See Trial Ex. P-2 [Doc. 157-2]. Specifically, Defendant Preston proposed:

a minimum 3 member ESOP committee with veto power/approval rights over the following:

- My entire compensation package, including bonuses, raises, etc. I am ok with their approval of any changes or I am ok to set thresholds that cannot be exceeded without their approval.
- Issue and payment of dividends.
- Acquisition or payment of treasury shares.
- Acquisition or liquidation of assets or the firm itself.
- Diversification through acquisitions or internal development.
- Consolidation through divestiture merger.
- Alteration of articles or by-laws.
- Right to liquidate, dissolve, sell out or recapitalize.
- ESOP plan will have 51% voting rights.

See id.

16. Defendant Preston prepared this proposed list of “elements of control” based on the list of control factors he understood Jacobs Capital required to remove the minority discount. See Trial Tr. Vol. 2 at 304:7–8, 304:20–25.
17. In his July 9, 2004 email, Defendant Preston also stated “Let me know if you feel there needs to be additional control mechanisms given to the ESOP shareholders to eliminate the 23% [minority] discount.” See Trial Ex. P-2 [Doc. 157-2].
18. On July 21, 2004, Timothy Boyd, TPP’s initial ESOP counsel, through his paralegal Thomas Womack, sent Jacobs Capital a draft of the ESOP plan document. See generally Trial Ex. P-3 [Doc. 157-3]. Section 13(c) of the draft ESOP plan document provided that the ESOP “Trustee or ESOP participant” would have the following powers (collectively “Control Mechanisms A through F”):
 - A. The ESOP must approve any salary increases for the Chief Executive Officer in excess of five percent (5%) a year;
 - B. All payments of dividends shall be approved by the ESOP;
 - C. All acquisitions or payments of Treasury shares shall be approved by the ESOP;
 - D. Any significant change in control shall be approved by the ESOP including any acquisition or divestiture;

E. Any change or alteration of the bylaws or charter shall be approved by the ESOP;

F. The ESOP shall have voting rights equal to fifty-one percent (51%) of all outstanding stock of the Company.

See id. at 2–3; see also Trial Ex. P-5 at 48 [Doc. 157-5].

19. In a response email dated July 22, 2004, Jacobs stated that he “still need[s] to know how many trustees the ESOP has and who they are and what decisions require a 75% vote.” See Trial Ex. P-3 at 1. This question was sent to Timothy Boyd’s paralegal. See id.
20. On July 29, 2004, Jacobs Capital issued a second and final valuation of the Company (the “2004 Final Valuation”) as of May 31, 2004. See Trial Ex. J-3 [Doc. 161-3]. In the 2004 Final Valuation, Jacobs Capital removed the twenty-three percent (23%) minority discount “given Management’s representation that” certain elements of control (generally, the “Control Mechanisms”) would be provided for in “the ESOP documents as well as the corporate charter and bylaws.” See id. at 29. The Control Mechanisms listed in the 2004 Final Valuation included those in the draft ESOP plan above as well as an additional element (hereinafter “Control Mechanism G”): “([G]) The ESOP will have three Trustees, at least two of which shall not be the controlling shareholder.” See id.

21. At all relevant times, the ESOP only had one Trustee, Defendant Preston. See Trial Tr. Vol. 2 at 300:15–17.
22. Defendant Preston testified that he read the 2004 Final Valuation, but may have reviewed it selectively and that he was not sure he reviewed the portion providing for the removal of the minority discount. See id. at 307:3–23. Defendant Preston testified he may “have taken it for granted that” Control Mechanisms A through F would be in the 2004 Final Valuation and that “a three-person committee and not trustees” would also be included. See id.
23. During his deposition, Mr. Jacobs testified that “if the [Control Mechanisms listed in the 2004 Final Valuation] weren’t put into the corporate documents and were not legally enforceable, . . . then there would need to be a minority discount.” See id. at 480:3–6. Therefore, “the conclusion” of Mr. Jacobs’ reports “is contingent upon the implementation of the things that would give the ESOP control. You would never get rid of the minority discount if the ESOP didn’t get control.” See id. at 480:7–10.
24. Removing the minority discount from the 2004 Final Valuation increased the value of the Company as of May 31, 2004 by \$2.1 million. See Trial Ex. J-3 at 30; Trial Ex. J-4 at 30.

B. The ESOP Committee and Its Supervision of TPP's Activities

25. There was a three (3)-member ESOP committee consisting of Steven Byerly, Susan Locke, and Defendant Preston (the “ESOP Committee”). See Trial Tr. Vol. 6 at 1162:15–17. Ms. Locke and Mr. Byerly were not trustees of the ESOP. See Trial Tr. Vol. 4 at 824:23–24; Trial Tr. Vol. 2 at 308:16–18.
26. Mr. Byerly testified that as members of the ESOP Committee, he and Ms. Locke approved three (3) of Defendant Preston’s salary increases after doing their due diligence to make sure the Company could afford these increases and that such salary increases “made sense for the Company.” See Trial Tr. Vol. 4 at 776:8–14.
27. TPP acquired Schwartz Engineering Company, a mechanical, electrical, and plumbing engineering firm based in Maryland. See id. at 779:21–24. Mr. Byerly testified that the ESOP Committee approved of this acquisition. See id. at 780:5–8, 18–20.
28. Mr. Byerly believed that “if [Defendant Preston] wanted a pay raise, he had to have [the ESOP Committee’s] approval because, in my mind, we had this power.” See id. at 781:20–22.
29. Ms. Locke testified that she was consulted if Defendant Preston’s salary was to be increased more than five percent (5%) because she “would have had to have approved [those] as . . . a member of the ESOP Committee.” See id. at

839:11–21. Ms. Locke further testified that she approved such salary increases. See id. at 839:22–23.

30. Ms. Locke stated that in deciding whether to approve Defendant Preston’s salary increases, she would “make sure that . . . an increase wouldn’t be detrimental to . . . the Company’s bottom line” and would consult with Mr. Byerly and Defendant Preston. See id. at 840:2–16.
31. Ms. Locke’s testimony was unclear as to whether the ESOP Committee approved the acquisition of Schwartz Engineering Company. See id. at 845:14–846:16. At trial, after reviewing unspecified documents, she testified that the ESOP Committee would have approved the acquisition, but at her deposition, she testified that she did not recall the ESOP Committee approving the acquisition. See id.

C. TPP’s Organization and the Effect of that Organization on the ESOP

32. TPP’s Articles of Incorporation and Bylaws created two (2) classes of Company stock: Class A and Class B stock. See Trial Ex. J-5 at 1–2; Trial Ex. P-6 at 4.
33. The owners of Class A stock held forty-nine percent (49%) of the voting rights of all outstanding stock and had the exclusive right to name two (2) of the three (3) directors on the Board of Directors, who were the “Class A Directors.” See id.

34. Defendant Preston at all times held the majority of Class A stock. See Trial Tr. Vol. 2 at 331:23–25.
35. The owners of Class B stock held fifty-one percent (51%) of the voting rights of all outstanding stock and had the exclusive right to name one director on the Board of Directors, who was the “Class B Director.” See Trial Ex. J-5 at 1–2; Trial Ex. P-6 at 4.
36. The ESOP at all times was the sole owner of Class B stock in TPP. See Trial Tr. Vol. 4 at 920:1–2.
37. As the Trustee of the ESOP, Defendant Preston appointed himself as the Class B Director. See Trial Tr. Vol. 2 at 317:3–318:24, 391:1–11.
38. Defendant Preston testified that he intended to convey to the ESOP Control Mechanisms A through F by giving the ESOP all of the Class B stock and having a three (3)-person ESOP Committee vested with the power to approve certain actions. See Trial Tr. Vol. 2 at 305:1–7, 310:18–311:1.
39. Provision 4.6 of TPP’s Bylaws provides that a majority of the Board of Directors, which must include the Class B Director, shall approve the corporate activities defined in Control Mechanisms A through E. See Trial Ex. P-6.
40. TPP’s Bylaws do not mention the ESOP or the ESOP Committee. See id.; Trial Tr. Vol. 2 at 391:25–392:4.

D. The ESOP Plan Documents

41. The original ESOP plan documents, drafted by attorney Timothy Boyd, were executed on September 30, 2004. See Trial Tr. Vol. 1 at 81:25–85:2, 113:11–13 [Doc. 170].
42. Stuart Baesel drafted a new ESOP plan document in 2007 (the “ESOP Plan Document”), which was adopted and replaced the original ESOP plan documents. See Trial Ex. J-6 [Doc. 161-6].
43. The ESOP Plan Document does not address or incorporate any of the Control Mechanisms that were supposed to be held by the ESOP. See Trial Tr. Vol. 2 at 389:11–13. The ESOP Plan Document removed the provision in the original plan document giving the ESOP Committee authority to direct the Trustee in voting the ESOP stock. See Trial Ex. J-6 at 55.
44. Defendant Preston “assumed” that the provision that “the trustee shall vote all shares of Company stock as directed by the [ESOP] Committee” “was in the [Company’s] Bylaws.” See Trial Tr. Vol. 2 at 315:1–17.
45. The ESOP Plan Document provides that “the Trustee may exercise all ownership rights with respect to an asset held in the Trust Fund.” See Trial Ex. P-5 at ¶ 13(b)(ii).

E. The 2006 Transaction

46. In January 2006, TPP again retained Jacobs Capital to provide a valuation of TPP as of December 31, 2005 for purposes of an ESOP transaction. See Trial Ex. J-2 at 3.
47. On January 24, 2006, Jacobs Capital asked TPP via an email to confirm that “per Management’s representation” Control Mechanisms A through G, which were listed in the email, “have been incorporated into the ESOP document as well as the corporate charter and bylaws.” See Trial Ex. P-7 [Doc. 157-7] at 1.
48. In response, Mr. Byerly stated that “some of these provisions were never actually incorporated into the documents of the ESOP. Most should be and I will make this happen.” See id.; see also Trial Tr. Vol. 2 at 365:1–366:17.
49. Mr. Byerly knew that the ESOP did not have three (3) trustees, but did not correct this mistake. See Trial Tr. Vol. 5 at 824:9–20, 825:1–9.
50. On February 3, 2006, Jacobs Capital issued a valuation report (the “2006 Valuation”), which determined that the fair market value of 100% of the equity of TPP as of December 31, 2005, was \$25 million. See Trial Ex. J-2 at 5 [Doc. 161-2].
51. The 2006 Valuation did not apply a minority discount and included the same language from the 2004 Valuation that this was due to management’s

representation that Control Mechanisms A through G would be provided to the ESOP and memorialized in the ESOP plan documents as well as the Company's charter and bylaws. See id. at 31.

52. On October 1, 2006, the ESOP purchased 496,032 shares of Class A stock in TPP from Defendant Preston for the price of \$1 million. See Trial Ex. P-30.
53. Defendants relied upon the 2006 Valuation, which was issued approximately eight (8) months earlier and valued the Company as of December 31, 2005, to determine the per-share price for the 2006 Transaction. See Trial Tr. Vol. 4 at 791:7–8.
54. The Class A stock purchased in the 2006 Transaction did not provide the ESOP with any additional control over the company. See Trial Tr. Vol. 2 at 331:8–10. Defendant Preston remained the majority shareholder of Class A stock after the 2006 Transaction. See id. at 331:23–25.
55. Defendant Preston testified that he reviewed the 2006 Valuation when it was issued. See id. at 323:7–324:6. He did not notice that the 2006 Valuation stated that the ESOP would have three (3) trustees and had no explanation for why he did not notice or correct this inaccuracy. See id.
56. Defendant Preston was “pretty sure” that Mr. Baesel, the Company's ERISA attorney, told him “it was all right” to rely on the December 31, 2005 valuation

report for the October 1, 2006 stock transaction “without updating [the report] in any way.” See id. at 329:17–330:5.

57. No one at TPP specifically asked Mr. Baesel before the 2006 Transaction whether the 2006 Valuation could be relied upon for that transaction. See Trial Tr. Vol. 5 at 925:4-7.
58. Further, Mr. Baesel testified that he does not “advise clients whether a particular appraisal can be relied upon” because he’s “not the right person to advise a company as to whether or not a certain valuation should be used for a particular stock transaction.” See id. 923:15–924:1.

F. The 2008 Transaction

59. Defendants began contemplating another ESOP transaction beginning in September 2007. See Trial Tr. Vol. 6 at 1197:20–25. Jacobs Capital was again retained by TPP to provide a valuation of the Company as of December 31, 2007, for purposes of an ESOP transaction. See Trial Ex. P-1.
60. On January 16, 2008, Andrew Preston provided Jacobs Capital with budget projections for 2008 via email, predicting \$66,048,000 in total billing for 2008. See Trial Ex. P-42 at 2 [Doc. 157-34].
61. Defendant Preston sent a memo via email to all employees of TPP on January 20, 2008 (the “January 20, 2008 Email”) in which he provided his outlook regarding TPP’s business after he attended the National Multi Housing

Conference. See Trial Ex. P-15 [Doc. 157-13]. The email informed employees that a “slowdown” in the economy “has taken place and will continue to take place through 2008,” “the housing market is in recession,” and TPP’s industry would be particularly affected by the changing economic conditions. See generally id. The January 20, 2008 Email stated that the Company had hired enough staff through 2007 to achieve \$70 million in revenue in 2008 and warned that “if we don’t bring enough work into the firm to support those of you already on board, there will be an inevitable reduction in staff.” See id. at 4. Defendant Preston stated that revenues in “January and February are down, indicating a lack of work and excess staff” and noted that “two projects went on hold while [he] was out of town last week.” See id.

62. In his January 20, 2008 Email, Defendant Preston stated that “it [was] safe to say” that, unlike past years, “a 65% increase” in revenue from 2007 to 2008 “isn’t happening,” despite the Company’s “average growth of over 60% [every year] since 2004[.]” See id. However, Defendant Preston remarked that he “would be happy with \$72,000,000 [in revenue] in 2008, which is a more modest increase of only 20% growth over last year” and that he “wouldn’t be surprised if [TPP] achieved \$80,000,000 in 2008[.]” See id. He stated he “would be surprised if [TPP] only did the same amount in 2008 that [it] did in 2007. This would be \$60,000,000 in revenue.” See id.

63. The following day, on January 21, 2008, Defendant Preston sent another email to all employees with additional updates on TPP, its industry, and the outlook of the economy. See Trial Ex. P-32 at 1 [Doc. 157-26]. Defendant Preston reiterated that he felt the economy was already in a recession based on a rise in unemployment and the housing market slowdown, which he remarked was “one of the worst ever recorded.” See id. He also stated that there was an opportunity to transfer some work from the Company’s Washington D.C. area offices to Atlanta and that three (3) D.C. projects had either recently moved to Atlanta or were about to make that move. See id.
64. Defendant Preston sent the January 20, 2008 Email to Michael Jacobs of Jacobs Capital during late January 2008. See Trial Tr. Vol. 6 at 1192:8–18. Defendant Preston also spoke with Mr. Jacobs about the January 20, 2008 Email. See id. at 1192:18–1193:17.
65. On February 15, 2008, the Company laid off twenty-four (24) of its approximately three hundred (300) employees (the “February 15, 2008 Layoffs”). See Trial Ex. P-19 at 1 [Doc. 157-17]. The Company had never had a layoff of that scale before February 15, 2008. See Trial Tr. Vol. 2 at 347:15–25.
66. The February 15, 2008 Layoffs saved the Company approximately \$146,000 per month in payroll. See Trial Ex. P-39 at 9 [Doc. 157-32].

67. The severance letter on TPP letterhead provided to those employees subject to the February 15, 2008 Layoffs claimed that “poor economic conditions have had a significant effect on [the Company’s] business. The [C]ompany has decided on a subsequent layoff of staff.” See Trial Ex. P-17 [Doc. 157-15]; see also Trial Tr. Vol. 2 at 355:20–25.
68. Defendant Preston testified that he did not believe the statement about poor economic conditions in the severance letter was correct, but rather, was TPP’s Human Resource Manager Lori Jenkins’ “way of letting folks know” that they had been let go. See id. at 356:1–20. He stated that the February 15, 2008 Layoffs were instead a “belt-tightening” measure and were “pretty light cuts,” mostly of “young intern graduate architects.” See Trial Tr. Vol. 6 at 1220:10–18.
69. Mr. Byerly testified that the February 15, 2008 Layoffs occurred because the Company had hired so many people and “discovered that some people were not performing at the level that we had hoped when we hired them.” See Trial Tr. Vol. 5 at 803:21–804:5. He also stated that when two (2) of TPP’s “relatively large [projects]” went on hold, the Company began “to execute on” plans to layoff poor performers. See id. at 804:6–13.
70. Mr. Byerly testified that discussions amongst the Company’s principals regarding the February 15, 2008 Layoffs were held by email on the Company

server and through meetings. See id. at 806:9–15, 807:4–7, 828:4–8. Emails on the Company’s server from this time were deleted in 2018 as part of an automatic deletion program, which the Company had failed to suspend before November 2018, despite this action being initiated four (4) years earlier. See Trial Tr. Vol. 6 at 1220:22–1221:11.

71. After the February 15, 2008 Layoffs and by March 2008, Mr. Byerly recommended that the managing principals and leaders of TPP get Gmail accounts and that “anything related to layoffs or salary cuts be communicated amongst ourselves on Gmail Accounts.” Trial Tr. Vol. 4 at 807:9–13. Mr. Byerly recommended this switch to Gmail Accounts because he suspected a leak in the Company’s I.T. department, which “as a routine practice” reviewed emails on the Company server. See id. 807:14–808:10. Mr. Byerly formed these suspicions after an employee who was being considered for the February 15, 2008 Layoffs approached Mr. Byerly with the knowledge that the Company was contemplating laying him or her off before a final decision was made regarding his or her employment. See id.
72. Defendant Preston testified that they switched to Gmail accounts because “there was an I.T. leak.” See Trial Tr. Vol. 2 at 354:21–25.
73. Defendant Preston did not notify Jacobs Capital about the February 15, 2008 Layoffs. See id. at 356:11–13.

74. Sometime before February 22, 2008, Andrew Preston provided updated projections to Jacobs Capital, projecting \$60,443,000 in total billing for 2008. See Trial Tr. Vol. 4 at 1064:2–10.
75. On February 22, 2008, Jacobs Capital issued a draft valuation report (“2008 Draft Valuation”) valuing TPP at \$55 million as of December 31, 2007, using Andrew Preston’s reported projections in total billings of \$60,443,000 for 2008. See Trial Ex. J-1 at 19, 37 [Doc. 161-1].
76. The 2008 Draft Valuation was not signed and had the word “Draft” on the front page. See generally id. Additionally, various fields in the report were either blank or had brackets around them, indicating the bracketed information needed to be updated. See generally id.; see also Trial Tr. Vol. 2 at 335:17–336:1.
77. Defendant Preston noticed that the 2008 Draft Valuation was marked as a draft and had blanks and bracketed information. See Trial Tr. Vol. 2 at 334:1–9. He understood the brackets indicated information that needed to be updated from the previous year. See id. at 335:17–336:1. He did not provide information to update the bracketed information to Jacobs Capital. See id. at 336:8–21, 337:4–7, 339:11–25.
78. Defendant Preston testified that despite the draft label, he believed the 2008 Draft Valuation was “final” from “a financial and analytical perspective” and

that the incomplete and outdated spots were immaterial to assess the value of the Company. See Trial Tr. Vol. 2 at 340:2–6; see also Trial Tr. Vol 6 at 1194:16–21. Defendant Preston does not recall asking Jacobs Capital if this was the case. See Trial Tr. Vol. 2 at 340:7–10, 341:10–25.

79. Steven Byerly, Andrew Preston, and Defendant Preston testified that the 2008 Draft Valuation was not finalized because Mr. Jacobs wanted to sell TPP and was waiting on finalizing the 2008 Draft Valuation to incentivize TPP to get an audit of its financials in order to sell the Company. See Trial Tr. Vol. 5 at 794:15–20, 1090:19–1091:19, 1092:25–1093:7; see also Trial Tr. Vol. 6 at 1195:16–1196:15.
80. Mr. Jacobs’ primary business was in selling companies, and conducting valuations, such as the ESOP valuations at issue, was a “loss leader” for Jacobs Capital. See Trial Tr. Vol. 5 at 937:7–938:10, 939:6–13.
81. Defendant Preston engaged Mr. Jacobs to explore the sale of the Company in late 2007 and early 2008. See Trial Tr. Vol. 6 at 1196:15–1997:3.
82. Mr. Jacobs testified that Jacobs Capital would send draft valuation reports to clients to review for factual accuracy before finalizing the report. See Trial Tr. Vol. 2 at 462:11–17.

83. Mr. Jacobs explained that a draft report is not conclusive, stating “[u]ntil we issue a final report, we haven’t formed any conclusion definitively.” See id. at 471:17–18.
84. When asked why the 2008 Draft Valuation was not finalized, Mr. Jacobs testified that he presumed he did not sign it because he would not sign a report unless he was confident the information in the report was accurate. See id. at 488:10–17. Mr. Jacobs testified he was not confident in the accuracy of the 2008 Draft Valuation because TPP had not undergone an audit, despite Mr. Jacobs’ repeated requests that it do so. See id.
85. In the section entitled “Purpose” in the 2008 Draft Valuation, Jacobs Capital provides that its “conclusion of value will be utilized by the Company for the purposes of communicating that value of the Company as of the Valuation Date to the ESOP plan participants and future participants and transacting share in the ESOP. The fair market value determined herein shall not be used for any other purposes.” See Trial Ex. J-1 at 5.
86. In the “Assumptions and Limiting Conditions” section of the 2008 Draft Valuation, Jacobs Capital stated: “The conclusions of this Draft Report are limited to the extent that the Company is in the process of having its 2007 financial results audited. If the results presented in the audited statements differ materially from the reviewed statements contained in the [2008 Draft

Valuation] Report, the conclusions will have to be modified accordingly.”

See id. at 4.

87. The 2008 Draft Valuation contained the same statement as the 2004 Valuation and 2006 Valuation that Jacobs Capital

ha[d] not applied a minority discount given Management’s representation that the following provisions have been incorporated into the ESOP documents as well as the corporate charter and bylaws:

- A. The ESOP must approve any salary increases for the Chief Executive Officer in excess of five percent (5%) a year;
- B. All payments of dividends shall be approved by the ESOP;
- C. All acquisitions or payments of Treasury shares shall be approved by the ESOP;
- D. Any significant change in control shall be approved by the ESOP including any acquisition or divestiture;
- E. Any change or alteration of the bylaws or charter shall be approved by the ESOP;
- F. The ESOP shall have voting rights equal to fifty-one percent (51%) of all outstanding stock of the Company.
- G. The ESOP will have three Trustees, at least two of which will not be the controlling shareholder.

See id. at 41; see also Trial Ex. J-2 at 34.

88. Relying on the 2008 Draft Valuation, Defendants approved the 2008 Transaction, which took place on February 29, 2008. See Trial Ex. P-31 [Doc. 157-25]. As part of the 2008 Transaction, the ESOP purchased 1,331,558

shares of Class A stock for the price of \$5 million for a per-share price of \$3.75. See id.

89. To effectuate the 2008 Transaction, TPP took out a \$5 million loan from Georgian Bank and paid those funds to Defendant Preston as the selling shareholder. See Trial Ex. P-16 [Doc. 157-14]. Defendant Preston personally guaranteed 100% of TPP’s \$5 million loan from Georgian Bank. See id. at 1, 4.

G. Expert Witnesses

90. The Court qualified Steven Sherman, presented by the Secretary, as an expert witness in the field of valuation. See Trial Tr. Vol. 3 at 534:10 [Doc. 172]. Mr. Sherman is a Certified Public Accountant and currently works as a managing director at Loop Capital Financial Consulting Services, LLC. See Trial Ex. D-3 at 59–61 [Doc. 159-3]. Mr. Sherman previously worked at KPMG LLC, a prominent accounting firm, for over thirty (30) years. See id.
91. Mr. Sherman’s first expert report in this case is dated August 26, 2019 (“First Sherman Report”). See Trial Ex. D-3. In the First Sherman Report, he provided a critique of the 2006 Valuation and 2008 Draft Valuation (together, the “Jacobs Valuations”) as well as his opinion of the fair market value of the Company and Transactions as of the transaction dates: October 1, 2006 and February 29, 2008. See id. at 5.

92. Mr. Sherman opined that the Jacobs Valuations for the 2006 and 2008 Transactions were “materially in excess of fair market value.” See id.
93. In providing his own analysis and opinion of fair market value as of the transaction dates, Mr. Sherman used three (3) valuation methods: (1) the Capitalization of Cash Flow Method (“CCF Method”), (2) the Guideline Public Company Method (“GPC Method”), and (3) the Merged & Acquired Company Method (the “M&A Method”). See id.
94. In the First Sherman Report, Mr. Sherman valued the 2006 Transaction at \$523,973. See id. at 6. He valued the 2008 Transaction at \$2,575,501. See id.
95. The Court also qualified Defendants’ expert in the field of valuation, Jesse Ultz. See Trial Tr. Vol. 7 at 1236:2–9. Mr. Ultz is designated as an Accredited Senior Appraiser and is currently a managing director in the valuation advisory group of Stout Risius Ross, LLC. See Trial Ex. D-2 at 63 [Doc. 159-2].
96. Mr. Ultz’s first expert report is dated January 24, 2020 (“First Ultz Report”). See generally id. Mr. Ultz provided a critique of the First Sherman Report and provided a valuation opinion for the 2006 and 2008 Transactions as of the transaction dates. See id.

97. In critiquing the First Sherman Report, Mr. Ultz testified that Mr. Sherman's valuation analysis contained numerous errors (including mathematical mistakes) and unreasonable assumptions. See Trial Tr. Vol. 6 at 1249:19–23. Among his critiques, Mr. Ultz opined that Mr. Sherman erred when he used an “as-is” valuation methodology and applied a minority discount based on the ESOP members' lack of control of the Company. See Tr. Ex. D-2 ¶¶ 105, 128–132. Mr. Ultz opined that “the conclusions in the [First Sherman Report] are unreliable and fatally flawed.” See id. ¶ 141.
98. In the First Ultz Report, Mr. Ultz valued the 2006 Transaction at \$812,226 and the 2008 Transaction at \$4,836,797. See id. ¶¶ 139, 140.
99. Mr. Sherman provided a second report dated March 10, 2020 (the “Second Sherman Report”). See Trial Ex. P-1 [Doc. 157-1].
100. In the Second Sherman Report, Mr. Sherman valued the 2006 Transaction at \$731,987 and the 2008 Transaction at \$2,449,055. See id. at 6.
101. Mr. Ultz provided a second rebuttal report dated September 14, 2020 (the “Second Ultz Report”), in which he critiqued the Second Sherman Report and provided another opinion regarding the values of the 2006 and 2008 Transactions. See Trial Ex. D-1 [Doc. 159-1]. The Second Ultz Report also provided a comparison of the analytical choices from the First Sherman Report and Second Sherman Report. See id.

102. Mr. Sherman stated that he “elected to file [the Second Sherman Report] based on new information presented by the DOL. The information presented provided insights into the last twelve months of revenue and profitability of the Company closer to both the 2006 and 2008 ESOP transaction dates and projections as of those dates.” See Trial Ex. P-1 at 5.
103. Mr. Ultz opined that the changes made in the Second Sherman Report were not the result of new information; rather, Mr. Ultz claimed that the First Sherman Report showed that Mr. Sherman was already in receipt of the “new” documents cited in the Second Sherman Report prior to issuing the First Sherman Report. See Trial Tr. Vol. 6 at 1244:10–19.
104. Mr. Sherman confirmed in his testimony at trial that he did have the “new” documents he relied on in the Second Sherman Report at the time he issued the First Sherman Report, but they had not come to his attention at that time. See Trial Tr. Vol. 3 at 649:21–23, 658:7–13, 663:15–16.
105. In the Second Ultz Report, Mr. Ultz described the changes between the First Sherman Report and Second Sherman Report, identifying instances where Mr. Sherman’s valuation philosophy changes, where the reason for a change was undisclosed or unsupported, and where a change was made in response to Mr. Ultz’s critiques in the First Ultz Report. See Trial Ex. D-1 at 66–76.

106. In their first reports, both Mr. Sherman and Mr. Ultz used the same financial information Jacobs Capital used to formulate its valuation opinions. See Trial Tr. Vol. 3 at 649:4–16; Vol. 6 at 1283:1–9.
107. In their second reports, both Mr. Sherman and Mr. Ultz relied on projections of revenue created by TPP’s management. See generally Trial Exs. P-1, D-1. For the 2008 Transaction, Mr. Sherman and Mr. Ultz used different financial projections (both from TPP management) and they dispute which projection most closely represents what was known or knowable by Defendants at the time of the 2008 Transaction: February 29, 2008. See Trial Ex. D-1 ¶ 40.
108. The different projections of revenue used by the experts come from Microsoft Excel spreadsheets created by Andrew Preston to track the Company’s actual and projected budget as its Chief Financial Officer. See Trial Ex. J-10 [Doc. 164-1]; J-11 [Doc. 164-1]. Andrew Preston compiled and created these spreadsheets in 2008 and used them to track financial projections for each month. See Trial Tr. Vol. 5 at 998:6–12, 1029:24–1034:2. The spreadsheets were “living, breathing documents” such that Andrew Preston continued to update them as billings, expenses, and other financial information became finalized. See id. at 1012:3–1013:3. However, Andrew Preston did not track the dates of his changes, the date he finalized a spreadsheet, or enact any other

system that would allow someone to decipher the last date that Andrew Preston modified the financial projections for a given month. See id.

109. Andrew Preston explained that in the first weeks of a new month he would focus on collecting and sending invoices for the previous month and that he would turn to creating projections in “the back end of the month.” See id. at 983:4–985:7, 1012:11–17.
110. Andrew Preston would update the financial projection sections of his spreadsheets as information about the status of projects came in. See id. at 1050:11–1051:15.
111. Andrew Preston also updated the Company’s actual and expected direct labor costs in real time as employees were hired or left TPP. See id. at 1054:23–1055:11.
112. The “Salary” tab of the spreadsheets contains the names of all TPP employees and lists their actual monthly salaries through the present and their projected salaries through the end of the year. See Trial Ex. J-10, Trial Ex. J-11. The total direct labor cost from the “Salary” tab automatically filled the relevant cell in the “Budget Projections” tab of the spreadsheets. See Trial Tr. Vol. 6 at 1355:7–16.
113. Once the spreadsheets contained the final budget figures for a previous month, Andrew Preston would highlight that month’s column on the

- “Summary” tab of the spreadsheet in green. See id. at 1012:3–17. Andrew Preston would then save the spreadsheet and begin inputting information for the next month. See id. at 1012:3–17; see also Trial Tr. Vol. 6 at 1354:2–10.
114. The spreadsheets do not indicate the date any particular data point was entered and there is no way to know when a spreadsheet was saved. See Trial Tr. Vol. 5 at 1067:14–17.
115. For their 2008 Transaction valuation opinions, Mr. Sherman used the Trial Ex. J-10 spreadsheet and Mr. Ultz used the Trial Ex. J-11 spreadsheet. See generally Trial Ex. P-1, D-1. In Trial Ex. J-11, TPP’s projected revenue for 2008 was \$50,014,226, while in Trial Exhibit J-10, TPP’s projected revenue for 2008 was \$61,093,731. See id.; see also Trial Tr. Vol. 6 at 1305:10–15.
116. Andrew Preston testified that Trial Exhibit J-11, utilized by Mr. Ultz, would provide the most accurate projection information as of the 2008 Transaction, while Trial Exhibit J-10, utilized by Mr. Sherman, included information from after the date of the 2008 Transaction. See id. at 1029:24–1033:5.
117. Mr. Ultz opined that the projections in Trial Exhibit J-11 were more contemporaneous to the 2008 Transaction given its inclusion of final budget results for the month of January 2008, and thus, was likely prepared by Andrew Preston at the end of February or beginning of March of 2008. See Trial Ex. D-1 ¶ 42.

118. The projection used by Mr. Sherman in Trial Exhibit J-11 include the final budget results for the months of January and February 2008. See Trial Ex. J-10.
119. Mr. Ultz opines that Mr. Sherman erred in using the projection in Trial Exhibit J-11 because it was “prepared well after the February 29, 2008” Transaction and includes “information learned after the 2008 Transaction Date [that] was not known or knowable as of February 29, 2008.” See Trial Ex. D-1 ¶¶ 40, 42.
120. In contrast, Mr. Sherman testified that his choice to use the projection in Trial Exhibit J-10 was correct because it better reflects what was known or knowable to Defendants regarding TPP’s current finances as of the 2008 Transaction date. See Trial Tr. Vol. 3 at 613:16–614:13; 625:22–626:3.
121. In support, Mr. Sherman averred that the projection he used from Trial Exhibit J-10 reflects the Company’s knowledge of the February 15, 2008 Layoffs and salary reductions that took place in February 2008. See id. at 621:16–20.
122. However, it is undisputed that salary reductions did not take place until March 2008. See Trial Tr. Vol. 6 at 1360:23–25.
123. Defendants submitted unredacted versions of Trial Exhibits J-10 and J-11 (which are labeled as D-21 and D-20, respectively), and the Court above

granted their “Motion to Supplement the Trial Record” to include these exhibits. [See Doc. 181].

124. In these unredacted spreadsheets, the salary information for each employee of TPP can be viewed in the “Salary” tabs, as well as the months that their salaries stopped. See Trial Exhibits D-20, D-21.³
125. In both Trial Exhibit D-20 and D-21, all of the February 15, 2008 Layoffs are accounted for in the “Salary” tab, as each laid off employee’s salary information ends in February 2008. See id.
126. In comparing the salary information in Trial Exhibit D-21, the unredacted version of Trial Exhibit J-10 (which provides the projection used by Plaintiff’s expert, Mr. Sherman), to the record of when TPP laid off employees in Trial Exhibit P-19, it is evident that Trial Exhibit J-10 and the projection therein accounts for TPP employees who were subsequently laid off at the end of March 2008. Compare Trial Exhibit D-21, with P-19 at 2–3.
127. Trial Exhibit D-21 also accounts for the layoffs of several employees in late April 2008, including Wilson Nieto, Dyanna Snyder, and Muny Mujeyi, all laid off on April 25, 2008, and Christopher Tidwell, laid off on April 30, 2008. See id.

³ As of the date of the entry of this order, Trial Exhibits D-20 and D-21 are not in the case record. However, as noted above, the Court directs Defendants to work with the Clerk to ensure that these materials will become part of the case record.

128. Trial Exhibit D-20, the unredacted version of Trial Exhibit J-11 (which provides the projection used by Defendants' expert, Mr. Ultz), reflects the layoff or resignation of numerous employees in March and April 2008, including Brett Vaughn (resigned on March 14, 2008); Jason Orozco (resigned on March 21, 2008); James Thackston, Rachel York, and Jason Newsome (who all resigned on March 28, 2008); Bryan Padilla (laid off on March 31, 2008); Michael Romot (resigned on April 1, 2008); and Christopher Tidwell (laid off on April 30, 2008). See Trial Exhibit D-20.
129. However, Trial Exhibit D-20 does not reflect most of the layoffs made on March 31, 2008, as Trial Exhibit D-21 does. See Trial Exhibits D-20, D-21.
130. The use of the \$50 million revenue projection for 2008 in Trial Exhibit J-10 versus the \$61 million revenue projection for 2008 in Trial Exhibit J-11 is the largest driver of difference between the experts' valuations for the 2008 Transaction. See Trial Tr. Vol. 6 at 1305:10–15.
131. Mr. Ultz criticized several other aspects of the valuation decisions and explanations Mr. Sherman used to create his First and Second Sherman Reports. See generally Trial Exs. D-1, D-2.
132. In both the First and Second Sherman Reports, Mr. Sherman applied a ten percent (10%) minority discount. See Trial. Tr. Vol. 3 at 550:18–20.

133. Mr. Ultz argued that Mr. Sherman's minority discount was inappropriate because Mr. Sherman had valued TPP according to an "as-is" analysis, which uses the actual cash flows of the Company and would thus already value the Company from a minority or non-controlling standpoint. See Trial Tr. Vol. 6 at 1264:1–1265:8; 1267:1–14. Therefore, he testified that taking an additional minority discount on top of this as-is analysis would result in penalizing "the value of the business twice." See id. at 1267:19–23.
134. Mr. Ultz pointed to multiple valuation treatises that support his argument that if "valuing a business based on the as-is cash flow stream, then you've already valued the business on a minority basis, or a non-controlling basis" and would not take a discount for lack of control. See id. at 1264:13–1267:23.
135. In his testimony, Mr. Sherman acknowledged that he used an "as-is" analysis which accounted for "minority cash flows," but explained that he felt an additional minority discount was necessary because Defendant Preston still had control of the Company and could "do what he wanted to the detriment of the ESOP in this case." See Trial Tr. Vol. 3 at 551:15–22. As support, Mr. Sherman pointed to Defendant Preston's increases to his salary and personal expenses in 2005 and 2007. See id. at 551:7–14.
136. Next, as it pertains to calculating TPP's value pursuant to the CCF Method, the Parties' experts disagreed about whether the ESOP expenses should be

added back to the Company's Earnings Before Interest, Taxes, Depreciation, and Amortization (the "EBITDA"). See Trial Tr. Vol. 3 at 541:4–542:20, 547:10–548:5; see also Trial Tr. Vol. 6 at 1277:13–21; 1278:3–13. In normalizing the cash flow under this valuation method, expenses that would be eliminated by the next owner of a company are added back to the EBITDA. See Trial Tr. Vol. 4 at 542:10–20.

137. Mr. Sherman opined that he did not add back the ESOP expenses because the ESOP was not likely to be eliminated after the 2006 and 2008 Transactions because one of the goals of the ESOP was to retain and recruit employees. See Trial Tr. Vol. 3 at 541:4–542:20; 547:10–548:5; see also Trial Exhibit P-16 at 3 [Doc. 157-16] ("The ESOP was created to give added incentive to his employees to stay with the Company"); Trial Tr. Vol. 5 at 1123:22–25.
138. In contrast, Mr. Ultz opined that he would add back the ESOP expenses, finding the ESOP to be an incremental benefit beyond what was normally required to retain employees because "TPP was already paying its people at the top end of the pay scale" and "when it implemented the ESOP, TPP didn't cut any other expenses." See Trial Tr. Vol. 6 at 1277:13–21.
139. Another large difference between the Parties' conclusions of value stems from the company-specific risk premium applied in the CCF Method. See id. at 1293: 17–24. A company-specific risk premium is an increase to the discount

rate and reflects unique risk factors for a company that is then applied to a company's projected cash flows to calculate a company's value pursuant to the CCF Method. See id. at 1293:15–19.

140. In both the First and Second Sherman Reports, for the 2006 Transaction, Mr. Sherman applied a two percent (2%) company-specific risk premium to the weighted average cost of capital, and, for the 2008 Transaction, Mr. Sherman applied a three percent (3%) company-specific risk premium. See id. at 1293:9–11. Mr. Ultz did not apply a company-specific risk premium in valuing either Transaction. See id. at 1303:11–17.
141. Mr. Ultz opined that the reasons Mr. Sherman gave to support the company-specific risk premiums in his valuations were “unjustified” and are “captured elsewhere in his analysis[,]” resulting in certain risks being doubly counted. See id. at 1294:3–1295:2.
142. In his testimony at trial, Mr. Sherman emphasized two (2) reasons to support his company-specific risk premiums: (1) the key man risk and (2) aged receivables or bad debt held by the Company. See Trial Tr. Vol. 3 at 574:5–10; 574:14–575:17; 632:12–16.
143. A key man is an individual of high-value to the company and poses a risk because if that person leaves the company, the company suffers as a result. See id. at 574:14–16.

144. Both experts agree that Defendant Preston represents an important figure and key man to TPP. See id. at 575:2–8; see also Trial Tr. Vol. 6 at 1295:18–19; 1373:10–18.
145. However, Mr. Ultz testified that by including Defendant Preston’s excessive salary (which was more than that would be paid to a generic CEO), Mr. Sherman already accounted for the key man risk in his as-is cash flow analysis because if Defendant Preston left, the Company would be able to pay that same excessive salary to hire another “key man” CEO. See Trial Tr. Vol. 6 at 1295:7–1296:4; 1374:8–1375:4. Therefore, according to Mr. Ultz, Mr. Sherman’s calculation accounted for the same “risk” twice, which artificially lowered Mr. Sherman’s valuation of the company as of the date of the 2008 Transaction. See id.
146. Next, Mr. Sherman testified that TPP’s aged receivables (or bad debt) support the company-specific risk premiums he used in his valuations for the 2006 and 2008 Transactions. Mr. Sherman explained that TPP’s business model involved accepting large projects and beginning working on those projects for a developer before the project received funding, creating the risk that TPP would not be paid for its work if the project was not ultimately funded. See Trial Tr. Vol. 3 at 574:4–10. TPP would carry these costs as receivables until a project it was working on was funded and it was paid. See id.

147. Mr. Sherman increased the company-specific risk premium he applied to the 2008 Transaction to three percent (3%) up from two percent (2%) in his valuation from the 2006 Transaction due to the Company's projection in Trial Exhibit J-10 that its bad debt expenses would almost double. See id. at 633:15–24.
148. Mr. Ultz disagreed with this reasoning after reviewing TPP's bad debt and aged receivables over a period of five (5) years; he found that the amount of these liabilities remained consistent over the years. See Trial Tr. Vol. 6 at 1297:11–16. Additionally, Mr. Ultz credited the statement of a third-party bank that TPP's aged receivables were within "normal market terms." See id. at 1297:16–1298:3.

H. Events Following the 2008 Transaction

149. On March 8, 2008, eight (8) days after the 2008 Transaction on February 29, 2008, TPP's managing principals exchanged emails via their Gmail accounts referring to "the next round of layoffs[,]” which were anticipated to happen during April 2008. See Trial Ex. P-35 [Doc. 157-28].
150. In an email on March 11, 2008, Mr. Byerly explained that salary cuts for employees between five percent (5%) and fifteen percent (15%) would be made immediately and additional layoffs would take place at the end of

March. See Trial Ex. P-36 [Doc. 157-29]; see also Trial Tr. Vol. 2 at 369:1–20; Trial Tr. Vol. 5 at 830:8–15.

151. In an email on March 12, 2008, Mr. Byerly informed TPP’s managing principals that Defendant Preston “thinks the Managing Directors should take a 20% pay cut.” See Trial Ex. P-37 [Doc.157-30].
152. On March 14, 2008, Mr. Byerly asked the managing principals for a preliminary list of staff reductions by the end of the day. See Trial Ex. P-38 [Doc. 157-31]. In an email on March 15, 2008, Defendant Preston reiterated the need for the managing principals to submit their preliminary layoff lists, stating: “This is a crisis time for the firm.” See Trial Ex. P-34 at 4.
153. On March 16 or 17, 2008, Bear Stearns, a Wall Street investment bank, collapsed. See Trial Tr. Vol. 6 at 1279:23–25; 1359:18–21. Defendant Preston testified that the collapse of Bear Stearns caused “six or seven [of the Company’s] substantial projects to go on hold in the back half of March” 2008. See id. at 1206:21–1207:13. Those projects were worth “somewhere around \$13 million . . . of revenue.” See id. at 1207:6–13.
154. At the end of March 2008 and over the subsequent months, TPP laid off a substantial number of its employees. See Trial Ex. P-19.

155. Defendant Preston testified that the decision to lay off a certain number of employees at the end of March 2008 was a result of the collapse of Bear Stearns. See Trial Tr. Vol. 6 at 1220:2–6.
156. Mr. Byerly testified that between March 8 and 11, 2008, there were rumors circulating that Bear Stearns was facing financial difficulty. See Trial Tr. Vol. 4 at 808:16–24.
157. However, according to Defendants’ valuation expert, Mr. Ultz, “Bear Stearns went from being completely solvent to out of business in three days” and the collapse of that institution was an event that “nobody saw that coming.” See Trial Tr. Vol. 6 at 1279:1–8.
158. In June 2008, TPP sought another valuation from Jacobs Capital. See Trial Tr. Vol. 4 at 794:21–795:17. Jacobs Capital issued a valuation on September 15, 2008, valuing TPP at just \$15 million as of June 30, 2008. See Stip. Fact ¶ 15.
159. In a valuation report dated December 17, 2009, an independent appraiser, Applied Economics, found that TPP did not have a positive value. See id. ¶¶ 16–17.
160. TPP entered a consent resolution terminating the ESOP the following day on December 18, 2009. See id. ¶ 17.

161. Defendant Preston contends that he paid TPP “\$2 million toward the ESOP loan.” See Trial Tr. Vol. 6 at 1205:3–7.
162. Eric Klein, a commercial lender at Georgian Bank, testified that Georgian Bank requested additional collateral on TPP’s loan from Georgian Bank. See Trial Tr. Vol. 5 at 1116:4–7; 1129:8–16.
163. One million dollars of Defendant Preston’s alleged “pay back” of the ESOP loan was in the form of a certificate of deposit (“CD”) given to Georgian Bank as additional collateral to secure Georgian Bank’s \$5 million loan to TPP. See Trial Vol. 5 at 1047:12–15; 1129:2–16.
164. Defendant Preston “put a million dollars of his personal money back into the Company as well, in addition to the CD.” See id. at 1047:16–1048:6. This payment “repaid part of the \$5 million loan [from Georgian Bank to TPP] in 2010[.]” See id. at 1047:13–15.
165. The additional collateral from the CD and the \$1 million given to TPP from Defendant Preston was eventually used to pay down Georgian Bank’s loan to TPP. See id. at 1129:12–1130:6.
166. The ESOP was ultimately responsible for paying for the shares it received during the Transactions. There was an acquisition loan (secured by a promissory note) between TPP and the ESOP, such that the ESOP had to pay TPP for Defendant Preston’s stock shares and the shares would be released to

the ESOP as the ESOP repaid the acquisition loan to TPP. See Trial Tr. Vol. 2 at 244:14–17; Vol. 4 at 928:19–23; 929:24–930:4.

III. Conclusions of Law

By his Complaint, the Secretary asserts that Defendants TPP and Preston breached the fiduciary duties of prudence and loyalty owed to the ESOP with regard to the 2006 and 2008 Transactions and that each of the Transactions was prohibited by Section 1106(a) of ERISA. See Compl. Additionally, the Secretary alleges that TPP is liable as a co-fiduciary for Defendant Preston’s breaches of fiduciary duty pursuant to Section 1105(a) of ERISA. See id.

A. Defendant TPP’s Status as a Fiduciary

As an initial matter, the Court addresses Defendants’ argument that the Secretary’s claims fail as a matter of law because Defendant TPP was not a fiduciary to the ESOP.⁴ “A person or entity becomes an ERISA fiduciary either [1] by being named as a fiduciary in written instruments that govern how an employee benefit plan is established or maintained, or [2] by exercising discretionary authority or control over the management, administration, or assets of a plan.” See In re SunTrust Banks, Inc. ERISA Litig., 749 F. Supp. 2d 1365, 1372 (N.D. Ga. 2010). Specifically, ERISA states:

⁴ The Court notes that Defendants assert this argument only as to Defendant TPP and not Defendant Preston. [See generally Doc. 178].

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term “named fiduciary” means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly[.]

29 U.S.C. § 1102(a)(1)-(2). As for the second category of fiduciary, which is known as a “functional fiduciary,” 29 U.S.C. § 1002(21)(A) provides:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002(21)(A). A functional fiduciary, as the Eleventh Circuit has explained, “is a fiduciary only ‘to the extent’ that it performs a fiduciary function. As such, fiduciary status under ERISA is not an ‘all-or-nothing concept,’ and “a court must ask whether a person is a fiduciary with respect to the particular activity at issue.” Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267, 1277 (11th Cir. 2005).

Essentially, Defendants contend that TPP did not act as a functional fiduciary with respect to the Transactions and, therefore, the Secretary's claims must fail. [See Doc. 178 at 97]. However, Defendants' argument ignores the fact that TPP is the named fiduciary in the ESOP Plan Document. Section 1.24 of the ESOP plan defines "fiduciary" and states that "[t]he Sponsor of the Plan is the 'named Fiduciary' for purposes of ERISA § [1102](a)(2)." See Trial Ex. J-6 at 15. In turn, the term "Sponsor" is defined as TPP Holdings, Inc. See *id.* at 20. Thus, TPP is a fiduciary of the ESOP by being named as a fiduciary in the ESOP Plan Document. Accordingly, the Court finds that Defendants' argument fails.

B. Breach of Fiduciary Duty Claims

To establish an ERISA claim, the Secretary must prove by a preponderance of the evidence (1) that the Plan is an ERISA covered plan, (2) that Defendants were fiduciaries to the Plan, (3) that Defendants breached their fiduciary duties, and (4) that those breaches resulted in loss to the Plan. See Willett v. Blue Cross & Blue Shield of Ala., 953 F.2d 1335, 1343 (11th Cir. 1992). As relevant here, Section 1109(a) of ERISA provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including the removal of such fiduciary.

29 U.S.C. § 1109(a). Section 1104 defines the fiduciary duties owed pursuant to ERISA:

- (1) a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
 - (A) for the exclusive purpose of:
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
 - (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Id. § 1104. Part (A) is known as the “Duty of Loyalty” and part (B) is known as the “Duty of Prudence.” Tussey v. ABB, Inc., 746 F.3d 327, 335 (8th Cir. 2014); Braden v. Wal-Mart Stores Inc., 588 F.3d 585, 598 (8th Cir. 2009).

Section 1109(a) imposes liability on a fiduciary for “any losses to the plan resulting from each . . . breach” of the above fiduciary duties. 29 U.S.C. § 1109(a). The Eleventh Circuit has appeared to interpret this language to “require that the

breach of the fiduciary duty be the proximate cause of the losses claimed.”⁵ Willett, 953 F.2d at 1343. Because of this requirement, a fiduciary is not liable pursuant to Section 1109 where his actions—“although a breach of his fiduciary duty[,] did not cause the loss to the [Plan].” Ironworkers Local No. 272 v. Bowen, 695 F.2d 531, 536 (11th Cir. 1983).

In the instant matter, the Secretary claims that Defendants breached the fiduciary duties they owed to the ESOP pursuant to ERISA, specifically the duties

⁵ The Circuit Courts of Appeal are split on who bears the burden of demonstrating causation. Compare Silverman v. Mut. Benefit Life Ins. Co., 138 F.3d 98, 104 (2d Cir. 1998) (holding that Section 1109 of ERISA requires plaintiff to show that the loss claimed resulted from the fiduciary’s breach), cert. denied, 525 U.S. 876 (1998) and Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995) (“[A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan”), with Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 363 (4th Cir. 2014) (“[O]nce a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation.”), McDonald v. Provident Indem. Life Ins. Co., 60 F.3d 234, 237 (5th Cir. 1995) (quoting Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994)) (“[A]n ERISA plaintiff must prove a breach of a fiduciary duty and a prima facie case of loss to the plan . . . [then] ‘the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by the breach of duty.’”), and Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992) (same). Courts in the Eleventh Circuit appear to allocate the burden of proving loss causation to the plaintiff. See Willett, 953 F.2d at 1343-44 (“On remand, the burden of proof on the issue of causation will rest on the beneficiaries; they must establish that their claimed losses were proximately caused either by a failure by Blue Cross to cure Mays’ breach or knowing participation by Blue Cross in Mays’ breach.”); Perez v. DSI Contracting, Inc., Civil Action No. 1:14-CV-282-LMM, 2015 WL 12618779, at *5 (N.D. Ga. July 24, 2015) (describing the circuit split on causation in ERISA breach of fiduciary duty cases).

of loyalty and prudence.⁶ The Court begins with whether Defendants breached their duty of prudence with regard to the 2006 and 2008 Transactions.

1. Duty of prudence

The Secretary argues that Defendants violated the duty of prudence owed to the ESOP by: (1) not providing accurate information to Jacobs Capital regarding the ESOP's control and failing to adequately review the 2006 Valuation and 2008 Draft Valuation, both of which did not apply a minority discount; (2) relying on the 2006 Valuation for the 2006 Transaction, which took place nine (9) months after the 2006 Valuation was issued and therefore was outdated; (3) relying on a draft valuation for the 2008 Transaction that was not signed and had missing and out-of-date information; and (4) relying on the 2008 Draft Valuation for the 2008 Transaction even though it included projections Defendants should have known were overly optimistic based on their knowledge of TPP's outlook at the time. [See generally Docs. 177, 180]. Defendants argue that they acted prudently because they hired and relied on experts, specifically: Jacobs Capital, in determining fair market value for

⁶ In his Complaint, the Secretary also claims that Defendants failed to discharge their duties with respect to the Plan in accordance with the documents and instruments governing the Plan, thus violating 28 U.S.C. § 1104(a)(1)(D). See Compl. ¶ 40(c). The Secretary did not pursue this claim at trial. Therefore, the Court finds that the Secretary has abandoned this claim and dismisses it. See Devs. Sur. & Indem. Co. v. Roofing, No. 3:15-CV-655-J-34PDB, 2017 WL 2350280, at *2 (M.D. Fla. May 31, 2017) (finding that a plaintiff abandoned claims where it did not pursue those claims in either its motion for summary judgment or at a bench trial).

the 2006 and 2008 Transactions; and on their legal counsel to implement Control Mechanisms A through F. [See Doc. 178 at 84, 87].

“Although securing an independent assessment from a financial advisor or legal counsel is evidence of a thorough investigation, it is not a complete defense to a charge of imprudence.” See Howard v. Shay, 100 F.3d at 1484, 1489 (9th Cir. 1996) (internal citation omitted). As courts have noted, “independent expert advice is not a ‘whitewash’” nor “a magic wand that fiduciaries may simply wave over a transaction to ensure that their responsibilities are fulfilled.” Perez v. Commodity Control Corp., 2016 WL 11638303, at *6 (S.D. Fla. May 4, 2016) (quoting Howard, 100 F.3d at 1489 and Donovan v. Cunningham, 716 F.2d 1455, 1474 (5th Cir. 1983)); see also Perez v. Bruister, 823 F.3d 250, 253 (5th Cir. 2016) (“[R]eliance on outside experts does not alone indicate that fiduciaries have satisfied their duty of care.”). Thus, to satisfy the duty of prudence through reliance on an expert’s advice “the fiduciary must (1) investigate the expert’s qualifications,” “(2) provide the expert with complete and accurate information,” and “(3) make certain that reliance on the expert’s advice is reasonably justified under the circumstances.” See Howard, 100 F.3d at 1489 (internal citations omitted); see also Brundle ex rel. Constellis ESOP v. Wilmington Tr., 919 F.3d 763, 773 (4th Cir 2019); Bussain v. RJR Nabisco, Inc., 223 F.3d 286 (5th Cir. 2000); Chao v. Hall Holdings Co., Inc., 285 F.3d 415 (6th Cir. 2002); Keach v. U.S. Tr. Co., 419 F.3d 626 (7th Cir. 2005).

The Court finds that a preponderance of the evidence establishes that Defendants failed to adequately review the 2006 Valuation and 2008 Draft Valuation to ensure that their reliance on the expert's advice that a minority discount should not be applied was reasonable. The Court likewise finds that a preponderance of the evidence shows that Defendants did not correct information in these documents they should have known was inaccurate. Fiduciaries "contemplating an otherwise prohibited transaction" have a duty to "ask questions" and "probe [their] own experts," "question[ing] and test[ing] the underlying financial data and assumptions." Brundle on behalf of Constellis Emp. Stock Ownership Plan v. Wilmington Tr. N.A., 241 F. Supp. 3d 610, 643 (E.D. Va. 2017). "[T]he fiduciary is required to make an honest, objective effort to read the valuation, understand it, and question the methods and assumptions that do not make sense." Howard, 100 F.3d at 1490.

Here, the Court finds that Defendants did not sufficiently review the 2006 Valuation and 2008 Draft Valuation—or the Company's and the ESOP's formation documents—to verify the level of control the ESOP had over decisions at the Company. Review of the Jacobs Valuations by a prudent fiduciary would have, at the very least, revealed that Jacobs Capital incorrectly believed the ESOP had three (3) trustees (two (2) of whom were not the selling shareholder) and erroneously relied on this in not applying a minority discount. Defendants knew that at all times

that the ESOP had only one Trustee (Defendant Preston), but never corrected the Jacobs Valuations. Additionally, the Court finds that Defendants' reliance on the 2008 Draft Valuation—despite its being marked as a draft and including blank or out-of-date information—was imprudent, further demonstrating the inadequate investigation Defendants conducted as to the fair market value of TPP stock at the time of the 2008 Transaction. Despite recognizing that the 2008 Draft Valuation was a draft and included information from the previous year that had not been updated, Defendants did not follow up with Jacobs Capital to provide this missing or out-of-date information or inquire as to the effect of this on the value the 2008 Valuation ascribed to TPP. Defendants proffer their belief that the only reason the 2008 Draft Valuation was not finalized was due to Mr. Jacobs' personal desire to incentivize an audit and sale of the Company, but this belief does not insulate Defendants from their duty of prudence, which includes a duty to make certain that their reliance on an expert's advice is reasonable.

Indeed, the Court finds that this case is quite like First Bankers Trust Services, Inc., where the district court concluded that the fiduciary did not conduct a meaningful review of an appraisal, in part because the draft valuation on which the transaction relied “contained a blank page where it indicated that information about the state of [the company's] industry and region was missing.” See 2017 WL 1232527, at *75 (D.N.J. Mar. 31, 2017). The court noted that “a prudent investor

would not have moved forward with the [transaction] where a valuation report was missing an entire industry analysis section” and that the fiduciary’s failure to follow up and question the appraiser was “troublesome.” See id. The Court finds Defendants’ similar failure to follow up with Jacobs Capital and reliance on an unsigned, draft valuation with missing and out-of-date information to be troubling.

A prudent fiduciary would have also reviewed and probed the ESOP Plan Document and the Company’s Bylaws to ensure that the Control Mechanisms were provided for and enforceable, since these Control Mechanisms were the only reason a minority discount was not applied to the Jacobs Valuations. It is uncontested that the ESOP Plan Document drafted by Mr. Baesel, which replaced the original ESOP plan documents, did not memorialize the Control Mechanisms. Although the ESOP had an element of control—Control Mechanism F: voting rights equal to 51% of all outstanding stock of the Company—it did not have the other Control Mechanisms contemplated by the Jacobs Valuations. Despite testimony that an ESOP Committee (comprised of Mr. Byerly, Ms. Locke, and Defendant Preston) informally consulted and approved Defendant Preston’s salary increases and the acquisition of Schwartz Engineering, nothing in the ESOP Plan Document or Company Bylaws required the ESOP Committee’s approval for these actions. The Bylaws vested the approval authority for Control Mechanisms A through E with TPP’s Board of Directors: requiring approval by “both (i) a majority of the Board of Directors present at a

meeting at which a quorum is present, and (ii) the Class B Director.” See Trial Ex. P-6 at 6. Thus, the Class B Director held the power to exercise the rights supposedly conveyed to the ESOP by Control Mechanisms A through E, *not* the ESOP’s Trustee nor the ESOP Committee.

Defendant contends that the ESOP possessed enforceable rights pursuant to Control Mechanisms A through E because the Class B Director “was obligated to act for the ESOP[.]” [Doc. 179 at 27]. However, pursuant to Georgia law, a director must “perform his duties in the good faith belief that he acts in the best interests of the corporation,” O.C.G.A. § 14-2-830(a), “serv[ing] the interests of the *entire body of stockholders*, as well as those of the individual shareholder.” See Pelletier v. Zweifel, 921 F.2d 1465, 1484 n.37 (11th Cir. 1991) (emphasis in original) (citing Oliver v. Oliver, 45 S.E. 232, 233 (Ga. 1903)). Although a director may not become “the active and successful opponent of an individual stockholder,” he “must attempt to promote the interests of all stockholders.” See id. Therefore, by definition, the Class B Director was not obligated to act solely in the interest of the ESOP when exercising the Control Mechanisms A through E. Additionally, the fact that Defendant Preston was simultaneously both the Class B Director and the ESOP Trustee is of no consequence, as ERISA requires “that the fiduciary with two hats wear only one at a time[.]” See Pegram v. Herdrich, 530 U.S. 211, 225 (2000). Thus, when approving the certain corporate actions supposedly controlled by the

ESOP as the Class B Director, pursuant to the Company's Bylaws, Defendant Preston was not acting as the ESOP Trustee—he was acting as the Class B Director with the duty to promote the interests of all TPP's stockholders, not just the ESOP. See Pelletier, 921 F.2d at 1484 n.37 (internal citation omitted).

Courts have similarly found a breach of an ERISA fiduciary's duty of prudence where the fiduciary failed to review a valuation or question an appraiser's decision to either include a control premium or fail to include a control discount where an employee stock ownership plan did not have meaningful control. See Pizzella v. Vinoskey, 409 F. Supp. 3d 473, 484, 514–516 (W.D. Va. 2019), aff'd in part, rev'd in part sub nom. Walsh v. Vinoskey, 19 F.4th 672 (4th Cir. 2021); Brundle, 919 F.3d at 777 (upholding the district court's finding that the fiduciary failed to ensure its reliance on an appraiser's valuation was reasonably justified when it “did not investigate the appropriateness of applying a 10% control premium” and “fail[ed] to discount the [valuation] for lack of control” where the employee stock ownership plan did not have power to control the company). For example, in Vinoskey, the appraisal was completed on a controlling-interest basis, however, the corporate structure of the company meant that even though the employee stock ownership plan was acquiring 100 percent of the company's shares it did not stand to gain full control. See 409 F. Supp. 3d at 514. The district court found the fiduciary did not act prudently because it failed to probe the company's “underlying corporate

structure thoroughly to determine whether the [employee stock ownership plan] would be able to control” the company and question the accuracy of the control assumption made in the appraisal. See id. at 515.

The Court also finds that the Secretary has shown that the removal of a minority discount from the Jacobs Valuations caused a loss to the ESOP as it overpaid for the shares purchased in the 2006 and 2008 Transactions. “Purchasers will generally pay more for ‘rights associated with control of the enterprise.’” Brundle, 919 F.3d at 777 (citing Estate of Godley, 286 F.3d at 214). For each of the Transactions at issue, it is undisputed that the ESOP did not purchase a majority of TPP’s outstanding shares, and as discussed above, the ESOP did not gain meaningful control through the Control Mechanisms provided for in the Jacobs Valuations. Therefore, the stock price paid by the ESOP should have been discounted to reflect the level of control actually held by the ESOP, and this overpayment constitutes a loss. The Court rejects Defendants’ argument that they are “insulated from liability” because a “hypothetically prudent fiduciary would have made the same decision anyway.” [Doc. 178 at 80]. As explained above, a prudent fiduciary would not have made the same decision in accepting the stock prices in the 2006 Valuation and 2008 Draft Valuation without a minority discount, because the ESOP purchased a minority share of the Company and did not gain control. Accordingly, the Court finds that the Transactions were not objectively reasonable and that there is a causal

connection between Defendants' deficient conduct in reviewing and correcting representations about the ESOP's control in the 2006 Valuation and 2008 Draft Valuation, such that the Secretary has met his burden to prove a loss to the Plan. [See id. at 81]. Accordingly, the Court finds that Defendants breached the duty of prudence owed to the ESOP pursuant to ERISA.

However, the Court finds that Defendants did not breach the duty of prudence through the other conduct alleged by the Secretary. First, as for the 2006 Transaction, the Court finds that Defendants did not act imprudently when relying on Jacobs Capital's 2006 Valuation for the 2006 Transaction, which took place nine (9) months after the 2006 Valuation was generated. [See Doc. 177 at 34, 91–92]. The Secretary cites to Donovan v. Cunningham, [see id. at 92], in which the Fifth Circuit reversed the decision of the district court and found that the fiduciaries acted imprudently with regard to two ESOP transactions that occurred thirteen (13) and twenty (20) months after the valuation of the subject company's stock price. See 716 F.2d at 1469. In Donovan, the analysis regarding the out-of-date valuation focused on whether the factual assumptions underlying the earlier valuation remained valid at the time of the transactions. See id. The Fifth Circuit emphasized that the fiduciaries knew at the time of the transactions that the projected revenues on which the appraisal was based had not yet materialized and that the actual revenues were significantly less than the projection. See id. The court found the

fiduciaries’ investigation insufficient because a “cursory study of [the appraisal] would have shown that” several of “the facts and assumptions underlying the [appraisal]” did not remain valid at the time of the transactions and “should have caused prudent fiduciaries to question whether continued reliance on the . . . appraisal was warranted.” See id. at 1469–70. Here, the Secretary argues that Defendants acted imprudently because Defendants did not review the 2006 Valuation after it was issued in February 2006 before the October 1, 2006 Transaction. [See Doc. 177 at 91–92]. However, the Secretary has not pointed to any underlying fact or assumption that changed or became invalid such that an additional review closer in time to the October 1, 2006 Transaction would have revealed that the 2006 Valuation no longer remained valid. This is distinguishable from the facts in Donovan where reliance on the out-of-date valuation was imprudent because a review would have shown that the underlying facts used in the appraisal were no longer valid, and therefore, the appraisal overvalued the subject company’s stock. See 716 F.2d at 1469–70. Accordingly, the Court finds that Defendants did not breach the duty of prudence by relying on the 2006 Valuation for the 2006 Transaction even though the 2006 Valuation was approximately nine (9) months old at the time of the Transaction.

Next, as for the 2008 Transaction, the Court disagrees with the Secretary that the evidence proffered establishes that Defendants knew or should have known that

the Company's financial outlook was overly optimistic, and thus, it was imprudent to engage in the stock transaction on February 29, 2008. Specifically, the Secretary contends that Defendant knew or should have known that the projected revenue for 2008 would be closer to \$50 million than \$60 million. [See Doc. 177 at 68].

The Court finds that a preponderance of the evidence shows that Defendants were aware of a slowing economy that would affect their business and the 2008 Draft Valuation took this into consideration, but that the magnitude of what would become the Great Recession and its effect on TPP was not known to Defendants at the time of the 2008 Transaction. First, the Court finds that Defendant Preston's January 20, 2008 Email and his follow-up email the next day acknowledge that the housing market was in a recession that would affect TPP's business and industry and that the large levels of growth the Company had achieved in recent years would not be "happening." Defendant Preston shared his belief that a revenue of \$72 million was still achievable and that TPP had hired enough employees to reach such a revenue, but that if the amount of work could not support this level of revenue, a reduction in staff would occur.

These emails are not representative of a fiduciary putting his head in the sand and failing to recognize changing economic conditions; instead, they evidence that fiduciary's awareness that previous levels of success would not be reached and that expectations for TPP's growth and projected revenue had to change in response. The

January 20, 2008 Email was shared with Mr. Jacobs and the 2008 Draft Valuation reflected TPP's expectation of more modest growth and a downturn in the economy. Indeed the 2008 Draft Valuation specifically states: "The revenue growth expected by management is reflective of a much slower economic environment than in recent years" and that "[w]hile the Company currently has substantial work and potential work in its pipeline, the amount of work in the pipeline is below 2007 levels." See Trial Exhibit J-1 at 26.

Additionally, while the Court finds that the February 15, 2008 Layoffs that occurred approximately a month after the January 20, 2008 Email were due to economic conditions as provided in the severance letters, these layoffs are in line with the expectation that if a revenue of \$70 million could not be reached in 2008, reductions in staff would result. On January 16, 2008, Defendants' projected revenue was already at \$66 million and a revenue projection of \$60.4 million was used by Jacobs Capital in the 2008 Draft Valuation issued just days later, on February 22, 2008. Thus, by the time of the 2008 Transaction, Defendants knew that a revenue of \$70 million or more in 2008 was no longer likely. However, this does not prove that a projected revenue as low as \$50 million was more likely than the revenue projection of \$60.4 million used in the 2008 Draft Valuation. Additionally, the Court finds that the creation of the Gmail accounts by TPP management indicates that Defendants expected that they would need to have

additional discussions related to layoffs in the future that they did not want on the Company Server due to I.T. leaks. However, there is no evidence that such discussions took place on the Gmail accounts or additional layoffs were planned before February 29, 2008 (when the 2008 Transaction was effectuated).

Moreover, the Secretary relies heavily on his valuation expert and that expert's Second Sherman Report to show that a revenue projection of \$50 million for 2008 was known or knowable to Defendants at the time of the 2008 Transaction. In his valuation for the 2008 Transaction in the Second Sherman Report, Mr. Sherman used a revenue projection of approximately \$50 million found in Trial Exhibit J-10, which was a budget and projection spreadsheet created by TPP's CFO Andrew Preston. However, the Court finds Mr. Sherman's use of this projection and his testimony in support of the Second Sherman Report to be unreliable as the \$50 million revenue projection was finalized *after* the 2008 Transaction date and relied on events that occurred subsequent to the 2008 Transaction. Specifically, Mr. Sherman opined that this revenue projection would have been known or knowable to Defendants at the time of the 2008 Transaction because it included the layoffs and salary reductions that took place in February 2008. However, no such salary reductions occurred in February 2008. Further, a review of the unredacted version of the spreadsheet in comparison to TPP's record of when certain employees left reveals that the revenue projection of \$50 million in Trial Exhibit J-10 incorporated

not only the February 15, 2008 Layoffs, but also the layoff or resignation of an additional twenty-seven (27) employees at the end of March 2008 and six (6) employees throughout April 2008. See Trial Ex. D-21. Thus, the Court concludes that a preponderance of the evidence does not establish that Defendants should have known that a revenue projection closer to \$50 million was more likely than a revenue projection of \$60.4 million as of the 2008 Transaction date. Therefore, the Court finds that Defendants did not violate their duty of prudence by relying on the 2008 Draft Valuation based on a revenue projection of \$60.4 million for 2008.

In sum, the Court concludes that Defendants breached ERISA's duty of prudence by failing to adequately review, question, and probe Jacobs Capital's 2006 Valuation and 2008 Draft Valuation regarding the ESOP's level of control and the elimination of the minority discount. This breach resulted in a loss to the ESOP because the ESOP overpaid for stock that was valued on a controlling-interest basis in the 2006 and 2008 Transactions. However, Defendants did not act imprudently by relying on the nine (9)-month old 2006 Valuation or on the 2008 Draft Valuation's projected revenue which accounted for surrounding economic conditions.

2. Duty of loyalty

Next, the Court turns to the Secretary's claim that Defendants breached ERISA's duty of loyalty, which requires fiduciaries to act "solely in the interest of

the participants and beneficiaries” and “for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.” 29 U.S.C. § 1104(a)(1)(A). Complying with ERISA’s duty of loyalty requires a fiduciary to make decisions “with an eye single to the interests of the participants and beneficiaries.” See Perez v. Bruister, 54 F. Supp. 3d 629, 653–54 (S.D. Miss. 2014). Thus, an ERISA fiduciary must avoid conflicts of interest. See id. (citing Mertens v. Hewitt Assocs., 508 U.S. 248, 251–52 (1993)).

The Court finds by a preponderance of the evidence that Defendants breached the duty of loyalty they owed to the ESOP and its beneficiaries because they had the minority discount removed from the Company’s various stock valuations while simultaneously failing to ensure that the ESOP’s Control Mechanisms were implemented. As discussed above, aside from Control Mechanism F (holding 51% of voting rights), the ESOP did not have the Control Mechanisms provided for in Jacobs Capital’s 2006 and 2008 Draft Valuations. As discussed above, Jacobs Capital’s belief that these Control Mechanisms were adequately implemented (and thus enforceable by the ESOP) was the sole basis on which it removed the significant minority discount from the Company’s valuations. Defendant Preston affirmatively sought to eliminate or decrease what he characterized as the “big” minority discount, which, in turn, increased the price of the stock he was selling to the ESOP. While such an action could have also been in the interest of the ESOP by providing the

ESOP with heightened control *if* the Control Mechanisms had been properly implemented, Defendants did not ensure that this was the case. The fact that Defendant Preston was theoretically willing to cede certain aspects of control to the ESOP is immaterial given that the evidence shows that the ESOP never possessed such control.

As discussed in the preceding section, Defendants did not adequately review, probe, or correct the minority discount removal provision in Jacobs Capital's 2004 Final Valuation, 2006 Valuation, or 2008 Draft Valuation. Defendant Preston testified that he did not review the section of the 2004 Final Valuation discussing the minority discount, taking for granted that the Control Mechanisms he had proposed in his July 9, 2004 email were going to be incorporated. Thus, he never noticed that the Jacobs Valuations premised the removal of the minority discount on the ESOP having three (3) trustees, with no mention of an ESOP Committee. Moreover, while Defendant Preston testified that he relied on his ESOP and corporate attorneys to implement Control Mechanisms A through F, he did nothing to ensure his reliance was correct, but instead assumed certain provisions were in the Company's Bylaws.

Essentially, the minority discount was removed and the share price of TPP's stock increased without the exchange of meaningful control to the ESOP. Therefore, Defendants did not act with "an eye single to the interests of" the ESOP; instead, Defendants created a conflict of interest between the ESOP's interest in a lower share

price (or conversely, control of TPP) and Defendant Preston's desire for the removal of the discount. See Bruister, 54 F. Supp. 3d at 653–54.

C. Prohibited Transactions

The Court now turns to the Secretary's claims that the 2006 and 2008 Transactions are prohibited transactions pursuant to ERISA. Section 1106(a)(1)(A) of ERISA "prohibits the fiduciary of any ERISA plan from causing a 'sale or exchange . . . of any property between the plan and a party in interest.'" Brundle, 919 F.3d at 763 (quoting 29 U.S.C. § 1106(a)(1)(A)). Section 1106(b) provides that a fiduciary shall not: (1) "deal with the assets of the plan in his own interest or for his own account"; (2) "in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries"; or (3) "receive any compensation for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." See 29 U.S.C. § 1106(b). The categorical bar on transactions between a plan and a party in interest arises because, by their very nature, such transactions are "likely to injure the pension plan." Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 242 (2000); see also Herman v. S.C. Nat'l Bank, 140 F.3d 1413, 1416 (11th Cir. 1998) ("ERISA prohibits stock transactions between a plan and a 'party in interest' because of the obvious conflicts of interest and the high

potential for abuse and injury to the plan.”). Transactions prohibited by ERISA section 1106(a) are per se prohibited “regardless of whether any harm actually results from the transaction.” See Commodity Control Corp., 2017 WL 1293619, at *5 (citing Donovan v. Walton, 609 F. Supp. 1221, 1246 (S.D. Fla. 1985), aff’d sub nom. Brock v. Walton, 794 F.2d 586 (11th Cir. 1986)).

However, ERISA provides an exception, permitting party-in-interest transactions otherwise prohibited by Section 1106 if the “ESOP pay[s] no more than ‘adequate consideration’ for the employer’s stock.” See Brundle, 919 F.3d at 770; 29 U.S.C. § 1108(e)(1). This exception is an affirmative defense and an ESOP fiduciary raising the defense “bears the burden of proving by a preponderance of the evidence that the sale was for adequate consideration.” See Brundle, 919 F.3d at 770. “This burden is a heavy one.” Id. (quoting Howard, 100 F.3d at 1488). ERISA defines “adequate consideration” 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).

As an initial matter, the Court notes that the Parties dispute the legal framework surrounding whether a transaction was for “adequate consideration.” The Secretary contends that a finding of adequate consideration is a two-pronged conjunctive test requiring proof that: (1) Defendants performed a “good faith investigation” of the value of Defendant Preston’s stock in TPP (purchased by the ESOP), and (2) the stock was sold for “fair market value.” [Doc. 177 at 82–83]. In

turn, Defendants argue that good faith is not a separate requirement for adequate consideration, such that the exception applies as long as the ESOP paid fair market value for the stock. [See Doc. 178 at 94–95].

The Eleventh Circuit has yet to address this issue. However, several other circuit courts, as well as district courts within this Circuit and others, have found that the Section 1108(e) exception to prohibited transactions requires an inquiry into the conduct of the fiduciary in determining fair market value. See Bruister, 823 F.3d at 263 (“ESOP fiduciaries will carry their burden to prove that adequate consideration was paid by showing that they arrived at their determination of fair market value by way of a prudent investigation in the circumstances then prevailing.”); Chao, 285 F.3d at 436 (“The definition of ‘adequate consideration’ has two distinct parts. First, there is the ‘fair market value’ part, then there is the ‘as determined in good faith by the trustee’ part.”); Keach, 419 F.3d at 636 (“In order to rely on the adequate consideration exemption, a trustee or fiduciary has the burden to establish that the ESOP paid no more than fair market value for the asset, and that the fair market value was determined in good faith by the fiduciary.”); Howard, 100 F.3d at 1488–89; see also Commodity Control Corp., 2017 WL 1293619, at *7–9 (district court within the Eleventh Circuit finding the two (2)-prong inquiry used by other circuit courts persuasive in the absence of contrary binding or persuasive authority from the Eleventh Circuit). Moreover, courts have emphasized that the “primary focus of the

adequate-consideration inquiry rests on the *conduct* of a fiduciary, as judged by ERISA’s ‘prudent man’ standard of care.” See Vinoskey, 409 F. Supp. 3d 473, 512 (emphasis in original) (citing Brundle, 919 F.3d at 770).

Thus, the Court disagrees with Defendants’ position that the Section 1108(e) adequate consideration requirement is met absent an inquiry or investigation into the fiduciary’s conduct. See Eyler v. Comm’r., 88 F.3d 445, 455 (7th Cir. 1996) (“the adequate consideration test focuses on the conduct of the fiduciaries in determining the price, not the price itself”); Howard, 100 F.3d at 1488 (“the inquiry into whether the ESOP received adequate consideration focuses on the thoroughness of the fiduciary’s investigation”). Upon review of the authority cited by both Parties as well as persuasive authority from other courts, the Court agrees with the Secretary that whether the ESOP paid adequate consideration in the 2006 and 2008 Transactions requires a determination of whether the fiduciary determined fair market value in good faith through a prudent investigation.⁷ Pursuant to this standard, a fiduciary must act “with the care, skill, prudence, and diligence under the

⁷ The Court notes that the Department of Labor has proposed, but never enacted, regulations defining “adequate consideration.” Under these proposed regulations, “adequate consideration” must (1) reflect the stock’s “fair market value” and (2) be “the product of a determination made by the fiduciary in good faith.” Proposed Regulation Relating to the Definition of Adequate Consideration, 53 Fed. Reg. 17, 632, 17, 633 (proposed May 17, 1988) (to be codified at 29 C.F.R. pt. 2510). “[C]ourts look to these regulations for guidance,” Brundle, 919 F.3d at 770 n.2, but “proposed regulations have no legal effect.” Henry v. Champlain Enters., Inc., 445 F.3d 610, 619 (2d Cir. 2006). The Court finds these regulations persuasive as guidance, especially given that several circuits “have adopted the DOL’s proposed definition of adequate consideration.” Id. (collecting decisions from the Sixth, Seventh, and Ninth Circuits).

circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B). Indeed, the Court finds it “must place emphasis on the conduct of Defendants as fiduciaries of the ESOP, rather than the stock price ultimately used to consummate” the 2006 and 2008 Transactions. See Commodity Control Corp., 2017 WL 1293619, at *9.

Defendants do not dispute that, pursuant to Sections 1106(a)(1)(A) and 1106(a)(1)(B), Defendant Preston is a Trustee of the ESOP and was a party-in-interest, such that the 2006 and 2008 Transactions in which he sold stock to the ESOP are categorically barred by ERISA. However, Defendants contend that the exception pursuant to Section 1108(e) applies. Specifically, Defendants argue that because their valuation expert, Mr. Ultz, opined in his second report that the ESOP paid less than fair market value for Defendant Preston’s stock in the Company during the 2006 and 2008 Transactions, they have met their burden to prove that the sale was for adequate consideration.

Although the fair market value of the subject transaction is certainly part of the inquiry, the Court rejects Defendants’ argument that the price paid for the stock alone establishes adequate consideration and satisfies Defendants’ burden to employ this affirmative defense. Defendants also contend that Defendant Preston acted in good faith in determining fair market value because he relied on the valuations

provided by Jacobs Capital and the advice of his legal counsel. However, as the Court found above, Defendants did not act prudently when relying on the 2006 Valuation or 2008 Draft Valuation because both eliminated the minority discount without investigating whether the ESOP truly had control. Therefore, because the Court finds that Defendants have not established by a preponderance of the evidence that they came to fair market value for the 2006 and 2008 Transactions by way of a prudent investigation, the Court concludes that the Transactions were not for adequate consideration. Accordingly, the Court concludes that the 2006 and 2008 Transactions were prohibited transactions pursuant to ERISA, and enters judgment in favor of the Secretary on this issue.

D. Co-fiduciary Liability

Lastly, the Secretary alleges a claim for co-fiduciary liability against Defendant TPP pursuant to 29 U.S.C. § 1105(a). Section 1105(a) makes a fiduciary to a plan “liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan” in three (3) circumstances: (1) if he knowingly participates in or conceals the co-fiduciary’s breach, (2) if by failing to comply with his own fiduciary duties, he enables the co-fiduciary to commit a breach, and (3) if he knows of a co-fiduciary’s breach and fails to make “reasonable efforts under the circumstances to remedy” that breach. Sections 1105(a)(1) and (3) “require actual knowledge of the breach.” Renfro v. Unisys Corp., 671 F.3d 314, 324 (3d Cir. 2011).

“[T]he fiduciary must know the other person is a fiduciary with respect to the plan, must know that he participated in the act that constituted a breach, and must know that it was a breach.” Id. (internal quotation marks omitted) (quoting Donovan, 716 F.2d at 1475).

The Secretary argues that TPP is liable as a co-fiduciary because it was the Plan Administrator and, therefore, a fiduciary to the ESOP. [See Doc. 177 at 96]. Moreover, he contends that because TPP is charged with knowledge of the actions of its CEO and Director, it “participated knowingly in [Defendant Preston’s] breaches [of his fiduciary duties] and had knowledge of [Defendant Preston’s] breaches and did not make reasonable efforts under the circumstances to remedy th[ose] breach[es].” [See id.] Thus, it appears to the Court that the Secretary purports to establish co-fiduciary liability pursuant to Section 1105(a)(3). Defendants contends that Section 1105(a) limits liability to fiduciaries and TPP was not a fiduciary for purposes of the Transactions. [See Doc. 178 at 97]. Specifically, Defendants contend that TPP is not a fiduciary because it did not act as a fiduciary with respect to the particular activity at issue—here, entering into the Transactions. [See id.]

Contrary to Defendants’ assertion, as the Court previously found, TPP is a fiduciary of the ESOP by virtue of it being the named fiduciary in the ESOP Plan Document. See supra part III.A. Nevertheless, the Court finds that the Secretary

has failed to establish TPP's co-fiduciary liability pursuant to Section 1105(a)(3). As noted above, Section 1105(a)(3) "requires actual knowledge of the breach." Renfro, 671 F.3d at 324. The Secretary's argument in favor of co-fiduciary liability amounts to nothing more than a conclusory statement that TPP had knowledge of Defendant Preston's actions, and therefore, it also had knowledge of his breaches of fiduciary duties and knowingly participated in the same. [See Docs. 177 at 96; 178 at 42]. But the Secretary has failed to point to any facts adduced at the bench trial to support such a finding of actual knowledge on the part of TPP. In particular, the Secretary has not argued nor established, by a preponderance of the evidence, that Defendant Preston had knowledge that his actions (or lack thereof) with respect to the Transactions were breaches of his fiduciary duties as the ESOP's Trustee. Therefore, the Court denies the Secretary's claim for co-fiduciary liability.

IV. Relief

Having determined liability, the Court addresses the relief owed to the ESOP as a result of Defendants' breaches of their fiduciary duties and engagement in prohibited transactions.

A. Calculation of Damages—Fair Market Value

Section 1109(a) of ERISA states that breaching fiduciaries are "personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). "To calculate the loss to an ESOP and compensate it

for a fiduciary's ERISA violation, a court typically subtracts the stock's fair market value, as determined by the court, from the inflated price paid by the ESOP.” Brundle, 919 F.3d at 781; see also Bruister, 823 F.3d at 265 (collecting cases). “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.’” Kim v. Fujikawa, 871 F.2d 1427, 1430–31 (9th Cir. 1989); accord Sec’y of U.S. Dep’t of Labor v. Gilley, 290 F.3d 827, 830 (6th Cir. 2002) (“[T]o the extent that there is any ambiguity in determining the amount of loss in an ERISA action, the uncertainty should be resolved against the breaching fiduciary.”). Lastly, “[w]hile the district court may not determine damages by speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.” Bruister, 54 F. Supp. 3d at 675–76 (internal quotation marks omitted) (quoting In re Liljeberg Enters., Inc., 304 F.3d 410, 447 (5th Cir. 2002)).

There are five (5) sets of valuations of TPP with regard to the 2006 and 2008 Transactions before the Court: the Jacobs Valuations, the First Sherman Report, the First Ultz Report, the Second Sherman Report, and the Second Ultz Report. The Secretary argues that the Court should rely on the valuations within the Second Sherman Report to establish fair market value of the Transactions, or alternatively, take a twenty-three percent (23%) discount from the Jacobs Valuations, which the

Secretary posits represents the fair market value of the Transactions if a minority discount had properly been included. In turn, Defendants contend that, according to the Second Ultz Report, the ESOP paid less than fair market value for the stock in both the 2006 and 2008 Transactions and, therefore, there is no loss to the ESOP. However, as discussed above, the Court finds that the ESOP overpaid for stock in the 2006 and 2008 Transactions because the Jacobs Capital Valuations did not apply a minority discount and the ESOP did not have meaningful control.

As an initial matter, the Court finds the valuations in the Second Sherman Report and Second Ultz Report to be less reliable as a starting point for calculating fair market value due to their use of TPP's management's projections. The evidence presented at the bench trial established that there is no way to tell from the spreadsheets themselves when these projections were finalized as they were continuously updated. And upon a detailed review, the Court finds that both of the 2008 projections used by the Parties' experts incorporated information that was not known or knowable to Defendants as of February 29, 2008. As discussed above, the revenue projection used by Mr. Sherman from Trial Exhibit J-10 incorporated information regarding significant employee layoffs and resignations that occurred after the 2008 Transaction. Andrew Preston stated that Trial Exhibit J-11, used by Mr. Ultz, would be the best source of information for what was known or knowable to the Company as of the 2008 Transaction date because the projection in this

spreadsheet would have been completed between February 15 and March 15, 2008, and closer to the 2008 Transaction date. However, the unredacted version of this spreadsheet, Exhibit D-20 (submitted by Defendants after the bench trial), reveals that this revenue projection also incorporated information about the layoff or resignation of TPP employees from after the 2008 Transaction date, including Bryan Padilla, who was laid off on March 31, 2008; Michael Romot, who resigned on April 1, 2008; and Christopher Tidwell, who was laid off on April 30, 2008, and several others.

Both of the Parties' experts explained that valuations should not incorporate information that was not known or knowable at the time of the Transactions. See Trial Tr. Vol. 3 at 533: 16–19 (Mr. Sherman explaining that “a proper valuation should only consider what’s known or knowable as of the valuation date.”); Trial Tr. Vol. 6 at 1286: 25–1287:4 (Mr. Ultz stating that “you’re not supposed to rely on subsequent events that weren’t known or knowable as of the valuation date.”). Yet the revenue projections used in their respective valuations for the 2008 Transaction both accounted for employment information and data from March and April of 2008 that could not have been known or knowable to Defendants as of February 29, 2008.

Additionally, the Court questions the reliability of management’s projections used in the experts’ valuations of the 2006 Transaction as there were two (2) spreadsheets that highlighted the month of September 2006 as green, indicating final

information for September 2006, and no corresponding spreadsheet for August 2006. See Trial Tr. Vol. 6 at 1342:11–1345:23. Mr. Ultz explained that the spreadsheet and projection used by both experts was “effectively the August version” even though it was mislabeled and indicated final figures for September 2006. See id. While Mr. Ultz opined that the August 2006 spreadsheet would be the best information available as to what was known or knowable as of the October 1, 2006 Transaction date, it is unclear to the Court how he determined which of the two (2) spreadsheets represented the “August 2006” version. See id. And Andrew Preston’s testimony regarding how he created these projections indicates to the Court that any spreadsheet representing final figures for September 2006 would have been created after the October 1, 2006 Transaction date, and, thus, could include subsequent event information. Moreover, the haphazard way that the spreadsheets were maintained—as demonstrated by the labeling of two September 2006 spreadsheets and the inclusion of employment data from March and April 2008 within the spreadsheets that were meant to represent projections as of January and February 2008—makes the use of these projections by the experts less reliable. Accordingly, the Court will not rely on the experts’ valuations in their Second Sherman Report and Second Ultz Report in calculating fair market value of the stock for the either the 2006 or 2008 Transactions.

In his closing argument and post-trial briefing, the Secretary alternatively contended that the Court should calculate fair market value of the 2006 and 2008 Transaction by simply subtracting twenty-three percent (23%) from the 2006 and 2008 Draft Valuation issued by Jacobs Capital. [See Doc. 180 at 28–29]. This percentage represents the minority discount Mr. Jacobs applied in the 2004 Draft Valuation before it was removed. While the Court appreciates this calculation of fair market value of the 2006 and 2008 Transaction in theory, in practice the Court finds that it results in too much speculation and guesswork. First, while the stock sold in the 2006 and 2008 Transactions should have been valued on a minority-interest basis as it is clear that the ESOP did not have meaningful control of TPP, the ESOP did have at least one element of control because it held fifty-one percent (51%) of the voting rights of the outstanding stock. There is no evidence in the record as to what this one aspect of control would have been worth, if anything, or how it would affect the minority discount applied by Mr. Jacobs. Even more significantly, the Court agrees with Defendants’ observation that, in the 2004 Draft Valuation, Jacobs Capital did not just simply apply a twenty-three percent (23%) discount to reach its valuation opinion, but instead only applied the discount to certain valuation methodologies (the Adjusted Net Asset Value Method, Guideline Transaction Method, and Capitalization of Earning Method) and not another (Guideline Public Company Method) before weighing those methodologies. See

Trial Exhibit J-4 at 30; [see also Doc. 180 at 29 n.8]. Additionally, the Jacobs Valuations do not specify the weight Mr. Jacobs gave to each of the methodologies, and the 2008 Draft Valuation appears to change the weight given to each methodology from that applied in the 2004 Draft Valuation and 2006 Valuation. Compare Trial Exhibit J-4 at 30, and Trial Exhibit J-2 at 35 (both applying no weight to the Adjusted Net Asset Value Method and stating only that the Guideline Public Company and Guideline Transaction Methods are of lesser value and weighing them equally, and that the Capitalization of Earnings Approach has been given the greatest weighting), with Trial Exhibit J-1 at 43 (giving the Adjusted Net Asset Value Method a 10% weight with the Guideline Public Company and Guideline Transaction Methods having an equal weight and the Capitalization of Earnings Approach given the greatest weight). Thus, to engage in this calculation of fair market value, the Court would not only have to assume that Mr. Jacobs would have applied the same twenty-three percent (23%) minority discount he applied in his 2004 Draft Valuation to his 2006 and 2008 Draft Valuations, but also speculate as to the weight he gave each methodology. And although the Court may approximate the extent of damages, it may not engage in speculation or guesswork of this kind. See Bruister, 54 F. Supp. 3d at 675–76. Therefore, the Court will not calculate fair market value of the Transactions using the alternative method proffered by the Secretary.

That leaves the Court with the valuations in the First Sherman Report and First Ultz Report, both of which were entered into evidence at trial and are properly before the Court. See Trial Exhibit D-2; Trial Exhibit D-3. The Court finds the valuations in the First Sherman Report to be less reliable than the valuations in the First Ultz Report. First, the Court credits Mr. Ultz's uncontested testimony that the First Sherman Report contained basic mathematical errors. Next, the Court finds that Mr. Sherman improperly increased the valuations in his First Sherman Report by including an additional ten percent (10%) minority discount in calculating his CCF method when he had valued TPP on an "as-is" basis, which is already a minority-interest valuation. Mr. Ultz's clear explanation and citation to several valuation treatises in support of this argument that an additional minority discount would be inappropriate based on the "as-is" method used by Mr. Sherman is persuasive to the Court. For these reasons, the Court will not use the valuations within the First Sherman Report to calculate the fair market value of the 2006 and 2008 Transactions.

Thus, the Court finds the most reliable valuation of fair market value of the 2006 and 2008 Transactions to be those in the First Ultz Report. Accordingly, the Court finds the fair market value of the shares acquired by the ESOP in the 2006 Transaction to be \$812,226.00, and the fair market value of the shares acquired by

the ESOP in the 2008 Transaction to be \$4,836,797.00. Therefore, the total loss to the ESOP is equal to \$350,977.00.

B. Prejudgment Interest and Injunction

The Secretary also seeks prejudgment interest and requests that the Court enjoin Defendant Preston from administering or providing any services to an ERISA plan. See Compl.; [see also Doc. 177 at 98–103]. Prejudgment interest “may be granted in the discretion of the district court in an ERISA action.” Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich., 748 F. App’x 12, 24 (6th Cir. 2018). Such interest “is not awarded as a penalty, but as compensation for the use of funds.” Bruister, 823 F.3d at 274 (quoting Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir.1988)). In other words, “[p]rejudgment interest is not granted ‘according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.’” Bruister, 54 F.Supp. 3d at 680 (quoting Firman v. Life Ins. Co. of N. Am., 684 F.3d 533, 546 n.63 (5th Cir. 2012)).

Defendants do not offer any argument against the imposition of prejudgment interest in this case. Recognizing that the ESOP overpaid for Defendant Preston’s stock in two transactions that occurred over fourteen (14) and sixteen (16) years ago, respectively, the Court finds that to fully compensate the ESOP, prejudgment interest is appropriate in this case. The Court will apply the rate set forth in section

6621(c) of the Internal Revenue Code, which, as of the date of this order, is seven percent (7%), with prejudgment interest to begin the date this action was filed, December 30, 2014. Additionally, the Court notes that, as a general rule, prejudgment interest awards are simple interest awards, not compound interest awards. See Whitfield, 853 F.2d at 1306. Accordingly, applying a simple seven percent (7%) interest rate to the loss to the ESOP from 2006 and 2008 Transactions, the Court finds the amount of prejudgment interest to be paid is \$189,681.43 and the amount of the total award to be \$540,658.43.

As for the Secretary's request for an order enjoining Defendant Preston from administering or providing any services to an ERISA plan, the Court declines to grant such relief. Courts have permanently enjoined defendants from serving as fiduciaries where ERISA fiduciaries "have engaged in egregious misconduct." Vinoskey, 409 F. Supp. 3d at 541; Bruister, 54 F. Supp. 3d at 681. Although Defendant Preston certainly failed to live up to the duties imposed on him as a fiduciary for the ESOP, the Court does not find that his conduct has been so egregious to warrant a permanent injunction against acting as a fiduciary in the future. See Vinoskey, 409 F. Supp. 3d at 541 (finding injunctive relief requested by the Secretary was not warranted because the conduct was not egregious, where the fiduciary ignored red flags in an appraiser's valuation and did not adequately probe or question assumptions made about the company's level of control).

C. Setoff Argument

Lastly, the Court considers Defendants' argument that payments made by Defendant Preston to Georgian Bank and TPP following the Transactions reduce any damages owed by Defendants to the ESOP by \$2 million. [See Doc. 178 at 105–109]. Defendants first raised this argument in a “Motion to Amend [Proposed] Pretrial Order to Include Argument and Evidence relating to Recent Case Law” filed on February 11, 2022, eleven (11) days before the bench trial in this matter was set to begin. [See Doc. 145]. By their motion, Defendants argue that the Fourth Circuit's decision in Walsh v. Vinoskey, 19 F. 4th 672 (4th Cir. 2021), supports their newly proposed argument that any damages owed to the ESOP should be reduced by \$2 million as a result of post-transaction payments made by Defendant Preston on TPP's loans with Georgian Bank. [See id. at 2]. At the beginning of the bench trial, the Court denied Defendants' motion as untimely, but did permit the Parties to submit post-trial arguments on this issue. See Trial Tr. Vol. 1 at 8:3, 14:7–16:3.

Upon review of the Parties' post-trial arguments, the Court finds the facts in Vinoskey regarding the defendant's post-transaction cancelation of the employee stock ownership plan's debt to be highly distinguishable from those at hand in this case, and, therefore, concludes that Defendants' setoff argument fails on its merits. In Vinoskey, the employee stock ownership plan purchased 100 percent (100%) of the company's stock, such that it became the sole owner of the company. See 19

F.4th at 683. To effectuate the sale, the employee stock ownership plan paid the selling shareholders partly in cash and executed an interest-bearing promissory note to defendant Vinoskey for the remaining amount. See id. at 675. When the company later encountered financial difficulties, defendant Vinoskey voluntarily forgave approximately \$4.6 million due on the employee stock ownership plan’s outstanding debt owed to him pursuant to the promissory note. See id. at 675, 683. The Fourth Circuit, reversing the district court, held that the damages amount owed to the employee stock ownership plan due to defendant Vinoskey’s prohibited transactions should be reduced by the amount he forgave because his “debt write-off is better understood as reducing the final sale price at a later point in time *given that the [employee stock ownership plan] fully owned [the company].*” See id. at 683 (emphasis added). Alternatively, other courts have declined to reduce a defendant’s damages based on cancelled debt where the subsequent debt cancelation was “wholly unrelated” to the prohibited transaction and “had no bearing on the ESOP’s loss.” See id. at 682; Brundle, 919 F.3d at 783; see also Henry, 569 F.3d at 97–100.

Here, Defendants contend that any loss to the ESOP should be reduced by \$2 million because Defendant Preston paid that amount on the ESOP’s loans. [See Docs. 145 at 2; 178 at 108–109]. However, the Court finds that Defendant Preston’s payments did not reduce the amount the ESOP owed to TPP as a result of the Transactions, but reduced the amount owed by TPP to Georgian Bank. Defendant

Preston transferred a \$1 million CD to Georgian Bank on April 7, 2008, as the bank had requested additional collateral from TPP and Defendant Preston on the Company's \$5 million loan, which Defendant Preston had personally guaranteed. This additional collateral paid down TPP's loan to Georgian Bank in August 2010, which was approximately eight (8) months after the ESOP was terminated. Also on April 7, 2008, Defendant Preston transferred \$1 million from his personal account to the Company's checking account, which was used to pay down TPP's loan to Georgian Bank. These payments did not change the amount the ESOP owed to TPP. Moreover, unlike in Vinoskey, the ESOP was not the sole owner of the Company, such that reducing the debt owed by the Company would reduce the debt held by the ESOP. See 19 F.4th at 683. Because Defendant Preston's post-transaction payments had no bearing on the ESOP's loss, the Court declines Defendants' request to reduce the damages award by this amount.

IV. Conclusion

For the foregoing reasons, the Court finds Defendants Preston and TPP violated their duties of prudence and loyalty pursuant to 29 U.S.C. §§ 1104(a)(1)(A) and (B) and Defendant Preston caused a prohibited transaction in violation of 29 U.S.C. § 1106(a)(1)(A). As a result of these breaches, the ESOP overpaid for Defendant Preston's stock in the 2006 and 2008 Transactions. Therefore, the Court **DIRECTS** the Clerk to **ENTER JUDGMENT** against Defendants Robert N.

Preston and TPP Holdings, Inc. in the total amount of \$540,658.43, which includes \$189,681.43 in prejudgment interest.

Additionally, the Court **GRANTS** Defendants’ “Motion to Supplement Trial Record” [Doc. 181] with Proposed Exhibits D-20 and D-21. The Court **DIRECTS** Defendants to work directly with the Clerk’s Office to file exhibits D-20 and D-21 (previously submitted to the Court via email) into the record. Finally, the Court **DIRECTS** the Clerk to **CLOSE** this case.

SO ORDERED, this 20th day of September, 2022.



Eleanor L. Ross
United States District Judge
Northern District of Georgia