APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor, *Plaintiff-Appellee*, *v.* BRIAN J. BOWERS, an individual; DEXTER C. KUBOTA, an individual; BOWERS + KUBOTA CONSULTING, INC., a corporation; BOWERS + KUBOTA CONSULTING, INC. EMPLOYEE STOCK OWNERSHIP PLAN, *Defendants-Appellants*.	No. 22-15378

Filed October 25, 2023
Amended January 8, 2024

Before:
CARLOS T. BEA, DANIEL P. COLLINS, and KENNETH K. LEE, *Circuit Judges*.

ORDER

Judge Bea recommended, and Judge Lee voted, to deny the petition for rehearing en banc. Judge Collins voted to grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote. Fed. R. App. P. 35. The petition for rehearing en banc (Dkt. No. 39) is

DENIED. No future petitions for rehearing or rehearing en banc will be accepted.

The opinion filed October 25, 2023 (Dkt. No. 37) is amended, and the amended version has been filed concurrently with this order.

AMENDED OPINION

LEE, *Circuit Judge*:

Congress enacted the Equal Access to Justice Act (EAJA) to curb abusive and costly lawsuits involving the federal government. 28 U.S.C. § 2412. The EAJA thus allows a prevailing party to seek attorneys' fees and costs from a federal agency if the agency's litigation position was not "substantially justified." The U.S. Department of Labor's Employee Retirement Income Security Act (ERISA) lawsuit here was time- consuming and expensive for Appellants Brian Bowers and Dexter Kubota, who sold their company, Bowers + Kubota Consulting, Inc. ("B+K"), to an employee stock ownership plan (ESOP) at an allegedly inflated value. The government's case was also shoddy: It ultimately hinged on a single valuation expert, who opined that the plan overpaid for the company. The expert's errors led the district court to reject his opinion, and the government lost after a five-day bench trial. The district court, however, determined that the government's litigation position was "substantially justified" and denied Bowers and Kubota's request for attorneys' fees and costs.

We affirm the district court's denial of attorneys' fees. In hindsight, the Department of Labor's case had many flaws. But the district court did not err in concluding that the government was "substantially justified" in its litigation position when it went to trial. We cannot say that the district court abused its discretion in finding that the government's expert, despite his errors, had a reasonable basis—at least at the time of trial—for questioning whether the company's profits could surge by millions of dollars in just months.

We, however, remand on the award of costs because the district court based its denial of costs in part on a clearly erroneous factual finding.

BACKGROUND

I. The Secretary of Labor Brings an Unsuccessful ERISA Action Against Bowers, Kubota, and B+K.

To understand the district court's decision under the EAJA, we must first take a brief look at the merits of the Department of Labor's ERISA lawsuit. For the most part, we need not delve into the minutiae of the case. But it is useful to understand the basic nature of the ESOP transaction, why the government sued, and—most importantly—why the government lost.

A. Bowers and Kubota sell B+K Consulting to an ESOP.

Bowers and Kubota owned all the stock in B+K, a construction management, architecture, and engineering design firm based in Hawaii. In 2008, Bowers and Kubota began exploring options for selling the company. After some haggling with a potential third-party acquirer, Bowers and Kubota decided to sell B+K to an ESOP. As suggested by its name, an ESOP is an employee benefit plan that gives employees an ownership stake in their company. 26 U.S.C. §§ 401(a), 4975(e)(7). An ESOP has a trustee who owes fiduciary responsibility to the plan's participants and beneficiaries. 29 U.S.C. §§ 1104, 1106-(a)(1)(A), 1108(e), 1102(18).

In the fall of 2012, B+K retained Libra Valuation Advisors (LVA) to prepare a fair market valuation for the company. On December 3, 2012, B+K appointed a trustee to the ESOP.

From there, the deal moved quickly. On December 7, LVA changed its engagement letter to state that it was working for the ESOP trustee rather than B+K. Negotiations over the sale began on December 10. On December 11, LVA valued B+K at between $37,090,000 and $41,620,000. And by the end of that day, the ESOP trustee agreed that the ESOP would buy B+K from Bowers and Kubota for $40 million. Shortly after the agreement, LVA submitted its final report, which concluded that B+K's fair market value was $40,150,000. With LVA's advice that the $40 million price was fair, the deal closed on December 14—the ESOP trustee having billed only 30.1 hours of work.

B. The Department of Labor Sues Bowers, Kubota, and B+K Under ERISA.

Two years after the B+K sale, the transaction came under government scrutiny when a drop in the company's share price aroused the Department of Labor's suspicion that B+K was sold to the ESOP for more than its fair market value. The government conducted a multiyear investigation, culminating in a complaint filed against Appellants. The complaint alleged that Bowers and Kubota breached their fiduciary duties and engaged in self-dealing by inducing the ESOP to pay above the fair market value for the shares of B+K in violation of ERISA, 29 U.S.C. §§ 1001 et seq.

After surviving a motion to dismiss and a summary judgment motion, the government's case proceeded to trial. The government emphasized the circumstances of the ESOP transaction, questioning LVA's independence as well as the ESOP trustee's diligence. But when the dust settled on the government's case, the only question that mattered was whether B+K was sold for more than its fair market value.

To support that the ESOP overpaid for B+K, the government depended on its valuation expert, Steven Sherman. Sherman opined that LVA significantly overvalued B+K by basing its findings on an unsupportable projection of the company's 2012 Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA). LVA provided a 2012 EBITDA estimate of $9.2 million. In contrast, Sherman—arguing that LVA's estimate far exceeded B+K's past performance and the earnings achieved by industry peers—estimated $4.8 million.

To reconcile this gaping difference, Sherman flagged that LVA's forecast projected lower subconsultant expenses than B+K historically averaged, which Sherman argued would have inflated LVA's EBITDA estimate and ultimately its valuation. Sherman concluded that by adjusting these fees to align with historical averages, one could produce a 2012 EBITDA that better matched B+K's past performance. As it would turn out, however, Sherman was wrong because these subconsultant fees were not expenses on B+K's profit and loss statement but costs passed through to the company's clients. On top of his EBITDA adjustments, Sherman further reduced LVA's valuation by applying a "limited control" discount, which he argued would account for his observation that Bowers and Kubota controlled B+K after the sale, even though the ESOP had complete ownership of the company. Sherman concluded that B+K had a fair market value of $26.9 million at the time of the ESOP transaction.

After a five-day bench trial, Appellants prevailed. The district court rejected Sherman's expert report as unreliable, finding that several errors—his revised EBITDA estimate, his treatment of subconsultant fees, and his limited-control discount analysis—caused him to "significantly and unreasonably undervalue[]" B+K. Sherman erred in deducting subconsultant fees because he mistakenly treated them as B+K expenses, not as pass-through costs. His limited-control discount analysis was erroneous because it relied on post-sale facts that should not have been incorporated into the pre-sale valuation. And he faltered in his EBITDA estimate by glossing over B+K's upward- trending earnings and its backlog of contracts. The district court added that these issues might have been avoided if Sherman or the government's attorneys had interviewed B+K management about the company's finances.

Without a reliable expert to show that B+K was sold for more than its fair market value, the government's case crumbled.

II. The District Court Grants in Part and Denies in Part Appellants' Bill of Costs and Motion for Attorneys' Fees and Nontaxable Costs.

After the trial, Appellants filed a bill of costs, seeking reimbursement from the government for the taxable costs incurred in the case. 28 U.S.C. § 2412(a)(1). A magistrate judge recommended taxable costs of $72,962.95. The district court adopted this recommendation in part, modifying it to $41,810.46 based on its finding that certain depositions taken by Appellants "were unnecessary and unreasonably increased the cost of this litigation."

Appellants also sought attorneys' fees and nontaxable costs under the EAJA. The magistrate judge recommended denying the request, finding that the government's position was substantially justified and that it did not act in bad faith. The magistrate judge concluded that the government reasonably relied on Sherman's expert opinion, despite its flaws, when proceeding to trial. The district court adopted the magistrate judge's findings and conclusions. Appellants then timely appealed.

ANALYSIS

Congress enacted the EAJA to "eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority." *Ardestani v. INS*, 502 U.S. 129, 138 (1991). The EAJA partially waives the United States' sovereign immunity and allows prevailing parties to seek attorneys' fees and non-taxable costs if (a) the government's position was not "substantially justified" or (b) the government acted in bad faith. 28 U.S.C. § 2412(b), (d)(1)(A), (d)(2)(A). The EAJA also empowers a court to award taxable costs. 28 U.S.C. § 2412(a). We affirm the district court's denial of fees, but we remand its award of costs.

I. The District Court Did Not Abuse Its Discretion in Finding the Government's Position "Substantially Justified" and Denying Attorneys' Fees and Non-taxable Costs under 28 U.S.C. § 2412(d).

Under the EAJA, a prevailing party can seek attorneys' fees unless the government's litigation position was "substantially justified." *See Comm'r, INS v. Jean*, 496 U.S. 154, 159, 165 (1990). For the government's position to be substantially justified, it "must have a 'reasonable basis both in law and fact.'" *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Of course, the government's position need not be correct, but it must be "justified to a degree that could satisfy a reasonable person." *Underwood*, 487 U.S. at 565–66 & n.2.

Courts thus must avoid placing "too much weight on the government's ultimate loss" in hindsight, and instead assess "the reasonableness of the government's position *at the time of the litigation*." *Gonzales v. Free Speech Coal.*, 408 F.3d 613, 620 (9th Cir. 2005). In deciding whether the government's position was substantially justified after we already know the outcome, "it is not enough to repeat the analysis of the merits decision, and add adjectives." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1175 (D.C. Cir. 2005) (Roberts, J.). The central issue, then, is whether the government's position *at trial* was reasonable, despite its ultimate failure to prove that position.

We review the district court's fee determination under the EAJA for an abuse of discretion. *Underwood*, 487 U.S. at 559–60. "A district court abuses its discretion when . . . its application of the correct legal rule is illogical, implausible or without support in inferences that may be drawn from the facts in the record," *Meier*, 727 F.3d at 869– 70 (citing *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc)), such that we are left with a "definite and firm conviction" that the district court's conclusion was a mistake, *Hinkson*, 585 F.3d at 1262.

A. The Government Cannot Rely on Red Flags Alone to Defend its Litigation Position as "Substantially Justified."

To start, the government makes much hay about the "suspicious" circumstances of the ESOP transaction. It points out, among other things, that the plan used the same valuation advisor (LVA) that B+K had previously hired; that the ESOP trustee billed only 30 hours; and that the deal was completed at breakneck speed and landed on the same price that Bowers and Kubota had wanted when they started the process. Hearkening back to the adage "where there is smoke, there must be fire," the government implies that its litigation position was "substantially justified."

While these red flags can justify the *investigation*, they alone cannot be the basis for proceeding to trial. The government's case here depended on its claim that the ESOP improperly relied on LVA's opinion and paid well above the fair market value of the company. Put another way, the red flags were a red herring if the plan ultimately paid fair market value for the company. That means the government must have provided some evidence that the

ESOP sale price was inflated. And here, the government relied only on its expert's valuation opinion. We thus must review whether the district court abused its discretion in finding that the government reasonably relied on its expert's valuation opinion, despite its flaws, as the parties proceeded to trial.

B. The District Court Did Not Abuse Its Discretion in Finding that the Government was Substantially Justified in Relying on Sherman's Opinion at Trial.

The government's valuation expert, Steven Sherman, asserted that the $40 million valuation offered by LVA, B+K's advisor, was inflated because it had relied on a dubious $9.2 million projection for the company's 2012 EBITDA. In 2011, the company's EBITDA was only $2.6 million. Sherman cast doubt on LVA's projection of a sudden spike in EBITDA, given the company's historical performance and the results of comparable companies in the industry. Sherman concluded that $4.8 million would have been a more accurate projection for the 2012 EBITDA, and he downgraded the company's value accordingly.

Sherman believed that B+K's subconsultant fees possibly contributed to the inflated 2012 EBITDA projection. So he deducted those expenses in preparing his valuation of the company. But Sherman was wrong. He conceded at trial that he had mistakenly considered the fees as company expenses when in fact they were passed through to B+K's clients. Put another way, the subconsultant fees could not have affected the 2012 EBITDA projection.

The government either knew or should have known about this error before trial because Appellants' experts pointed out this mistake during discovery. Indeed, this error also would have been apparent had Sherman interviewed B+K management in accordance with the Uniform Standards of Professional Appraisal Practice. The government thus was not substantially justified in relying on this aspect of its expert's analysis.

But this error, as plain as it was, did not necessarily undermine Sherman's big-picture EBITDA analysis—and the government's position—as the parties headed to trial. Sherman's main objection to LVA's valuation of the company was that "the profitability of this company, which had historically been two to five or $6 million EBITDA, was not going to turn on a dime and go to nine or $10 million." He was stumped by how LVA could justify such a massive surge in expected profitability in such a short time in a competitive environment. One reason for this overestimate—he thought—could have been LVA's understated forecast of B+K's subcontract expenses; other candidates might have been LVA's failure to adjust for additional wages. Whatever the cause, Sherman stood firm in his conviction that B+K was not as profitable as LVA predicted. As he testified at trial, "the adjustment to subcontract expenses was more illustrative than anything else. . . . I looked at the historical EBITDA . . . [a]nd there was a radical change."[1]

Ultimately, the district court rejected Sherman's EBITDA analysis and his entire opinion. It found that Sherman overlooked that B+K's earnings trended up-

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[1] Sherman's application of a limited-control discount was also problematic because it was based on post-transaction circumstances. But this error does not necessarily suggest that the government's position was unreasonable. For one thing, the discount constituted only a small part of Sherman's overall analysis. What's more, the EAJA does not require the government's position to be faultless to be substantially justified under 28 U.S.C. § 2412(d). *See Underwood*, 487 U.S. at 565 (stating that "substantially justified" does not mean "'justified to a high degree,' but rather . . . justified to a degree that could satisfy a reasonable person").

wards and that the company had a backlog of contracts.[2] The court also noted that Sherman should have known that his projection was too low because B+K had notched a 2012 EBITDA of $7.047 million by the time that he produced his opinion.

But the government did not know heading to trial that the district court would reject Sherman's entire opinion, even if it knew or should have known that Sherman had erred in assessing the subconsultant fees. The government rationally believed that LVA's valuation analysis was faulty, given that LVA predicted that profitability would balloon in a matter of a few months with no compelling explanation why. Indeed, the actual EBITDA in 2012 turned out to be $7 million, far lower than LVA's estimate of $9 or $10 million (although much higher than Sherman predicted). Put another way, the government reasonably believed at the time that LVA's estimate of skyrocketing EBITDA was dubious, even if the government's reason why was wrong. And the fact that the district court denied Appellants' motion in limine to exclude Sherman as an expert witness would suggest to a reasonable person that the court would not later reject Sherman's entire opinion as unreliable.

In short, because of the evidence that the quickly ballooning projected earnings were dubious, we cannot "definitely" and "firmly" believe that the district court abused its discretion in finding that the government's litigation position at the time of trial had a reasonable basis. *Hinkson*, 585 F.3d at 1262. We recognize that this is a close call. We also note that the EAJA is not a toothless

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[2] Sherman had plausible responses to the district court's critiques of his opinion. For example, Sherman recognized that the company had strong revenue growth—indeed, his opinion incorporated B+K's revenue projections—but he contended that the company's profits remained far short of LVA's projections.

tool when combatting governmental overreach: the statute entitles parties to seek fees from the government when its case is based on incorrect legal positions or dubious evidence and expert testimony. Indeed, had the district court awarded fees here, it might not have been an abuse of discretion to do so. But we are constrained by that same deferential standard of review. And we cannot say that the district court abused its discretion in finding that the government's position was substantially justified at the time of trial.[3]

II. The District Court Did Not Abuse Its Discretion in Denying Attorneys' Fees and Nontaxable Costs under 28 U.S.C. § 2412(b) Because the Government Did Not Act in Bad Faith.

Appellants also appeal the district court's denial of attorneys' fees under 28 U.S.C. § 2412(b). Section 2412(b) allows a court to award attorneys' fees where the government acted in bad faith. *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991)). Here, the district court found that the government did not act in bad faith. We review that finding for clear error. *Ibrahim v. DHS*, 912 F.3d 1147, 1166 (9th Cir. 2019) (citing *Cazares v. Barber*, 959 F.2d 753, 754 (9th Cir. 1992)).

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[3] The dissent suggests that we are establishing a laxer standard for the government to prevail in an EAJA case. Not so. Our decision is largely based on our deferential standard of review and the unique facts of the case. At the time of trial, the government appeared to have substantial evidence for its case because its expert pinpointed the anomaly of Appellants' estimate that EBITDA would double in a short period of time (it turned out that both the government and Appellants were substantially off in their EBITDA projections). In the end, the government's case completely crumbled, but we cannot say that the district court abused its discretion in finding the government's position to be substantially justified at the time of trial.

"Mere recklessness does not alone constitute bad faith; rather, an award of attorney's fees is justified when reckless conduct is 'combined with an additional factor such as frivolousness, harassment, or an improper purpose.'" *Rodriguez*, 542 F.3d at 709 (quoting *Fink v. Gomez*, 239 F.3d 989, 993–94 (9th Cir. 2001)). Naturally, this is a higher burden than § 2412(d)'s requirement that the government's case be "substantially justified." *See Underwood*, 487 U.S. at 566 ("To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness."). Given our holding that the government was substantially justified in its position, the district court did not clearly err in finding that the government did not litigate in bad faith.

III. The District Court Abused Its Discretion in Reducing the Award of Taxable Costs.

Finally, we hold that the district court incorrectly reduced the magistrate judge's recommended award of taxable cost by relying on a clearly erroneous finding of fact. *Hinkson*, 585 F.3d at 1263; 28 U.S.C. § 2412(a)(1).

The parties agree that the district court mistakenly believed that several depositions occurred after it had denied Appellants' motion for summary judgment and that the depositions therefore "unreasonably increased the cost" of litigation. In reality, the depositions were taken before that judgment. Because the district court's reduction of costs was mainly based on that clear error, it abused its discretion. We thus remand the issue of costs so that the district court may reconsider its decision on the corrected record.

CONCLUSION

The EAJA deters the government from using its vast resources and power to pursue abusive litigation against its citizens. Appellants soundly defeated the government's flawed case against them. But whether the district court abused its discretion in denying attorneys' fees is a different question. And under that deferential standard, we do not have the "definite and firm conviction" that the district court erred in finding that the government's position was substantially justified. *Hinkson*, 585 F.3d at 1263. We AFFIRM the district court's denial of attorneys' fees and nontaxable costs, and we REMAND the district court's award of taxable costs.

COLLINS, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority's decision to vacate the district court's order reducing the cost award, and I therefore concur in Part III of the court's opinion. However, I dissent from the majority's decision to affirm the denial of attorney's fees in this case.

As a general rule, if a civil case brought by the Government is unsupported by substantial evidence, then the Government's litigating position is not "substantially justified" for purposes of determining the defendants' eligibility for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). Here, the majority does not dispute that the Government's case against Defendants-Appellants was unsupported by substantial evidence, yet the majority nonetheless upholds the district court's denial of attorney's fees. The majority does so on the ground that the Government reasonably failed to recognize, in advance of trial, just how weak its case was. *See* Opin. at 1178-79. But this replaces the statutory standard for when attorney's fees may be denied (*viz.*, when "the position of the United States was substantially justified") with a standard that is much more forgiving to the Government (*viz.*, whether the United States *reasonably believed* that its position was substantially justified). Because the majority's novel standard is inconsistent with the statute and precedent and leads to the wrong outcome in this case, I respectfully dissent.

I

The relevant provision of the EAJA states that, "[e]xcept as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort) . . . brought by or against the United States in any court having jurisdiction of that action, *unless* the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). Under the EAJA, the default rule is that attorney's fees will be awarded if the Government loses the case, unless the Government carries its burden to show that its position in the litigation was substantially justified or that, for other special reasons, an award of fees would be unjust. Here, the district court denied Defendants' motion for attorney's fees under § 2412(d) solely on the ground that the Government's position was substantially justified, and so the central question before us is whether the district court correctly so held.

In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court construed the phrase "substantially justified" in the EAJA by drawing upon the settled understanding of the familiar, and similarly phrased, "substantial evidence" standard that is applied in the administrative context. *Id.* at 564. Because that standard requires that an agency position be supported with "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" the Court held that the EAJA standard likewise required that the Government's position be "justified to a degree that could satisfy a reasonable person." *Id.* at 564–65 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). That means, in other words, that the Government's position must have a "reasonable basis both in law and fact." *Id.* at 565 (citation omitted). We review "the position of the United States" for substantial justification "as a whole," rather than by breaking the case down into "atomized line-items." *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1168–69 & n.16 (9th Cir. 2019) (en banc) (citations omitted).

As we have recognized, *Pierce*'s explicit analogy between the substantial evidence standard and the EAJA's "substantially justified" standard means that, except perhaps in a "decidedly unusual case," a judicial determination that the Government's case on the merits was "unsupported by substantial evidence" will ordinarily mean that the Government's position was not "substantially justified" and that fees should be awarded. *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (quoting *Al-Harbi v. INS*, 284 F.3d 1080, 1085 (9th Cir. 2002)); *see also Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir. 2013).

Under these standards, this is an easy case. As I explain in the next two sections, (1) the Government's case against Defendants was not supported by substantial evidence; and (2) there is nothing about this matter that would make it the sort of "decidedly unusual case" in which the Government's position can be said to have been "substantially justified" *despite* the lack of substantial evidence.

II

The Government brought this suit against, *inter alia*, Defendants-Appellants Brian Bowers and Dexter Kubota, the founders of a design firm called Bowers + Kubota Consulting ("B+K"), alleging multiple violations of the Employment Retirement and Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq*. As the majority notes, *see* Opin. at 1174-75, the Government's central theory was that Bowers and Kubota had committed multiple violations of ERISA in selling B+K to an Employee Stock Ownership Plan ("ESOP") for an allegedly inflated value of $40 million.[1] This theory, however, was unsupported by substantial evidence.

A

A review of the Government's claims in this matter confirms that the Government's case rested dispositively on the central premise that Bowers and Kubota had inflated the value of B+K when selling it to an ESOP in December 2012.

First, the Government alleged that Bowers and Kubota— who were allegedly "fiduciaries" of the ESOP within the meaning of ERISA, *see* 29 U.S.C. § 1002-(21)(A)(i)—had engaged in a transaction prohibited by § 406(a)(1)(A) of ERISA, 29 U.S.C. § 1106(a)(1)(A). That section prohibits ESOP fiduciaries from causing the ESOP to engage in the "sale or exchange, or leasing, of any property between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(A). However, ERISA carves out certain transactions from that prohibition, including an "acquisition, sale, or lease [that] is for adequate consideration." *Id.* § 1108(e)(1). For purposes of that provision, "adequate consideration" means (as relevant here) "the fair market value of the asset as determined in good faith by the trustee or named fiduciary." *Id.* § 1002(18)(B). To establish the applicability of this exception, it was Bowers and Kubota's burden to prove, as an affirmative defense to the Government's § 406(a)(1)(A) charge, that B+K's $40 million sale price was not inflated. *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996); *see also Perez v. Bruister*, 823 F.3d 250, 262 (5th Cir. 2016); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 864 (4th Cir. 1994).

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[1] An ESOP is "a type of pension plan that invests primarily in the stock of the company that employs the plan participants." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412 (2014).

Second, the Government alleged that Bowers and Kubota had engaged in a transaction prohibited by § 406(b)(1) and (b)(2) of ERISA, 29 U.S.C. § 1106(b)(1), (2). Those subsections prohibit fiduciaries from "deal[ing] with the assets of the plan in his own interest or for his own account," 29 U.S.C. § 1106(b)(1), and from "act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries," *id.* § 1106(b)(2). The district court construed these allegations—*i.e.*, that Bowers and Kubota were acting in their "own interest," and acting on behalf of a party (themselves) "whose interests are adverse to the interests of the [ESOP]"—as requiring the *Government* to make a showing that the $40 million sale of B+K was "for more than fair market value." In other words, the district court concluded that Bowers and Kubota would not be acting in their "own interest," *id.* § 1106(b)(1), or in the service of interests "adverse to the interests of the [ESOP]," *id.* § 1106(b)(2), if they arranged the sale of B+K for a price that fairly reflected the ESOP's interests (*i.e.*, for a price reflecting fair market value). The Government has not challenged the district court's legal analysis of the elements of this claim.

Third, the Government alleged fiduciary imprudence and disloyalty by Bowers and Kubota, in violation of § 404(a)(1)(A), (B), and (D) of ERISA. This cause of action rested on allegations that Bowers and Kubota had failed in their duties as trustees by (1) "[c]ausing unreasonable, inflated revenue projections" for B+K to be forwarded to a firm (LVA) conducting an evaluation of the value of B+K; (2) failing to adequately monitor the ESOP trustee (Saakvitne) to ensure that "he acted in the best interests of the [ESOP's] Participants and Beneficiaries"; (3) relying on a valuation of B+K, prepared by LVA, that "significantly overvalued the shares of [B+K]," without ensuring that reliance on LVA's valuation report "was reasonably justified under the circumstances"; (4) relying on another LVA- created "Fairness Opinion," which "indicated that the fair market value of the Company as of that date was $40,150,000," without "making certain that reliance on the Opinion was reasonably justified under the circumstances"; and (5) "[c]ausing the ESOP to enter into the purchase of the Company's stock at a price in excess of fair market value which was not solely in the interest of the Plan's participants."

Three of these five allegations—allegations (3), (4), and (5) above—rested explicitly on the Government's claim that B+K's overall value was overstated. Allegation (1) also rested indirectly on that valuation claim, because the allegedly inflated 2012 revenue projections would cause a loss to the ESOP only if they ultimately caused the company to be sold for more than it was worth. Allegation (2) also rested implicitly on the premise that the company was overvalued, because the Government's theory was that Bowers and Kubota's failure to monitor Saakvitne led to his agreement to buy B+K for an inflated price, in violation of his obligation to "act[] in the best interests of the [ESOP's] Participants and Beneficiaries."[2]

Accordingly, Bowers and Kubota's liability in this case ultimate hinged dispositively on whether they had

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[2] The Government also alleged that Bowers and Kubota were liable as co-fiduciaries, that they engaged in knowing participation in trustee Saakvitne's fiduciary breaches, and that they orchestrated improper indemnification agreements with the ESOP. The first two claims were entirely derivative of the Government's other claims. The third claim was not, strictly speaking, an operative substantive claim: the district court held that, properly construed, the Government's indemnification claim sought no finding of liability against Bowers and Kubota on the merits, but sought merely to hold certain indemnification agreements void in the event that liability was found on another ground.

inflated the value of B+K when selling it to an ESOP in December 2012. Although the party with the burden of proof on that issue shifted depending upon the claim, a finding that B+K was worth more than $40 million would doom the Government's entire case.

B

As the district court found, the evidence of *both* sides at trial showed that B+K was worth more than $40 million at the time it was sold to the ESOP. Although the Government sought to prove otherwise, its valuation methodology contained several obvious errors that, once corrected, confirmed that the company's value exceeded $40 million.

Specifically, the Government at trial relied exclusively upon a valuation expert named Sherman, who testified that at the time of sale, B+K was in fact worth just $26.9 million, and that Bowers and Kubota's competing valuation report was flawed. However, as the district court concluded, Sherman made three significant errors that caused him to "significantly *and unreasonably* undervalue[] the Company" (emphasis added).

First, Sherman erroneously treated some $10.5 million in "subconsultant fees"—which the company had in fact passed on to clients—as if they were company expenses that had to be "deducted in determining the value of the Company." As the district court concluded, "[t]his was a notable error" that caused Sherman's valuation of B+K to be "correspondingly too low."

Second, Sherman erroneously applied a nearly $3 million discount to the company's value based on circumstances occurring *after* the company's sale. This was a clear violation of the applicable appraisal standards.

Correcting just these two obvious errors in Sherman's analysis leads to a valuation of more than $40 million. That is, had Sherman correctly omitted the $10.5

million in subconsultant fees and the erroneous $3 million discount, his calculated value of the company—applying his own methodology—would have been $40.4 million.

Third, Sherman erroneously relied on the sale price floated in a nonbinding indication of interest from a third-party company, URS. URS had earlier raised the possibility of purchasing B+K for $15 million, "plus or minus 'cash and debt on the Company's balance sheet.'" The Government claimed in its Proposed Post-Trial Findings of Fact and Conclusions of Law that "Sherman appropriately considered URS's indication of interest as an objective, market-based indicator of the value at which a willing seller would purchase B+K." This aspect of Sherman's analysis was also seriously wrong. As the district court observed, B+K had approximately $14 million in "cash and working capital" on hand—meaning that Sherman, and by extension the Government, had "ignore[d] the actual 'cash and debt on the Company's balance sheet' that the URS indication of interest expressly acknowledged should be considered." Moreover, the URS indication of interest was, in essence, an initial low- ball negotiation position on the part of URS; it was not an actual estimate of the company's fair-market value. Accordingly, the URS indication of interest on which Sherman relied had "little relevance to the actual value of the Company."

In light of these errors, the district court found that Sherman "significantly and unreasonably undervalued the Company." "Not only does this render his ultimate valuation unreliable," the district court concluded, "it also undermines the usefulness of his critique of LVA's valuation" (*i.e.*, the competing valuation relied upon by Bowers and Kubota).

Without substantial evidence on the Government's part that B+K was worth anything less than $40 million, and faced with competing valuation evidence substantiating a value of over $40 million, Bowers and Kubota prevailed on the central issue at trial—*viz.*, "that the Company's shares were worth *at least* what the Company's ESOP paid for it" (emphasis added).[3]

Accordingly, it is established, for purposes of this appeal, that the Government's case on the merits was unsupported by substantial evidence. That brings this case within the general rule that there is no "substantial justification under the EAJA" where the Government's position was unsupported by "reasonable, substantial and probative evidence in the record." *Thangaraja*, 428 F.3d at 874; *see Al-Harbi*, 284 F.3d at 1085.[4]

III

The only question, then, is whether this is the "decidedly unusual case" in which the Government's position might be said to be substantially justified despite a wholesale lack of evidentiary support. *Al-Harbi v. INS*, 284 F.3d at 1085. It manifestly is not.

We found *Al-Harbi* to be such an "unusual" case, but our rationale for doing so has no applicability here. In *Al-Harbi*, we "upheld the government's central positions in

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[3] Moreover, even with respect to the subsidiary issue of whether the 2012 revenue projections were inflated, *see supra* at 22–23, the district court held that the Government's claims were simply unsupported. As the district court stated, Sherman inexplicably failed to take into account several relevant considerations in estimating his proposed "corrected" projections, thereby rendering his estimates "unreliable."

[4] Contrary to what the Government contends, this conclusion does not rest on or lead to the view that, whenever the Government loses a case on the merits, its position is not substantially justified under the EAJA. Here, the Government did not merely lose the case; it suffered a wholesale failure of proof on the central issue in the litigation that rendered its position, as an objective matter, wholly unsupported.

this appeal," but we nonetheless granted relief to the alien based solely on an *additional* issue that had been "articulated only relatively briefly in Al–Harbi's presentation to this court." 284 F.3d at 1085. "Under these unique circumstances," we held, "the government's litigation position as a whole [was] substantially justified, albeit not ultimately adequate to sustain the agency's decision." *Id.* Nothing comparable is presented in this case. Here, in contrast to *Al-Harbi*, the Government lost on the central issue that was the focus of the entire case, and it lost precisely because its position on that loadbearing issue was wholly unsupported. There is no sense, as in *Al-Harbi*, that it could be said that, despite its substantial-evidence-based loss on the dispositive issues, the Government's position could still be thought to be substantially justified as an overall matter.

The majority does not directly dispute that the Government's case was not supported by substantial evidence, but it nonetheless holds that the Government's litigating position was substantially justified. According to the majority, the Government "did not know heading to trial that the district court would reject" its expert's valuation. *See* Opin. at 1178. Until the district court did so, the majority asserts, the Government could reasonably have relied on that valuation "at the time of trial." *See* Opin. at 1179. This approach is contrary to the statute and the caselaw construing it.

The district court's merits decision here rested upon, and was driven by, objective—indeed, incontestable—flaws in the Government's expert's valuation of B+K. Given these objective errors—which were inherent in the Government's case even before the district court pointed them out—the majority is quite wrong in saying that the Government's litigating position was somehow reasonable *up to the point that the district court rejected it*. The district court's merits decision simply recognized and enumerated the patent substantive deficiencies that were built into the Government's case all along.

The majority suggests that, even though there was no evidentiary support for the Government's central claim about the valuation of B+K, the Government's position was still substantially justified because, in light of the allegedly inflated 2012 earnings estimates, the Government "*rationally believed* that LVA's valuation analysis was faulty" as well. *See* Opin. at 1178 (emphasis added). As an initial matter, this effort to isolate one assertedly valid sliver of the Government's case provides no basis for concluding that the Government's position was substantially justified. In applying that standard, we do not break down the Government's case into "atomized line-items" of this sort. *Ibrahim*, 912 F.3d at 1168–69 & n.16 (citations omitted). Rather, we ask whether the Government's case was "justified *in substance* or *in the main*," *Pierce*, 487 U.S. at 565 (emphasis added), and for the reasons that I have explained, it obviously was not. Moreover, the majority's effort to salvage some sliver of this shoddy case also fails on its own terms. As noted earlier, the district court held that the Government had failed to present "reliable" evidence to support its critique of these earnings estimates, because its expert's analysis simply overlooked multiple relevant factors. The district court also faulted the Government for failing to establish its broader claim that these earnings estimates ultimately caused the company to be sold for more than it was worth. In short, the Government's flawed reliance on these earnings estimates only further confirms that its case was objectively and seriously flawed.

More importantly, the majority's rationale effectively replaces the statutory standard for denying attorney's fees—*viz.*, whether the Government's position was "substantially justified," 28 U.S.C. § 2412(d)(1)(A)—with the much looser standard of whether the Government "rationally believed" that its position was substantially justified. According to the majority, even though the Government's case was *not* supported by substantial evidence, it was still "substantially justified" because it was assertedly not yet clear to the Government "at the time of trial" that its position lacked "a reasonable basis." Opin. at 1179. This is a dilution of the EAJA's standard, which does not allow the Government to defeat a fee request based on its failure to subjectively appreciate that its case was not supported by substantial evidence. The statute, as construed by the Supreme Court, requires that the Government's case *objectively* rest on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce*, 487 U.S. at 564–65 (citation omitted). That standard was not met here, and there are no special circumstances that would suggest that this is the "decidedly unusual case" in which the Government's position is substantially justified despite being unsupported by substantial evidence. *Al-Harbi v. INS*, 284 F.3d at 1085.

* * *

Accordingly, I would reverse the district court's determination that the Government's position in this case was substantially justified, and I would remand for the district court to consider the Government's remaining argument that none of the Appellants here satisfied the "net worth" requirements of the EAJA. *See* 28 U.S.C. § 2412(d)(2)(B) (limiting the eligibility of individuals and entities to claim attorney's fees under EAJA to those whose "net worth" is under specified amounts).

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MARTIN J. WALSH, Secretary of Labor, United States Department of Labor, Plaintiff, vs. BRIAN BOWERS, an individual; DEXTER C. KUBOTA, an individual; BOWERS + KUBOTA CONSULTING, INC., a corporation; BOWERS + KUBOTA CONSULTING, INC. EMPLOYEE STOCK OWNERSHIP PLAN, Defendants.	CIVIL NO. 18-00155 SOM-WRP POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER DIRECTING ENTRY OF JUDGMENT IN FAVOR OF REMAINING DEFENDANTS

POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER DIRECTING ENTRY OF JUDGMENT IN FAVOR OF REMAINING DEFENDANTS

September 17, 2021

I. INTRODUCTION.

Defendants Brian Bowers and Dexter Kubota owned all the stock in an engineering firm called Bowers + Kubota Consulting, Inc. (the "Company"). They created an

Employee Stock Ownership Plan ("the ESOP")[1] to which they sold all their shares for $40,000,000. The Government then sued Bowers and Kubota, alleging that they had violated the Employee Retirement Income Security Act of 1974 ("ERISA") by manipulating data to induce the ESOP to pay more than the Company's fair market value. This court determines that no ERISA violation has been established.

Part of the Government's case is based on a preliminary nonbinding indication of interest by a private company to purchase the Company for what the Government says was $15,000,000. That indication of interest expressly recognized that the dollar amount needed to be adjusted to reflect the cash and debt on the Company's balance sheet. Had that adjustment occurred, the quoted dollar figure would have risen to about $29,000,000. In any event, the Company never agreed to sell for $15,000,000, meaning that that figure did not represent what a willing buyer and willing seller would mutually agree to. The indication of interest ends up having little relevance to the fair market value of the Company. The Government also cites its expert, Steven J. Sherman, who valued the Company at $26,900,000. However, because that valuation rests on errors, the court is not persuaded by it.

The Government does not establish that the Company was worth less than $40,000,000 on the day of its sale. That is, the record does not show that the ESOP paid more than the Company's fair market value. Nor does this court find that Bowers and Kubota breached any fiduciary duty or are liable for any prohibited transaction, as they

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[1] This order refers to "an ESOP" (rather than "the ESOP") when discussing the generic concept of an ESOP, reserving "the ESOP" for the particular ESOP that purchased the Company's shares.

demonstrate that the Company was worth at least $40 million on the day of its sale.

Accordingly, this court, following a one-week non-jury trial,[2] finds in favor of Bowers and Kubota and against the Government.

II. FINDINGS OF FACT.

A. Overview.

On December 14, 2012, Bowers and Kubota, through their respective trusts, sold all 1,000,000 shares of the Company to the Company's ESOP for $40,000,000. Before the sale, the Brian K. Bowers trust, dated December 22, 2010, owned 510,000 of the 1,000,000 shares of the Company, and the Dexter C. Kubota Trust, dated March 17, 2006, owned the other 490,000 shares. *See* Joint Ex. 36 at DOL 000312. Thus, $20,400,000 of the sales price was to be paid to Bowers's trust, and $19,600,000 to Kubota's trust. *Id.* at DOL 000312-13. Nicholas L. Saakvitne, the ESOP's independent fiduciary and trustee, executed the purchase agreement on behalf of the ESOP. *Id.* at DOL 000325.

The ESOP, which paid for the shares with funds lent by Bowers and Kubota, agreed to pay Bowers and Kubota interest of 7 percent per annum on the amounts owed. The loan was for 25 years. *See* Joint Exs. 39-42.

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[2] The trial proceeded in accordance with this court's nonjury trial procedures, pursuant to which direct examination is presented through written declarations, rather than through oral testimony in open court. *See* Procedures for Trials Before Judge Susan Oki Mollway ¶ 15, https://www.hid.uscourts.gov/ (click on "Judge's Requirements," then on "Senior Judge Susan Oki Mollway," then on "Trial Procedures"). Under this procedure, the court rules on objections to the declarations, then hears live cross- examinations and live redirect examinations. Some of the witnesses testified by agreement via videoconference. The trial was conducted with various COVID-related protections in effect.

Once they sold their shares, Bowers and Kubota ceased to be the owners of the Company, and instead employees had the option of owning stock and thereby becoming part-owners of the Company. Of course, as with any stock purchase, whether an employee benefits by being a stock owner depends on the price of the stock and also on whether the Company's performance leads to increases or decreases in the value of the stock. Clearly, if the stock is overvalued, the employee who holds stock does not enjoy the benefit that an ESOP should be designed to confer. Unlike stock purchases outside the employment context, the Company's employees had and have certain protections under ERISA.

The Government's central contention in this case is that the sale for $40,000,000 violated ERISA. *See* Joint Ex. # 1; *see also* ECF No. 1. Before trial, the Government settled its claims against Saakvitne, the original trustee of the ESOP, and against the Saakvitne Law Corporation. *See* ECF No. 453. What went to trial were the following claims:

a. Bowers and Kubota failed to discharge fiduciary duties with the proper care, skill, prudence, and diligence in violation of 29 U.S.C. § 1104(a)(1)(A), (B), and (D) (Complaint ¶ 37);

b. Bowers and Kubota are liable for breaches of fiduciary responsibilities by other fiduciaries under 29 U.S.C. § 1105(a)(1)-(3) (Complaint ¶¶ 40-43);

c. Bowers and Kubota engaged in prohibited transactions between a plan and a party-in-interest in violation of 29 U.S.C. § 1106(a)(1)(A) (Complaint ¶¶ 45-47);

d. Bowers and Kubota engaged in prohibited transactions with the Company's ESOP in violation of 29 U.S.C. § 1106(a)(1)(A) (Complaint ¶¶ 49-50); and

e. Bowers and Kubota knowingly participated in a transaction prohibited by ERISA under 29 U.S.C. § 1132(a)(5) (Complaint ¶¶ 52-53).

B. The Company.

The Company is a Hawaii corporation that provides architectural and engineering design, project management, and construction management services throughout Hawaii and the Pacific Rim. *See* Am. Trial Decl. of Brian J. Bowers ¶ 6, ECF No. 640, PageID #21376.

The Company's predecessor, KFC Airport, Inc., was formed in or about 1980. In or about 1997, Bowers bought 100 percent of the shares of KFC Airport. Bowers is the Company's president and sits on its board of directors. *See* Am. Trial Decl. of Dexter C. Kubota ¶ 5, ECF No. 639, PageID # 21360; Am. Bowers Decl. ¶¶ 3, 5, and 6, ECF No. 640, PageID # 21376.

Kubota joined the Company in 1988 and later purchased 49 percent of the Company's shares, leaving Bowers with the other 51 percent of the Company's shares. Kubota is the Company's vice president and sits on its board of directors. *See* Am. Kubota Decl. ¶¶ 3, 5, and 6, ECF No. 639, PageID # 21360; Am. Bowers Decl. ¶ 4, ECF No. 640, PageID # 21376.

Bowers and Kubota placed the ownership of their respective Company shares into their respective trusts, which they controlled for their own benefit. *See* Am. Bowers Decl. ¶ 8, ECF No. 640, PageID # 21376. The court therefore treats what was the trusts' ownership of the Company as indistinguishable from ownership by Bowers and Kubota for purposes of the present decision.

C. The Company's Financial Statements.

Thomas Nishihara, a certified public accountant ("CPA") and the vice president of Robert H.Y. Leong & Company Certified Public Accountants A Professional Corporation, has been the Company's outside accountant since 2008. *See* Decl. of Thomas Nishihara ¶¶ 1, 3, 5, ECF No. 593, PageID #s 19654-55.

Nishihara has prepared the Company's tax returns and financial statements. *Id.* ¶¶ 6-7, PageID # 19655. From 2008 to 2011, Nishihara prepared those financial statements using the income tax basis of accounting, which is essentially a cash basis accounting method. *Id.* ¶ 15, PageID # 19657. The cash basis of accounting examines when revenue is received and when expenses are paid. *See* Bowers Test., ECF No. 640, PageID # 20439. In 2012, at the requests of Gary Kuba and Gregory Kniesel, who were hired to appraise the Company, Nishihara began using the accrual basis, which involves reporting revenues when earned and expenses when incurred. Nishihara actually converted the 2011 financial statement from a cash basis to an accrual basis. Under the accrual basis, annual expenses such as bonuses not yet earned may be reported as a contingency. *See* Nishihara Decl. ¶¶ 16-18, PageID # 19657.

Nishihara says that, for 2011 and 2012, he did not calculate the Company's earnings before interest, taxes, depreciation, and amortization ("EBITDA"). EBITDA is "essentially the pretax profits of the company." Test. of Steven J. Sherman, ECF No. 631, PageID # 20923. Nishihara explained that EBITDA can be calculated by taking the net income and adding interest, taxes, depreciation, and amortization. *See* Nishihara Test., ECF No. 629, PageID # 20527. Thus, Nishihara says, the Company's EBITDA could be calculated from the financial statements he prepared. *See* Nishihara Decl. ¶ 14, PageID # 19656; Nishihara Test., ECF No. 629, PageID # 20527.

Joint Exhibit 48 is an estimate of the Company's revenue for fiscal year 2012 prepared by Bowers and Kubota. *See* Kubota Amd. Decl. ¶ 19, ECF No. 639, PageID # 21363. It details the Company's contracts and lists historical financial data, as summarized below:

Year	Revenue
2003	$5,669,000
2004	$7,417,000
2005	$7,880,000
2006	$9,803,000
2007	$13,719,000
2008	$15,005,000
2009	$15,410,000
2010	$21,500,000
2011	$22,005,000
2012 (estimated)	$24,964,000

Joint Exhibit 48 contains a profitability comparison that details the Company's historical net income.[3]

Joint Exhibit 47 is a valuation of the Company by Libra Valuation Advisors ("LVA") as of December 14, 2012, the day the Company's shares were sold to the ESOP. There is no dispute about the accuracy of the historical EBITDAs listed in Joint Exhibit 47. This court therefore accepts those figures even though the calculation of the historical EBITDAs has not been detailed. Joint Exhibit 47 also lists the projected EBITDA of the Company for 2012 as $9,240,000 (rounded up to nearest $10,000). *See* Joint Ex. 47 at DOL 000235. Exhibit 5 to Joint Exhibit 47 lists the Company's EBITDAs for 2008 to 2012:

[3] The dollar amounts listed in the profitability comparison do not appear to represent EBITDA.

Year	EBITDA
2008	$1,670,000
2009	$1,585,000
2010	$3,050,000
2011	$2,614,000
2012 (estimated)	$9,235,000

See Joint Ex. 47 at DOL 000255.

Joint Exhibit 49 is LVA's valuation of the Company as of December 31, 2012, about two weeks after the sale. It lists the Company's actual EBITDA in 2012 as $7,050,000 (rounded to the nearest $10,000). *See* Joint Ex. 49 at DOL 000120; Joint Ex. 49, Ex 5, DOL 000138 (listing the 2012 EBITDA as $7,047,000).

The Government's expert, Steven J. Sherman, calculated "an adjusted EBITDA projection for 2012 of $4.9 million, more in line with the Company's historical financial performance." *See* Sherman Decl ¶ 187, ECF No. 635, PageID # 21323. Sherman opined that a company with historical profits of $2 million to $5 million would not "turn on a dime and go to nine or $10 million." Sherman Test., ECF No. 631, PageID # 20923. However, as detailed below, Sherman's calculation overlooks certain circumstances.[4]

In November 2012, Bowers and Kubota projected the Company's revenue for 2013 to 2017. Bowers said they had a pretty good idea what their revenue would be for 2013 and that, for 2014 to 2017, they projected a 5

[4] Unless the court specifically notes problems with testimony or expressly states a credibility problem, the court found witnesses credible.

percent growth rate. The Company's earnings were trending upward in 2012, and the Company had a backlog of contracts. *See* Decl. of Ian C. Rusk ¶¶22-24, ECF No. 622, PageID #s 20159-60. Bowers said they calculated expenses based on historical averages. *See* Bowers Test., ECF No. 628, PageID # 20402; Def. Ex. 89, Bates No. Pia 010048 or LIBRA- DOL INV 004759. Bowers also testified that the Company ended up performing very well from 2013 to 2017. *Id.*, PageID # 20403.

D. Initial Discussions with URS.

Between 2008 and 2012, Bowers and Kubota had considered and discussed selling the Company to: 1) others in the Company's management, 2) a private party, or 3) an employee stock ownership plan. *See* Test. of Brian J. Bowers, ECF No. 628, PageID # 20340; Am. Kubota Decl. ¶ 21, ECF No. 639, PageID # 21363. Bowers and Kubota ultimately ruled out a sale to others in the Company's management because those managers were not interested in buying the Company and/or lacked the financial means to do so. *See* Bowers Test., ECF No. 628, PageID # 20340.

Bowers and Kubota did communicate with private companies, including URS Corporation, about a possible sale. In 2011, Bowers and Kubota approached Sunnie House, the Pacific Sub Region Manager of URS, to discuss whether URS might be interested in purchasing the Company. House then prepared a memorandum for the URS corporate acquisition team. *See* Decl. of Sunnie House ¶¶ 3, 5, 7, ECF No. 599, PageID #s 19707-08. Paul Vallone, URS's director of corporate development, was responsible for managing its mergers and acquisitions. *See* Depo. Desig. of Paul Vallone, ECF No. 653-1, PageID # 23329. After the Company provided URS with various documents, including its sales numbers, award list, resumes, and 2010 tax returns, Vallone helped URS evaluate a possible purchase of the Company, then sent the Company a preliminary nonbinding indication of interest on or about December 5, 2011. *See* House Decl., ¶¶ 8-9, PageID #s 19708; Depo. Designations of Paul Vallone, ECF No. 653-1, PageID# 23369; Joint Ex. 4 (copy of Nonbinding Letter of Interest). That indication of interest stated that URS was interested in purchasing the Company for $15,000,000, plus or minus "cash and debt on the Company's balance sheet." It noted that the communication did not constitute an offer and stated, "If the proposal contained in this letter is acceptable to you, we are prepared to move to the next steps in the acquisition process, enter into an agreement for exclusivity for a period of 90 days, and begin initial due diligence." Bowers acknowledged and agreed to those terms. *See* Joint Ex. 4.

When asked at his deposition whether URS had conducted a due diligence review of the Company before sending its indication of interest, Vallone responded, "Very little. There would have been some financial review in order to come up with that number of 15 million, but we did not begin to do detailed due diligence on the [C]ompany." Depo. Desig. of Paul A. Vallone, ECF No. 653-1, PageID # 23388.

The Company at the time had more than $7 million in cash and more than $7 million in working capital. Had this been added to the $15 million cited in URS's indication of interest, the dollar amount would have risen to about $29 million to $30 million. *See* Bowers Test., ECF No. 628, PageID # 20373; Kubota Test., ECF No. 628, PageID # 20495; Amd. Kubota Decl. ¶ 28, ECF No. 639, PageID # 21364 (indicating that the Company's cash and work in progress "was potentially another $15 million"); Amd. Trial Decl. of Gregory E. Kniesel ¶ 57, ECF No. 641, PageID # 21402 (indicating that URS's nonbinding proposed purchase price was $29 to $30 million). The Government ignores the actual "cash and debt on the

Company's balance sheet" that the URS indication of interest expressly acknowledged should be considered. *See* Government's Proposed Findings of Fact and Conclusions of Law, ECF No. 655, PageID # 23541 (characterizing URS's preliminary nonbinding indication of interest as being for $15 million).

No agreement with URS was ever reached. This court therefore finds that the URS preliminary nonbinding indication of interest has little relevance to the actual value of the Company. An individual who makes an offer of $15,000 for a used luxury car with a Blue Book value of $40,000 does not, by virtue of making a "lowball" offer that is never accepted, tend to establish that the car is worth only $15,000. Here, there is no evidence that the URS indication of interest was the price that a willing buyer was willing to pay and that a willing seller was willing to accept. *See* IRS Revenue Ruling 59-60, § 2.02 (fair market value is "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts."), https://www.pvfllc.com/files/IRS_Revenue_Ruling_59-60.pdf (last visited September 15, 2021).

On January 25, 2012, while in discussion with URS, the Company hired GMK Consulting to provide a valuation of the Company for negotiation purposes. GMK's principal was Gary Kuba, a CPA accredited as a business valuator by the American Institute of Certified Public Accountants. *See* Joint Ex. 6; Bower's Test., ECF No. 628, PageID #s 20353, 20376; Decl. of Gary Kuba ¶ 6, ECF No. 600, PageID #s 20545; Kuba Decl. ¶¶ 17 and 21, ECF No. 600, PageID #s 19713-14. According to the Company's letter engaging GMK, GMK was being asked to prepare a limited report for internal use only. *See* Joint Ex. # 6.

In the course of its discussions with URS, the Company had sent URS more than a hundred documents, including financial information and material showing projected profits of $9,284,000 for 2012. *See* Bowers Test., ECF No. 628, PageID # 20351; Joint Ex. 48. In a statement that would be echoed during trial by the Government's expert, Steven Sherman, Kuba expressed concern about the reasonableness of this projection because it represented a "significant jump" from the Company's past performance. Kuba Decl. ¶ 29, ECF No. 600, PageID # 19717. The Company listed its profit for 2011 as $6,452,000. It listed its profit for 2010 as $6,367,000, its profit for 2009 as $4,332,000, and its profit for 2008 as $4,332,000. *See* Joint Ex. 48.

On March 21, 2012, despite his earlier concerns about the projected 2012 profits, Kuba relied on that figure because "the scope of my assignment was an internal-use analysis for negotiation purposes." Kuba Decl. ¶ 29, ECF No. 600, PageID # 19717. Kuba then sent Bowers his preliminary valuation of the Company at about $38,184,000. *See* Govt. Ex. 33. Bowers forwarded the preliminary valuation to the Company's CPA, Nishihara, telling him that the value "seems very high." Id Bowers later described this response as one of surprise, given the much lower figure in the URS indication of interest. *See* Bowers Test., ECF No. 628, PageID # 20387.

Before sending Bowers its valuation at $38,184,000, GMK had gone through several valuation drafts. An early draft listed a range of $31 to $54 million. After Bowers submitted comments, GMK reduced the upper range to be between $40 and $46 million. Ultimately, GMK ended up providing a valuation of approximately $39.7 million. *See* Bowers Test., ECF No. 628, PageID # 20384; Joint Ex. 17, Bates No. Bowers/Kubota 007208 (valuation of $39,676,623). Kuba said LVA charged very little for this quick and limited valuation, as Kuba did not dig into the underlying assumptions or do much due diligence. *See* Decl. of Gary Kuba 25 and 29, ECF No. 600, PageID # 19716-17. Given the limited scope of GMK's valuation, this court accords it little weight in determining the value of the Company.

The Company sent GMK's final valuation report to URS. This had clearly not been contemplated by GMK, which had been hired to produce a valuation for internal use only. Shortly thereafter, the Company and URS ended their discussion about a possible sale of the Company. *See* Bowers Test., ECF No. 628, PageID #s 20358, 20385: Kubota Test., ECF No. 628, PageID # 20448; Amd. Kubota Decl. ¶¶ 48-49, ECF No. 639, PageID # 21367; Kuba Decl. ¶ 50, ECF No. 600, PageID # 19723.

By June 2012, Bowers and Kubota, no longer exploring a sale to URS, were considering whether to sell the Company to an ESOP. *See* Bowers Test., ECF No. 628, PageID #s 20358-59; Amd. Bowers Decl. ¶ 24, ECF No. 640, PageID # 21379; Def. Ex. 50 (June 19, 2012, email from Bowers to Kuba and Kubota, stating, "Gary: We may be moving in the ESOP direction.").

E. The Decision to Form the ESOP.

Kuba recommended to Bowers that the Company hire Gregory M. Hansen, an attorney with the Honolulu law firm of Case Lombardi & Pettit, to help with the potential sale to the ESOP. *See* Amd. Bowers Decl. ¶ 25, ECF No. 640, PageID # 21379. Hansen had significant experience with ESOPs. In 2012, for example, more than 50 percent of Hansen's legal practice involved ESOPs. *See* Amd. Decl. of Gregory M. Hansen ¶ 14, ECF No. 642, PageID # 21414.

In late August 2012, Bowers and Kubota met with Hansen. *See* Amd. Bowers Decl. ¶ 26, ECF No. 640, PageID # 21379. Hansen recalls asking what minimum price Bowers and Kubota would sell the Company for and remembers that they replied that they hoped to get $40 million. *See* Amd. Hansen Decl., ECF No. 642, PageID # 21439; Hansen Test., ECF No. 629, PageID # 20593. Hansen explained to them that the sale price could not exceed fair market value as determined in good faith by an independent professional. *See* Hansen Test., ECF No. 629, PageID # 20602. On August 30, 2021, Hansen told Bowers and Kubota that they should get a formal valuation of the Company from Kuba as soon as possible. *See* Amd. Hansen Decl. ¶ 55, ECF No. 642, PageID # 21426.

On September 2, 2012, the Company signed a formal retainer agreement with Hansen, who was to coordinate a team of professionals, draft plan documents, and provide advice relating to the structure of a possible sale of the Company to an ESOP. *See* Amd. Bowers Decl. ¶ 27, ECF No. 640, PageID # 21379; Amd. Hansen Decl. ¶ 41, ECF No. 642, PageID # 21422; Joint Ex 15 (copy of engagement letter).

In the Fall of 2012, Bowers and Kubota concluded that they would indeed form an ESOP. *See* Amd. Kubota Decl. ¶ 51, ECF No. 639, PageID # 21368. There were tax advantages for Bowers, Kubota, the Company, and ESOP participants if the ESOP was formed by the end of 2012. *See* Amd. Kubota Decl. ¶ 55, ECF No. 639, PageID # 21368. Marcus Piquet, a CPA, was retained to advise on tax accounting issues related to ESOP transactions. *See* Depo. Desig. of Marcus Piquet, ECF No. 591-1, PageID #s 19519, 19528.

F. LVA Appraisal of the Company.

In July 2012, Kuba told Bowers that GMK was willing to prepare a formal valuation of the Company in connection with the formation of an ESOP. *See* Kuba Test., ECF No. 629, PageID # 20573; Joint Ex. 13 (email from Bowers to Nishihara, stating that Kuba is interested in "assisting us with the ESOP"). However, in October 2012, Kuba told the Company that he no longer wished to work on the valuation because he had come to feel "uncomfortable with the structure of the transaction." Kuba Decl. ¶ 57, ECF No. 600, PageID # 19725. Kuba's discomfort may have related to the nature of the transaction being proposed at the time--a minority transaction involving preferred stock, a structure that Kuba was unfamiliar with. *See* Hansen Test., ECF No. 629, PageID #s 20646-47; Hansen Decl. ¶ 17, ECF No. 646, PageID # 23154. Additionally, Kuba was conscious that he had previously rendered a limited valuation using the Company's projections. *See* Hansen Test., ECF No. 629, PageID # 20644; Kuba Decl. ¶ 57, ECF No. 600, PageID # 19725. With Kuba's withdrawal, Hansen recommended that the Company retain LVA, whose principal valuation expert was Greg Kniesel. *See* Kubota Decl. ¶ 57, ECF No. 639, PageID # 21369.

On October 20, 2012, LVA sent "The Board of Trustees of the Proposed Bowers + Kubota Employee Stock Ownership Plan" a proposed engagement letter. *See* Govt. Ex. 48. In the engagement letter, LVA agreed to provide a preliminary analysis and fair market value of the Company's stock no later than November 21, 2012, with a final summary letter no later than December 31, 2012. *See* Govt. Ex. 48, Bates No. DOL 001420.

Bowers sent Kniesel copies of the Company's accrual- basis financial statements for 2011 and 2012, as well as GMK's final valuation report. *See* Amd. Bowers Decl. ¶ 32, ECF No. 640, PageID # 21380; Amd. Kubota Decl. ¶ 59, ECF No. 639, PageID # 21369. Then, two days after the date of LVA's proposed engagement letter, Bowers and Kubota met Kniesel in Chicago. *See* Amd. Bowers Decl. ¶ 31, ECF No. 640, PageID # 21380; Amd. Kubota Decl. ¶ 57, ECF No. 639, PageID # 21369.

On November 21, 2012, LVA sent the Board of Trustees of the Proposed Bowers + Kubota Employee Stock Ownership Plan and Trust a "preliminary fair market value of the common stock" of the Company. *See* Joint Ex. 20. LVA preliminarily determined that the "ESOP Controlling Interest Value" fell between $37,090,000 and $41,620,000. *Id.* The next day, Bowers sent Nishihara (the Company's outside CPA) LVA's preliminary valuation as an attachment to an email, stating, "Range is tighter and falls within Gary's previous range which is good." Joint Ex. 21.

G. Hiring Saakvitne as the ESOP Trustee.

On November 21, 2012, Bowers and Kubota met with the Company's attorney, Hansen. Hansen had prepared a written agenda for the meeting that included a line item for "Trustee appointment--independent highly recommended." Joint Ex. 21. During the meeting, Hansen mentioned several names as possible trustees, but he strongly recommended Saakvitne as the ESOP trustee. Hansen had worked with Saakvitne on multiple ESOP transactions and considered Saakvitne to be a qualified and competent trustee.5 *See* Hansen Decl. ¶¶ 38-39, 69, ECF No. 642, PageID #s 21420-21, 21429; Hansen Decl. ¶ 27, ECF No. 646, PageID # 23158; Bowers Test., ECF No. 628, PageID # 20407-08. Bowers and Kubota agreed to hire Saakvitne based on that advice, Saakvitne's resume, and a call with Saakvitne. *See* Hansen Decl. ¶ 70(a), ECF No. 642, PageID # 21429; Hansen Test., ECF No. 629, PageID #s 20604-05; Bowers Test., ECF No. 628, PageID #s 20416- 17; Kubota Test., ECF No. 628, PageID # 20479.

Also on November 21, 2012, Hansen sent an email to Saakvitne with the subject "Bower+Kubota" (sic), telling Saakvitne that "[t]hey agreed to hire you on my advice." Govt. Ex. 58; Hansen Decl. ¶ 29, ECF No. 646, PageID #

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[5] The court takes judicial notice of Saakvitne's death on or about October 2, 2018. *See* Suggestion of Death, ECF No. 35. Saakvitne was therefore unavailable to testify at trial.

23158. The email further stated, "This is looking like a $12 million preferred stock transaction. There is a slight possibility they will change their mind and do a 100% transaction for 40 million . . . ." Govt. Ex. 58. Hansen told Saakvitne that Hansen was leaving town on December 19, 2021, and that the sale would have to close by that date. *Id.* Saakvitne was not the only person that Hansen told about the possible $40,000,000 price. *See* Depo. Desig. of Marcus Piquet, ECF No. 591-1, PageID #s 19579-80 (Hansen asked Piquet to look into a $40,000,000 loan); Govt. Ex. 66 (Piquet's Preliminary Action Plan, based on conference call on December 7, 2012, stating, "Brian and Dexter sell their stock to the ESOP for $40MM.").

On November 22, 2012, Hansen sent an email to Saakvitne that attached LVA's draft valuation of the previous day, telling Saakvitne that his engagement letter should be with the Trustees of the Bowers + Kubota Consulting, Inc. Employee Stock Ownership Plan. Govt. Ex. 59; Hansen Decl. ¶ 75, ECF No. 642, PageID # 21430.

On November 23, 2012, Hansen sent an email to Saakvitne that was cc'd to Kniesel of LVA. The email asked Saakvitne to send Kniesel a copy of Saakvitne's draft engagement letter or to send Kniesel Saakvitne's exact title. Hansen told Saakvitne that he had asked Kniesel to revise LVA's engagement letter to run directly to the ESOP trustee. *See* Joint Ex. 24; Hansel Decl. ¶ 77, ECF No. 642, PageID # 21431.

On or about November 26, 2012, the Company and Saakvitne entered into an Employee Stock Ownership Plan Fiduciary Agreement Between Bowers + Kubota Consulting, Inc. and Nicholas L. Saakvitne. Pursuant to this agreement, Saakvitne was to evaluate any proposed sale of the shares of the Company, negotiate terms on behalf of the ESOP, and continue to serve as the ESOP's trustee after that. *See* Joint Ex. 27; Kubota Test., ECF No. 628, PageID #s 20417-18.

On December 3, 2012, Bowers and Kubota, in their capacities as members of the Company's board of directors, signed a Resolution of Board of Directors by Unanimous Written Consent Without a Meeting that adopted the ESOP and appointed Saakvitne as the independent fiduciary and the sole ESOP trustee, retroactively effective as of January 1, 2012. *See* Joint Ex. 28.

H. The ESOP Document.

On December 11, 2012, Bowers and Kubota, in their capacities as the Company's officers, adopted the Bowers + Kubota Consulting, Inc. Employee Stock Ownership Plan (Effective As Of January 1, 2012). *See* Joint Ex. 38, Pages 1 and 90 of 100.

I. Negotiating the Sale to the ESOP.

On December 10, 2012, Bowers and Kubota offered to sell the "ESOP 100 percent of the Company's common stock for $41 million." Joint Ex. 32 at Bowers/Kubota 0182242. Bowers proposed that the sale would be financed at 10 percent interest per annum amortized over 20 years. *Id.*

Saakvitne sent Bowers and Kubota a counteroffer, offering to pay $39 million with a 25-year loan at 6 percent interest. Joint Ex. 32 at Bowers/Kubota 0182241-42.

Bowers then countered at $40 million, with a 25-year loan at 8 percent interest. Joint Ex. 32 at Bowers/Kubota 0182241.

Saakvitne agreed to the $40 million price, but countered with a request for a loan at 7 percent interest, which Bowers and Kubota accepted. Joint Ex. 32 at Bowers/Kubota 0182239-40. Bowers and Kubota knew that the sale could only close at $40 million if an independent professional determined that that price did not exceed fair market value. *See* Hansen Test., ECF No. 629, PageID #

20602 (Hansen told Bowers and Kubota that the sale price could not exceed fair market value as determined in good faith by an independent professional).

Saakvitne's negotiation saved the Company's ESOP millions of dollars. *See* Bowers Test., ECF No. 628, PageID # 20433; Gregory K. Brown Test., ECF No. 631, PageID # 21049 ("Well, in a $40 million deal, each 1 percent would be saving $400,000 a year, 3 percent would be $1.2 million a year. You know, that would drop off a little bit as the debt got paid down, but it would be quite a while where it would be, you know, a million dollars or more or even just slightly less of savings to the company because this was money that was, you know, being paid to the sellers.").

Bowers and Kubota had told Hansen that they wanted $40 million for the Company, and Hansen had told Saakvitne and others about that price point. The Government raises concern about how the parties ended up agreeing on the very amount that Bowers and Kubota wanted, suggesting that Saakvitne failed to really study the valuation and simply acquiesced in the sellers' price. But, as detailed later in these findings of fact, Saakvitne had LVA's valuation indicating that the Company was worth at least $40 million. Thus, Saakvitne had a good faith basis for agreeing to purchase the Company for $40 million.

J. Before Finalizing the Details of the Sale, Saakvitne Conducted Due Diligence.

Saakvitne was responsible for retaining a qualified independent appraiser to value the Company. *See* Bowers Test., ECF No. 628, PageID # 20419. He hired LVA, although, with his unfettered discretion to hire any independent appraiser, nothing required him to do so. *See* Gregory Kniesel Test, ECF No. 630, PageID # 20751; Bowers Test., ECF No. 628, PageID # 20419-20; Kubota Test., ECF No. 628, PageID # 20487. At most, Saakvitne knew that there was not much time to get a valuation by

Hansen's deadline of December 19, 2012, if an appraiser unfamiliar with the Company were to begin its valuation analysis only after Saakvitne formally became the ESOP trustee on November 26, 2012. But in fact that was not a rigid deadline. *See* Kubota Test., ECF No. 628, PageID # 20494. As Hansen testified, although he referred to that December date in connection with his personal schedule, he "did not intend in any manner to imply that a transaction should be completed prior to the time that the parties were able to address all of their legal obligations and responsibilities relating to a transaction. It was simply informational regarding my vacation schedule." Hansen Decl. ¶ 31, ECF No. 646, PageID # 23159.

On December 7, 2012, LVA changed its engagement letter to indicate that it was working for Nicholas L. Saakvitne, Trustee of the Proposed Bowers + Kubota Employee Stock Ownership Plan and Trust. Compare Joint Ex. 20 with Joint Ex. 30; Kniesel Test., ECF No. 630, PageID # 20749. The engagement letter signed by Saakvitne now stated that LVA prepare an analysis concerning the fair market value of the Company's stock and addressing whether the price the ESOP was paying for the stock was greater than its fair market value, whether the terms of a loan were at least as favorable to the ESOP as a comparable loan from an arm's length negotiation, and whether any sale was fair to the ESOP from a financial point of view. *See* Joint Ex. 30.

On December 11, 2012, LVA sent Saakvitne a preliminary valuation of the Company, indicating a value range of $37,470,000 to $41,250,000. *See* Def. Ex. 136 (LIBRA-DOL INV 005537) (indicating that the email was sent on December 11, 2012, at 3:30 p.m. EST). Saakvitne had this preliminary valuation when he agreed to the terms of the sale. *See* Joint Ex. 136 at Bowers/Kubota 018239 (email sent on December 11, 2012, at 4:55 pm PST, which is 7:55 EST). Apparently, Saakvitne also talked with Kniesel, of LVA, that same day. *See* Govt. Ex. 74 at SAK000049 (admitted into evidence on June 24, 2021, ECF No. 631, PageID # 20994, but not mentioned in the minutes for that day). Of course, the agreement on the price was only preliminary, as the closing documents were not executed until three days later and the parties knew of the requirement that an independent appraiser had to determine that the sale price did not exceed fair market value.

On December 14, 2012, LVA sent Saakvitne a summary of its valuation regarding the fair market value of the Company's stock. *See* Joint Ex. 34. LVA concluded that the fair market price of the Company's stock was $40.15 per share based on the 1,000,000 shares of the Company in existence. *See* Joint Ex. 34 at DOL 003415. Because the purchase price of $40,000,000 was slightly less than the $40,150,000 value LVA determined the Company was worth, LVA concluded that "the price paid by the ESOP to acquire the Common Stock in the Transaction is not greater than the fair market value of the Common Stock." *Id.* Saakvitne himself therefore viewed the proposed purchase price of $40,000,000 as not exceeding the fair market value of the shares. *See* Joint Ex. 35 at RHYL000481. In its letter dated December 14, 2012, LVA also said that the terms of the loans to the ESOP from Bowers and Kubota were "at least as favorable to the ESOP, from a financial standpoint, as would be the terms of a comparable loan resulting from arm's-length negotiation between independent parties." Joint Ex. 34 at DOL 003416. LVA further determined that the transaction was fair to the ESOP from a financial point of view. *Id.*

LVA's actual evaluation of the Company as of December 14, 2012, was attached to its summary. *See* Joint Exhibit 47. Saakvitne would have had this evaluation in hand when he entered into the stock purchase agreement dated the same day. *See* Exhibit 36.

Saakvitne apparently documented and billed for only 30.1 hours of work before the Company sold its stock to the ESOP. *See* Govt. Ex. 74. The Government's expert, Mark Johnson, opined that Saakvitne had clearly rushed the transaction, doing only minimal work and improperly relying on Kniesel, who Johnson said did not qualify as an independent appraiser, given his prior work for Bowers and Kubota. *See* Decl. of Mark Johnson ¶¶ 22(a) and (f), ECF No. 636, PageID #s 21339-40; Test. of Mark Johnson ECF No. 630, PageID # 20856. Gregory K. Brown, a defense expert with 45 years of legal practice involving ERISA, differed with Johnson's assessment, testifying that Saakvitne's due diligence was sufficient and consistent with those of ERISA fiduciaries. Brown characterized the sale of the Company as "relatively straightforward," noting that "[a] more complicated transaction would have required more due diligence." Amd. Decl. of Gregory K. Brown ¶¶ 7, 33, 50, ECF No. 648, PageID #s 23181, 23196-97, 23207.

Faced with these dueling opinions, this court turns to examining who bears the burden of proving either a deficiency in Saakvitne's performance as the ESOP trustee, or Saakvitne's satisfactory performance. It is the Government, as the plaintiff, that must prove Saakvitne's failings. The Government's expert, Johnson, did not detail what kind of review another trustee might have done. Instead, he simply concluded, "Rather than taking the time to properly supervise and evaluate the process, [Saakvitne] seemed proud of bringing the transaction to conclusion based [on] a tight and entirely artificial time frame." *See* Johnson Decl. ¶ 22(f), ECF No. 636, PageID # 21340; *see also* Johnson Test., ECF No. 630, PageID # 3-138 (stating that Saakvitne only spent 28 hours working on the transaction, but not quantifying whether 28 hours is more or less than one would expect based on comparably complex transactions). This is insufficient to meet the Government's burden.

The court is not, however, suggesting that the Government was acting on a mere whim in questioning Saakvitne's reliance on a valuation provided by the very appraiser who had previously provided a preliminary fair market value to the Board of Trustees of the Proposed Bowers + Kubota Employee Stock Ownership Plan before Saakvitne became the ESOP trustee. For that reason, this court takes the time to study with some care what LVA did.

K. LVA's Valuation dated December 14, 2012.

LVA used three methods to determine the value of the Company: 1) the guideline public company method, 2) the industry acquisitions method, and 3) the discounted cash flow method. *See* Joint Ex. 47 at DOL 000239.

Under the guideline public company method, LVA compared the Company to other publicly traded companies, concluding that the value of a 100 percent controlling interest in the Company using this method was $44,590,000. *See* Joint Ex. 47 at DOL 000236-37.

Under the industry acquisition method, LVA examined the sale prices of other comparable companies, concluding that the value of a controlling interest in the Company using this method was $42,250,000. *See* Joint Ex. 47 at DOL 000237-38.

Under the discounted cash flow method, LVA examined the Company's projected cash flow, including the residual value of the Company at the end of the forecasting horizon. LVA then discounted that amount by 18 percent to reflect the Company's present value. *See* Joint Ex. 47 at DOL 000238-39; Joint Ex. 47, Ex. 14 at DOL 000265. LVA then added a control premium of 30 percent after examining other companies and determined that the value of a 100 percent controlling interest in the Company under the discounted cash flow method was $40,390,000. *See* Joint Ex. 47 at DOL 000239-40; Joint Ex. 47, Ex. 14 at DOL 000265.

While the Government says that the LVA valuation is flawed because it used the 2012 projected EBITDA of $9.24 million in its discounted cash flow analysis, *see* Government's Proposed Finding of Fact ¶ 92, ECF No. 655, PageID # 23561, LVA does not appear to have done that. *See* Joint Ex. 47 at DOL 000238-39 (noting that "[t]he analysis for the DCF Method is based on . . . projected income statements after an adjustment has been made . . . to include income taxes at a 40 percent rate"). *Id.* at DOL 000238.

LVA assigned greater weight to the discounted cash flow method "because Management projects moderately lower, but increasing, profitability through 2017." *See* Joint Ex. 47 at DOL 000239. LVA assigned the discounted cash flow method a weight equal to the weight of the other two methods combined. Balancing the three methods, LVA concluded that a 100 percent controlling interest in the Company was worth $41,910,000. *Id.*

LVA viewed the Company as having $5,328,000 in excess cash and marketable securities. *See* Joint Ex. 47 at DOL 000231; Joint Ex. 47, Ex. 1 at DOL 000251. It therefore added that amount to the $41,910,000 to reach an aggregate fair market value of $47,240,000 for a controlling interest in the company. *See* Joint Ex. 47 at DOL 000239.

Recognizing that there was a limited market for a controlling interest in an entity like the Company, LVA then applied a 15 percent discount for lack of marketability. *See* Joint Ex. 47 at DOL 000245. This meant that LVA subtracted $7,090,000 (representing a rounded 15 percent) from $47,240,000 for a total value of the Company of $40,150,000, leaving a per- share value of $40.15 for each of the million shares. *See* Joint Ex. 47 at DOL 000246; Joint Ex. 47, Exhibit 16 at DOL 000267.

The Government's expert, Sherman, criticizes LVA's analysis as relying, in part, on an allegedly inflated projected EBITDA of $9,235,000. Sherman notes that that figure exceeded the Company's historical numbers. *See* Joint Ex. 47, Ex. 5 at DOL 000255; Sherman Test., ECF No. 631, PageID #s 20923, 20953. According to Sherman, a more appropriate EBITDA would have been $4,849,000, which would have yielded a value of only $21,821,000 under the guideline publicly traded company method (projected 2012 EBITDA of $9,240,000 x 4.5 multiple = $41,580,000 vs. "corrected" 2012 EBITDA of $4,849,000 x 4.5 multiple = $21,821,000). *See* Sherman Decl. ¶ 190, ECF No. 635, PageID # 21324. Using the "corrected" EBITDA in a merged or acquired company analysis, Sherman says that the Company would have been worth $26,670,000. *See* Sherman Decl. ¶ 197, ECF No. 635, PageID # 21325.

Sherman also criticized LVA's report for having relied on projections that he did not think were supportable. He says profitability should have been lower given the Company's historical results. *See* Sherman Test., ECF No. 631, PageID # 20950. Defense expert Ian C. Rusk, however, noted that Sherman's dismissal of Bowers and Kubota's projections as not supported by historical results was in error. Rusk says that the Company had actually achieved similar earnings. Because the Company's earnings were trending upward in 2012 and because of a backlog of contracts, Rusk says the projections were not inaccurate. *See* Decl. of Ian C. Rusk ¶¶ 22-24, ECF No. 622, PageID #s 20159-60.

The court finds that Sherman's "corrected" EBITDA should have taken into account those relevant circumstances identified by Rusk, and the failure to do so renders Sherman's EBITDA unreliable. Additionally, Sherman should have known that his "corrected" EBITDA was too low because the actual EBITDA as of December 31, 2012, was $7,047,000. *See* Joint Ex. 49 at DOL 000138. Although Sherman was supposed to base his appraisal only on circumstances existing on or before December 14, 2012, the actual EBITDA as of December 31, 2012, should have at least caused him to reexamine the historical results that he claimed required him to "correct" the EBITDA to only $4,849,000. The Company's earnings in 2010 and 2011, placed against the upward trend the Company experienced in 2012 and the Company's backlog of contracts, justified a higher EBITDA, further demonstrating the unreliability of Sherman's "corrected" EBITDA.

In November 2012, Bowers sent LVA revenue growth projections for 2014 through 2017. Those projections used a 5 percent growth rate. *See* Bowers Test., ECF No. 628, PageID # 20402. After 2012, the actual growth rate of the company ranged between 10 and 14 percent, meaning that Bowers actually understated the growth rate in November 2012. *See id.*, PageID # 20403.

L. Post-Transaction Valuations of the Company.

Up to now, these findings of fact have focused on how the Company was valued before being sold to the ESOP. But the court also has before it numerous after-the-fact valuations, most, but not all, provided by expert witnesses for the precise purpose of persuading this court in this case.

1. LVA's 2013 Valuation.

On June 7, 2013, LVA issued a valuation report for the Company as of December 31, 2012. With an effective date of just two weeks after the sale, this report set the value of the Company at $6,530,000, or $6.53 per share. *See* Joint Ex. 49 at DOL 000130. Obviously, these figures were a far cry from LVA's earlier valuation of $40.15 per share as of December 14, 2012. The reason for this marked drop is that the later valuation took into account the Company's obligations relating to the sale of Company stock to the ESOP. While it was the ESOP that entered into a loan agreement under which the ESOP would pay Bowers $20,400,000 and Kubota $19,600,000 for their shares in the Company, the Company itself, on December 14, 2012, guaranteed the ESOP's obligations to make those loan payments. *See* Guaranty, Joint Ex. 43. This caused LVA, after the sale, to treat the loans as Company debt in its valuation as of December 31, 2012.

Exhibit 1 to Joint Exhibit 49 reflects LVA's treatment of the ESOP's debt as a Company liability, leaving the Company with $11,738,000 in assets but $45,306,000 in liabilities. *See* Joint Ex 49, Ex. 1 at DOL 000134. Because of the high level of debt, LVA did not use the discounted cash flow method that it had used in its valuation as of December 14, 2012. *See* Joint Ex. 49 at DOL 000119. The debt also caused LVA to adjust what the Company could be sold for and/or what comparable companies were worth. *See* Joint Ex. 49 at DOL 000122-23. Given these circumstances, the later LVA valuation does not assist this court in determining the value of the Company on the date of the sale, December 14, 2012.

2. Steven J. Sherman.

Sherman, a CPA, currently works as a managing director at Loop Capital Financial Consulting. He previously spent more than 30 years with KPMG LLP. *See* Decl. of Steven J. Sherman ¶¶ 1-6, ECF No. 535, PageID #s 21274-75.

The court qualified Sherman as an expert witness for the Government with respect to the fair market value of the Company as of December 14, 2012, as well as with respect to analyzing LVA's valuation of that date. *See* ECF No. 631, PageID #s 21051, 21053-54.

Sherman testified that, on December 14, 2012, the Company was worth $26.9 million. *See* Sherman Decl. ¶ 635, ECF No. 635, PageID # 21282. According to Sherman, the Company had a fair market value of $32,197,000, from which he deducted 7 percent ($2,254,000) for lack of marketability. Sherman then deducted an additional $2,994,000 in light of the ESOP's "limited control." *See* Sherman Decl. ¶¶ 163, 168, 171, ECF No. 635, PageID #s 21310 and 21311. For reasons detailed in the paragraphs below, this court finds that Sherman significantly and unreasonably undervalued the Company. Not only does this render his ultimate valuation unreliable, it also undermines the usefulness of his critique of LVA's valuation.

The court begins its consideration of Sherman's valuation by noting that he appears to have ignored the Uniform Standards of Professional Appraisal Practice ("USPAP") in appraising the Company. According to Kenneth J. Pia, an expert witness for the defense, application of USPAP was mandatory. *See* Decl. of Kenneth J. Pia ¶¶ 15 n.1, 18-19, 24(C), ECF No. 650, PageID #s 21240-42; Test. of Kenneth J. Pia, ECF No. 632, PageID # 21117. Pia says that Sherman's failure to follow USPAP "introduced substantial errors" into Sherman's analysis. Pia Decl. ¶ 19, ECF No. 650, PageID # 21241.

Specifically, Pia testified that Sherman should have interviewed Company management and that the failure to do so violated USPAP's scope of work and competency rules, which require research and analysis to be sufficient to produce credible results and to be conducted in a manner that is not careless or negligent. Pia Decl. ¶¶ 19, 24(I)(A)-(B), ECF No. 650, PageID #s 21241-42. Pia noted that Sherman erred in how he treated subconsultant fees, and that the error could have been avoided by questioning Company management. It turns out that, when the Company retained subconsultants, it passed to clients any fees charged by those subconsultants without any markup. Pia Decl. 24(I)(G)(3), ECF No. 650, PageID # 23249; Bowers Test., ECF No. 628, PageID # 20413; Nishihara Test., ECF No. 629, PageID # 20528. Sherman, however, treated those pass-through subconsultant fees as Company expenses, which Sherman then deducted in calculating the Company's value. Pia pointed to this error as one reason that Sherman reached an erroneously low Company value. *See* Test. of Kenneth K. Pia, ECF No. 632, PageID # 21131-32, 21134-35.

This court recognizes that, in the context of a lawsuit over valuation, a plaintiff's expert does not typically have a way to interview a defendant or a defendant's managers. The court is conscious that it should not rule in a way that would make it nearly impossible for any plaintiff's expert to render a credible opinion on valuation. At the same, time, plaintiff's attorneys typically depose defendants and their managers or agents and may thereby obtain information needed by expert witnesses. Here, Sherman appears to have proceeded without the benefit of information that would have helped him to avoid the error concerning subconsultant fees. Sherman conceded that he treated $10.521 million as subconsultant expenses, which he deducted in determining the value of the Company as of December 14, 2012. *See* Sherman Test., ECF No. 631, PageID # 20926. This was a notable error.

Moreover, the basis for that $10.521 million figure remains unclear. *See* Sherman Decl. ¶ 212, ECF No. 635, PageID # 21327 (referring to $2.9 million in subconsultant fees in 2012); *see also* Joint Ex. 49 at DOL 000135 (Dec. 12, 2012, LVA report referring to $2.923 million in subconsultant fees). Whatever the correct amount of subconsultant fees might have been, Sherman treated those fees as amounting to $10.521 million and as being Company expenses. His resulting valuation of the Company was correspondingly too low.

Sherman had a separate deduction of $2,994,000 from his valuation to reflect what he called "limited control." *See* Sherman Decl., ECF No. 635, PageID # 21292. This "limited control" discount related to Sherman's conclusion that, after the sale, Bowers and Kubota continued to exercise meaningful control over the Company. According to Sherman, this was evidenced by the significant bonuses the Company paid them without documenting approval by Saakvitne. *See* Sherman Decl. ¶¶ 169, 171, ECF No. 635, PageID # 21312.

Pia faults Sherman for basing his "limited control" discount on matters occurring after December 14, 2012. According to Pia, USPAP Advisory Opinion No. 34 states:

> A retrospective appraisal is complicated by the fact that the appraiser already knows what occurred in the market after the effective date of the appraisal. With market evidence that data subsequent to the effective date was consistent with market expectations as of the effective date, the subsequent data should be used. In the absence of such evidence, the effective date should be used as the cut-off date for data considered by the appraiser.

Pia also says the American Institute of Certified Public Accountants Statement of Standards for Valuation Service Number One similarly states that "the valuation analyst should consider only circumstances existing at the valuation date and events occurring up to the valuation date." Pia Decl., ECF No 650, PageID # 23244. Sherman's reliance on matters occurring after the sale to apply the limited control discount appears to the court to have contravened the appraisal standards limiting the facts to be considered. As a result, Sherman improperly decreased the value of the Company by $2,994,000.

Moreover, as Pia testified, when principals sell a company to an ESOP, the ESOP does not then get unfettered control over the Company. *See* Pia Decl. ¶ 24(VI)(C), ECF No. 650, PageID # 23261. The record does not establish that Saakvitne had an absolute right to approve or disapprove the compensation paid to Bowers and Kubota.

Sherman's erroneous treatment of subconsultant fees and his consideration of after-the-sale developments to calculate a "limited control" discount amounted to an undervaluation of $13,515,000 ($10,521,000 + $2,994,000). If this amount were added to Sherman's value of $26,900,000, the total would be $40,415,000. In short, Sherman does not credibly undermine LVA's valuation as of December 14, 2012.

3. Kenneth J. Pia.

The court qualified Pia, Bowers and Kubota's retained expert, to provide an independent valuation of the Company as of December 14, 2012, and to review LVA's valuation and fairness opinions. *See* Test. of Kenneth J. Pia, ECF No. 632, PageID # 21110.

Pia is a CPA with more than 30 years of experience. He works for Marcum, LLP. *See* Decl. of Kenneth J. Pia ¶¶ 4-5, ECF No. 650, PageID # 23228-29.

Pia opined that the fair market value of the Company on December 14, 2012, was $43.20 million, or $43.20 per share. *See* Decl. of Kenneth J. Pia ¶ 10, ECF No. 650, PageID # 23238.

Pia opined that Kniesel's conclusions of the fair market value range "were within a reasonable range." *See* Decl. of Kenneth J. Pia ¶ 16, ECF No. 650, PageID # 23240.

As already noted earlier in these findings of fact, Pia was helpful to the court in evaluating Sherman's opinion. As to Pia's additional opinion that the Company was worth $43.20 million, this court, while understanding that that opinion is offered by the defense as validation of LVA's valuation, sees no need to determine whether the Company was in fact worth $43.20 million as of December 14, 2012. The court finds that the $40 million sale price did not exceed fair market value. The court is not in need of further validation of the actual sale price of $40 million.

4. Ian C. Rusk.

The court qualified Ian C. Rusk as a defense expert to provide opinions with respect to the fair market value of 100 percent of the shares of the Company as of December 14, 2012. Test. of Ian C. Rusk, ECF No. 631, PageID # 21060; Decl. of Ian C. Rusk ¶ 1, ECF No. 622, PageID # 20146.

Rusk is a professional business appraiser. *See* Rusk Decl. ¶ 4, ECF No. 622, PageID # 20147.

Rusk testified that the fair market value of a nonmarketable controlling interest in the Company as of December 14, 2012, was $43,050,000 or $43.05 per share. *See* Rusk Decl. ¶ 11, ECF No. 622, PageID # 20154. Rusk reasoned that the fair market value of the Company on a controlling interest basis was $44,600,000, but that there was a potential for dilution of the Company's stock. He therefore deducted 3.5 percent, or $1,550,000, leading to a value of $43,050,000. *See* Rusk Decl. ¶¶ 16-17, ECF No. 622, PageID #s 20155-56.

As with Pia's valuation opinion, Rusk's valuation opinion would be important only if the Government had mounted a credible challenge to the actual sale price. The court does, however, find Rusk's identification of certain aspects of the Company's finances helpful. In particular, the court credits Rusk for his discussion about the Company's EBITDA and about the upward trend the Company was experiencing in 2012.

M. The Sale Price Did Not Exceed the Fair Market Value of the Company as of December 14, 2012.

Having reviewed the evidence going to the value of the Company as of December 14, 2012, the court here summarizes that evidence and finds that the sale price of $40,000,000 did not exceed the fair market value of the Company as of December 14, 2012.

In the first place, the URS nonbinding preliminary indication of interest is not relevant to (and certainly does not establish) the fair market value of the Company. No agreement was ever reached between the Company and URS.

GMK valued the Company at approximately $39.7 million. This figure appears to have been based on limited data, and GMK ultimately withdrew from its role as an appraiser for the Company. These circumstances make this court hesitant to rely on the GMK valuation in determining the value of the Company as of December 14, 2014.

LVA then stepped in to perform an analysis and, on November 21, 2012, preliminarily determined for the Board of Trustees of the Proposed Bowers + Kubota Employee Stock Ownership Plan and Trust that the "ESOP Controlling Interest Value" was between $37,090,000 and $41,620,000. *See* Joint Ex. 20.

LVA was subsequently retained by Saakvitne and gave him its determination that the Company had a value of $40,150,000 as of December 14, 2012.

Bowers and Kubota sold their shares in the Company to the ESOP for $40,000,000. The Government pointed to a number of circumstances that the Government viewed as suspicious. The Government raised concerns that Saakvitne had spent very little time working on the matter before agreeing on a price and on the terms of the sale of the Company shares to the ESOP. But Saakvitne actually negotiated significant benefits for the ESOP, and the amount of time Saakvitne billed for is by no means proof of carelessness or negligence on his part.

The Government also voiced concern about Saakvitne's reliance on LVA to provide an independent valuation, when LVA had already provided a preliminary determination of value before Saakvitne became the ESOP trustee. To complicate matters further, LVA had Kuba's limited valuation, which ended up being in the same ballpark as LVA's opinion. In aid of showing that Saakvitne's reliance on LVA was problematic, the Government presented the opinions of its expert, Sherman, who valued the Company at $26,900,000 as of December 14, 2012. Unfortunately for the Government, however, Sherman's opinion contained notable errors that may have amounted to an undervaluation of $13,515,000 ($10,521,000 relating to subconsultant fees + $2,994,000 relating to a "limited control" discount). If $13,515,000 is added to his value of $26,900,000, the total is $40,415,000, which is very close to the actual sale price.

Taking into account all of the evidence presented, this court finds that the Company was not sold for more than fair market value.

N. The Limitations Defense.

Bowers and Kubota raised an affirmative defense premised on the statute of limitations. Given this court's valuation ruling and this court's ultimate conclusion (detailed in the conclusions of law) that they breached no fiduciary duty, they no longer need to rely on that defense. This court nevertheless includes here its factual findings relating to that defense, and, in the accompanying conclusions of law, discusses that limitations issue. Bowers and Kubota made two arguments relevant to their limitations defense.

First, they argued that the Government was on notice of their December 2012 sale to the ESOP from the time

Form 5500 was electronically filed in October 2013. According to Bowers and Kubota, the three-year limitations period began to run in October 2013, but this lawsuit was not filed until April 27, 2018.

Second, Bowers and Kubota argue that, because the claims against them are grounded in what the Government has asserted was a breach of fiduciary duty by Saakvitne, the Government should have acted more promptly once it knew or should have known about alleged deficiencies in Saakvitne's actions in his capacity as the trustee of other ESOPs being reviewed by the Government.

With respect to both arguments, this court makes the following findings.

1. It was Not Until December 2014 that Any Government Official Read the Form 5500 That Was Submitted Electronically in October 2013.

Form 5500 is an Annual Return/Report of Employee Benefit Plan, required to be filed with the Internal Revenue Service. Form 5500 for the ESOP in issue in this case was filed around October 15, 2013.

The supplemental attachments to that Form 5500 explained the transaction:

> Closing on December 14, 2012, the Plan purchased all of the issued and outstanding shares (Shares) of common stock of the Company and financed the purchase with two loans (ESOP Loans) from the Sellers that are evidenced by two executed Promissory Notes, and pledged the Shares to the Sellers to secure payment of the Notes. The Company common stock is held in a trust (Trust) established under the Plan. The loans are to be repaid over a period of twenty five years by Company contributions and/or distributed dividends and/or earnings to the Plan. As

> the Plan makes each payment of principal, an appropriate percentage of stock will be allocated to eligible employees' accounts in accordance with applicable regulations under the Code. Shares vest fully upon allocation. The loans are collateralized by the unallocated shares of common stock and are guaranteed by the Company. The lenders have no rights against shares of common stock once they are allocated under the ESOP. Accordingly, the financial statements of the Plan as of December 31, 2012, and for the year ended December 31, 2012, present separately the assets and liabilities and changes therein pertaining to:
>
> - The accounts of employees with vested rights in allocated common stock (Allocated) and
> - Common stock not yet allocated to employees (Unallocated).

Joint Ex. 62 at Page 17 of 32.

Apparently, the Form 5500 was also submitted to the Department of Labor via EFAST2. According to Marianne Gibbs, the ERISA Filing Acceptance Program Manager for the Office of the Chief Information Officer in the Department of Labor, EFAST2 collects information for the Government and discloses that information to the public and the Government. *See* Test. of Marianne Gibbs, ECF No. 632, PageID # 21216; Decl. of Marianne Gibbs ¶ 1, ECF No. 644, PageID #s 23140-01. Gibbs testified that the Government electronically receives a million filings per year via EFAST2 and does not have employees assigned to regularly read those filings. *Id.*, PageID #s 21217-18, 21231.

Nothing in the record establishes that anyone in the Government actually read the Form 5500 when it was submitted in 2013. Instead, the record establishes that Michael Wen, Senior Investigator for the United States

Department of Labor, Employee Benefits Security Administration, first read the relevant Form 5500 in December 2014. Decl. of Michael Wen ¶ 1, ECF No. 637, PageID #s 21345; Depo. Desig. of Michael Wen, ECF No. 643-4, PageID #s 21934-35; Decl. of Crisanta Johnson ¶ 53, ECF No. 623, PageID #s 20185; *See* Depo. Desig. of Robert Prunty, ECF No. 643- 2, PageID #s 21712-13. The legal import of this fact is addressed in the conclusions of law.

2. No Government Official Involved with Looking at Saakvitne's Performance as a Trustee for other ESOPs Was Actually Prompted By Anything About those other ESOPs to Examine Saakvitne's Performance as a Trustee for the ESOP in Issue in This Case.

In December 2014, Michael Wen of the Department of Labor was told by his supervisor to "find some ESOP cases in Hawaii." Depo. Desig. of Michael Wen, ECF No. 643-4, PageID # 21934. Wen then used the Government's ERISA data system to identify leveraged ESOPs with an asset value over either $1 million or $5 million. The ERISA data system identified the Company's ESOP. *Id.*

Wen's supervisor was Miguel Paredes. *See* Depo. Desig. of Miguel Paredes, ECF No. 643-5, PageID #s 22189, 22192-93. Paredes testified that the Government began investigating Saakvitne in 2014 and was concerned about his actions. *Id.*, PageID #s 22195, 22264.

Having identified the Company's ESOP, Wen turned to Dorian Hanzich, then a senior investigator for the Department of Labor and now a financial analyst for it, who then reviewed the GMK and LVA valuation reports, as well as the Company's financial statements, determining while performing preliminary diagnostics for the Department of Labor that the sale price must have been predetermined and that the ESOP had paid significantly more than fair market value. *See* Depo. Desig. of Dorian Hanzich, ECF No. 643-1, PageID #s 21469-70, 21483, 21500-01, 21513.

Robert Prunty of the Department of Labor spoke with Saakvitne in mid-2014 about another investigation the Department of Labor was conducting involving the Hot Dog on a Stick ESOP, which Saakvitne was the trustee of. *See* Depo. Desig. of Robert Prunty, ECF No. 643-2, PageID #s 21680-81, 21686. Prunty did not speak to Wen about the Company's ESOP before December 2014, and it was not until early 2017 that Prunty began investigating the Company's ESOP. *Id.*, PageID # 21686, 21694. According to Prunty, the EFAST2 system was not set up in a way that would have allowed a Government investigator to use Form 5500 filings to identify multiple ESOPs a particular person was involved with. *Id.*, PageID # 21715. Prunty testified that neither Wen nor Hanzich had worked on the Hot Dog on a Stick investigation. Depo. Desig. of Robert Prunty, ECF No. 643-3, PageID # 21891. In other words, the mere existence of the Hot Dog on a Stick investigation did not lead anyone to look at Saakvitne's work with the Company's ESOP.

The court received evidence regarding the issue of whether an earlier investigation involving Saakvitne might have alerted the Department of Labor to look at Saakvitne's other work, such as with the ESOP in issue here. Jerome Raguero of the Department of Labor (and its Rule 30(b)(6) representative for deposition purposes) testified that, when the Department of Labor investigates an ESOP, it does not generally ask about other ESOPs a person might be involved with, but that there was no policy prohibiting such questions. *See* Depo. Desig. of Jerome Raguero, ECF No. 643-7, PageID #s 22442, 22488, 22491. Raguero also testified that the Department of Labor does not have policies with respect to flagging ESOP transactions from the Form 5500s. *Id.*, PageID # 22519.

Paul Zielinski of the Department of Labor first heard of Saakvitne through the Hot Dog on a Stick investigation. *See* Depo. Desig. of Paul Zielinski, ECF No. 643- 8, PageID #s 22612, 22643. Zielinski said investigators could ask witnesses about their involvement with other ESOPs. *Id.*, PageID # 22647.

In fact, the Department of Labor's Ty Fukumoto said that an investigator "would definitely ask" about other clients that a service provider might be working with. *See* Depo. Desig. of Ty Fukumoto, ECF No. 643-9, PageID #s 22849, 22766. He testified that the Department of Labor used Form 5500s to help it decide which ESOPs it should investigate. *Id.*, PageID # 22791. Fukumoto became aware of Saakvitne in the mid-2000s, when Saakvitne was working with abandoned 401(k) plans. *Id.*, PageID #s 22820-21. He said that it was "very possible that in talking to Mr. Saakvitne or gathering information . . . additional investigations were opened as a result." *Id.*, PageID # 22849.

On or about June 15, 2016, Wen prepared a Major Case Submission relating to the ESOP at issue in this case. *See* Wen Depo. Desig., ECF No. 643-4, PageID # 22038. Wen explained that the case was "opened . . . due to a more than $30 million decrease in the company stock valuation after the ESOP purchased 100 percent of the common stock in 2012." *Id.*, PageID # 22041. Of course, as noted above, the decrease in valuation flowed from the debt incurred when the ESOP purchased the Company's stock and the Company guaranteed the ESOP's payment of the purchase price.

The court takes judicial notice of a matter that does not appear to be in dispute, which is that, in October 2017, the Government, the Company, and Bowers and Kubota in their individual capacities, agreed to toll the statute of limitations under ERISA effective October 16, 2017, to April 30, 2018. *See* ECF No. 367-2, PageID #s

7607-12 (copy of tolling agreement marked as Defense Ex. 241 but not offered into evidence).

The legal import of the facts set forth above concerning Department of Labor investigations is addressed in this court's conclusions of law.

III. CONCLUSIONS OF LAW.

A. Jurisdiction.

The Company's ESOP is an employee benefit plan as defined by ERISA. *See* 29 U.S.C. § 1002(3) ("The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."). The ESOP is governed by the applicable provisions of subchapter I of ERISA, 29 U.S.C. §§ 1001 to 1191d. *See* 29 U.S.C. § 1003(a)(1) ("this subchapter shall apply to any employee benefit plan if it is established or maintained--(1) by any employer engaged in commerce or in any industry or activity affecting commerce").

This Court has jurisdiction over this action pursuant to 29 U.S.C. §§ 1132(a)(2) and (5) ("A civil action may be brought . . . (2) by the Secretary . . . for appropriate relief under section 1109 of this title . . . ; [or] (5) . . . (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter.").

B. The Alleged Failure of Bowers and Kubota To Discharge Fiduciary Duties with the Proper Care, Skill, Prudence, and Diligence in Violation of 29 U.S.C. § 1104(a)(1)(A), (B), and (D) (Complaint ¶ 37).

Paragraph 37 of the Complaint asserts violations of 29 U.S.C. § 1104(a)(1)(A), (B), and (D). Those provisions state:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, 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; [and]

. . . .

(C) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

In relevant part, ERISA defines a fiduciary as follows:

> 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. . . .

29 U.S.C. § 1002(21)(A).

"ERISA 'defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan.'" *Johnson v. Couturier*, 572 F.3d 1067, 1076 (9th Cir. 2009) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)). The Ninth Circuit "construe[s] ERISA fiduciary status 'liberally, consistent with ERISA's policies and objectives.'" *Id.* (quoting *Ariz. State Carpenters Pension Tr. Fund v. Citibank*, 125 F.3d 715, 720 (9th Cir. 1997)); *see also LeGras v. AETNA Life Ins. Co.*, 786 F.3d 1233, 1236 (9th Cir. 2015) ("we have repeatedly stated that ERISA is remedial legislation that should be construed liberally to protect participants in employee benefits plans." (alteration signals, quotation marks, and citation omitted)); *Batchelor v. Oak Hill Med. Grp.*, 870 F.2d 1446, 1449 (9th Cir. 1989) ("ERISA is remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans."). In short, ERISA's aim is to protect employees in connection with plans like ESOPs.

Members of an employer's board of directors have ERISA fiduciary obligations to the extent they have responsibility over the ESOP and over the management or disposition of its assets. *See Couturier*, 572 F.3d at 1076 ("We have accordingly recognized that where members of an employer's board of directors have responsibility for the appointment and removal of ERISA trustees, those directors are themselves subject to ERISA fiduciary duties, albeit only with respect to trustee selection and retention."). The Department of Labor has provided guidance for fiduciaries who sit on a board of directors:

> Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have

> responsibility for the functions described in section 3(21)(A) of the [ERISA, 29 U.S.C. § 1002(21)(a)]. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act[, 29 U.S.C. § 1105(a)]).

29 C.F.R. § 2509.75-8(D-4).

ERISA seeks to ensure that fiduciaries who fund an ESOP acquire employer securities for "adequate consideration. "29 U.S.C. § 1108(e)(1). Courts therefore recognize that "an ERISA plan and ERISA fiduciary responsibilities thereunder, can exist even where a formal employee benefit plan ha[s] not been adopted." *Solis v. Webb*, 931 F. Supp. 2d 936, 945 (N.D. Cal. 2012). "A person's actions, not the official designation of his role, determines whether he enjoys fiduciary status, regardless of what his agreed-upon contractual responsibilities may be." *CSA 401(K) Plan v. Pension Pros., Inc.*, 195 F.3d 1135, 1138 (9th Cir. 1999) (quotation marks and citation omitted).

In analyzing the Government's assertions about breaches of fiduciary duty, this court keeps firmly in mind the Government's burden. A plaintiff has the burden of proving the breach of a fiduciary duty under 29 U.S.C. § 1104 or § 1105.6 *See Roth v. Sawyer-Cleator Lumber Co.*,

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[6] Because this court concludes that the Government fails to meet its burden of establishing a breach of fiduciary duty, this court does not

16 F.3d 915, 917 (8th Cir. 1994) (stating that "ERISA plaintiffs bear the burden of proving a breach of fiduciary duty"); *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1122 (D. Colo. 2020), aff'd, 1 F.4th 769 (10th Cir. 2021); *see also Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 700 (W.D. Mo. 2019) ("a plaintiff bears the burden of showing the defendant breached its fiduciary duties, which results in a prima facie case of loss to the plan"); *Larson v. Allina Health Sys.*, 350 F. Supp. 3d 780, 793 (D. Minn. 2018)("ERISA plaintiffs bear the burden of proving a breach of fiduciary duty.").

In June 2012, after the discussions with URS fell apart, Bowers and Kubota decided to consider a sale to an ESOP. *See* Bowers Test., ECF No. 628, PageID #s 20358-59; Amd. Bowers Decl. ¶ 24, ECF No. 640, PageID # 21379; Def. Ex. 50 (June 19, 2012, email from Bowers to Kuba and Kubota, stating, "Gary: We may be moving in the ESOP direction."). June 2012 is therefore the earliest that Bowers and Kubota could be said to have

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go on to address whether alleged losses were or were not caused by the breach. The subject of who bears the burden of establishing causation has divided courts, but within the Ninth Circuit that burden appears to rest with plaintiffs. *See Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1099 (9th Cir. 2004) (citing with approval a Sixth Circuit case for the proposition that a "fiduciary's failure to investigate an investment decision alone is not sufficient to show that the decision was not reasonable. . . . [A] plaintiff must show a causal link between the failure to investigate and the harm suffered by the plan." (citation omitted)). *See also Pledger v. Reliance Tr. Co.*, 2019 WL 10886802, at *28 (N.D. Ga. Mar. 28, 2019). By contrast, the Eighth Circuit has stated that, "once the ERISA plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit was not attributable to, the breach of duty." *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). *See* also *Chao v. Tr. Fund Advisors*, 2004 WL 444029, at *6 (D.D.C. Jan. 20, 2004).

been fiduciaries with respect to the Company's ESOP. Before then, they exercised no discretionary authority, management, or control with respect to an ESOP. This court concludes that Bowers and Kubota were fiduciaries as defined by ERISA from the time they exercised discretionary authority to form the Company's ESOP.

Bowers and Kubota generally ceased being fiduciaries for the ESOP on December 3, 2012, when Bowers and Kubota in their capacities as directors of the Company signed a Resolution of Board Directors by Unanimous Written Consent Without a Meeting that adopted the ESOP and appointed Saakvitne as the independent fiduciary and the sole ESOP trustee, retroactively effective as of January 1, 2012. *See* Joint Ex. 28. The Government fails to meet its burden of proving the breach of any fiduciary duty.

This court addresses each of the fiduciary duty allegations in Paragraph 37 of the Complaint, taking them in order except that Paragraph 37(c) is considered last given the nature of the fiduciary duty cited in that paragraph.

1. Paragraph 37(a) of the Complaint.

In Paragraph 37(a) of the Complaint, the Government asserts that Bowers and Kubota breached their fiduciary duty to the ESOP by sending LVA inflated revenue projections for 2012.

Essential to establishing this breach is establishing that the revenue projections were in fact inflated. The Government does not meet its burden of doing that.

The Government's expert, Sherman, criticized LVA's analysis because it relied, in part, on an allegedly inflated projected EBITDA of $9,235,000, which Sherman said exceeded historical numbers. *See* Joint Ex. 47, Ex. 5 at DOL 000255; Sherman Test., ECF No. 631, PageID #s 20923, 20953. He said that a more appropriate EBITDA would have been $4,849,000, which would have resulted in a much lower value. The court rejects Sherman's "corrected" EBITDA of $4,849,000 because, as this court found earlier in this order, Sherman failed to take relevant circumstances into account.

While the Government says that the LVA valuation is also flawed because it used the 2012 projected EBITDA of $9.24 million in its discounted cash flow analysis, *See* Government's Proposed Finding of Fact ¶ 92, ECF No. 655, PageID # 23561, LVA does not appear to have done that. *See* Joint Ex. 47 at DOL 000238-39 (noting that "[t]he analysis for the DCF Method is based on . . . projected income statements after an adjustment has been made . . . to include income taxes at a 40 percent rate"). *Id.* at DOL 000238.

This court concludes that the Government fails to prove by a preponderance of the evidence that Bowers or Kubota breached a fiduciary duty relating to the revenue predictions for 2012 that they provided to LVA.

2. Paragraph 37(b) of the Complaint.

In Paragraph 37(b) of the Complaint, the Government asserts that Bowers and Kubota sent LVA inflated revenue projections for 2013 to 2017. Once again, the Government does not establish that by a preponderance of the evidence.

As noted in this court's findings of fact, Bowers, in November 2012, sent LVA revenue growth projections for 2014 through 2017 using a 5 percent growth rate. *See* Bowers Test., ECF No. 628, PageID # 20402; Def. Ex. 89, Bates No. Pia 010048 or LIBRA-DOL INV 004759. After 2012, the actual growth rate of the company ranged between 10 and 14 percent, meaning that Bowers actually understated the growth rate in November 2012. *See* Bowers Test., ECF No. 628, PageID # 20403. In short, the Government fails to show by a preponderance of the evidence that Bowers and Kubota breached any fiduciary duty relating to their revenue predictions for 2013 to 2017.

3. Paragraphs 37(d) and (e) of the Complaint.

In Paragraphs 37(d) and (e) of the Complaint, the Government asserts that Bowers and Kubota breached their fiduciary duty to the ESOP by relying on LVA's preliminary and fairness opinion. Again, the record does not establish that alleged breach.

To start with, Bowers and Kubota could not have breached a duty in relying on LVA's preliminary or fairness opinion unless that opinion suffered from material errors or misstatements. The Government has not shown material errors or misstatements. To the contrary, this court has found that the Company was not sold for more than fair market value, and the sale price was nearly identical to LVA's valuation as of December 14, 2012.

In addition, as of December 7, 2012, LVA was working for "Nicholas L. Saakvitne, Trustee of the Proposed Bowers + Kubota Employee Stock Ownership Plan and Trust." *See* Joint Ex. 30. Saakvitne had the exclusive right to hire an appraiser, and it was he who relied on LVA's fairness opinion in negotiating and executing the sale and sale documents. To the extent the Government is seeking to blame Bowers and Kubota for Saakvitne's reliance on LVA's opinion, such blame is not actionable unless the opinion was materially flawed, which this court has found not to have been the case.

Nor has the Government shown how any reliance on the valuations damaged the Company's ESOP.

Accordingly, this court concludes that the Government fails to meet its burden of establishing a breach of fiduciary duty relating to reliance on LVA's preliminary and fairness opinions, as alleged in Paragraphs 37(d) and (e) of the Complaint.

4. Paragraph 37(f) of the Complaint.

In Paragraph 37(f) of the Complaint, the Government asserts that Bowers and Kubota breached a fiduciary duty by causing the ESOP to purchase the Company's stock for more than fair market value. This court has found that, in paying $40,000,000 for 100 percent of the Company's stock on December 14, 2012, the ESOP did not pay more than fair market value. This finding is fatal to the claim in Paragraph 37(f) of the Complaint.

5. Paragraph 37(c) of the Complaint.

Paragraph 37(c) of the Complaint asserts that Bowers and Kubota breached their limited fiduciary duty to monitor Saakvitne after he was appointed as the ESOP's trustee and fiduciary. The Government does not prove this assertion by a preponderance of the evidence.

The Department of Labor's published guidance discusses the fiduciary duty to monitor a trustee, which in this case Bowers and Kubota had even after Saakvitne's appointment because they exercised discretionary authority with respect to monitoring Saakvitne:

> At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.

29 C.F.R. § 2509.75-8(FR-17). This guidance is consistent with the Plan, which states:

> The Company shall have all powers necessary to enable it to administer the Plan and the Trust Agreement in accordance with their provisions,

> including without limitation the following: . . . (9) reviewing the performance of the Trustee with respect to the Trustee's administrative duties, responsibilities and obligations under the Plan and Trust Agreement.

Joint Ex. 38 § 17.03.

This court has already ruled in this case that the power to appoint and remove a trustee gives rise to a duty to monitor the trustee's performance. *See* ECF No. 47, PageID # 472 (citing *Webb*, 931 F. Supp. 2d at 953; *Carr v. Int'l Game Tech.*, 770 F. Supp. 2d 1080, 1090 (D. Nev. 2011)). As noted by the Northern District of California in *In re Calpine Corporation ERISA Litigation*, 2005 WL 1431506, at *3 (N.D. Cal. Mar. 31, 2005), the duty arising from § 2509.75-8(FR-17) is "limited."

Bowers and Kubota did not breach their limited fiduciary duty to monitor Saakvitne to ensure that he was acting in the best interests of the ESOP. In its proposed Conclusions of Law, the Government claims:

> Defendants breached their fiduciary duty to monitor Saakvitne because they knew of Saakvitne's misconduct, having set up the entire transaction to facilitate it, and failed to take remedial steps. Specifically, Defendants set up the entire transaction before appointing Saakvitne at the last minute, leaving him insufficient time to do anything but rubber stamp the prebaked transaction set out for him by Defendants. Defendants then watched as the pieces of their plan fell into place, doing nothing despite their knowledge the $40 million price was in excess of fair market value.

ECF No. 655 ¶ 38, PageID # 23590. The record does not support the Government's statement.

On November 21, 2012, Hansen sent Saakvitne an email in which Hansen told Saakvitne that Hansen was leaving town on December 19, 2021 and that the sale would have to close by that date. *See* Govt. Ex. 58; Hansen Decl. ¶ 29, ECF No. 646, PageID # 23158. While that date did not give Saakvitne a lot of time to conduct due diligence, there was actually no requirement that the deal close in December 2012. *See* Kubota Test., ECF No. 628, PageID # 20494; Hansen Decl. ¶ 31, ECF No. 646, PageID # 23159. At most, there were tax advantages for Bowers, Kubota, the Company, and ESOP participants if the sale concluded by the end of 2012. *See* Amd. Kubota Decl. ¶ 55, ECF No. 639, PageID # 21368. That suggests that Saakvitne may have decided that the tax benefits to the ESOP outweighed the burden of finalizing the sale by the end of 2012.

While the Government argues that Saakvitne was forced by the time constraint to hire LVA, the record demonstrates that he had unfettered discretion to hire any independent appraiser, and that he was not required to hire LVA. *See* Gregory Kniesel Test, ECF No. 630, PageID # 20751; Bowers Test., ECF No. 628, PageID # 20419-20; Kubota Test., ECF No. 628, PageID # 20487. Saakvitne may have decided that LVA was a well-respected appraisal company that had already started an appraisal and that, given the tax benefits to the ESOP and its participants, it was better to hire LVA than to delay the sale. If this court is to find any deficiency, it had to be proven by the Government. It was not.

Nor does the record support the Government's suggestion that Bowers, Kubota, and Saakvitne conspired to arrange for a $40 million sale price. Bowers and Kubota had told Hansen that they were hoping to sell the Company for $40,000,000. *See* Joint Ex. 58; Govt. Ex. 66. Hansen then tried to organize the process, asking Marcus Piquet to look into a $40,000,000 loan. *See* Depo. Desig. of Marcus Piquet, ECF No. 591-1, PageID # 19579. While Hansen's email to Saakvitne of November 21, 2012, mentions the possibility of selling the Company for $40 million, *see* Govt. Ex. 58, that merely gave Saakvitne insight into the price Bowers and Kubota wanted to sell their shares for. Saakvitne's negotiation, *see* Joint Ex. 32, ended up saving the ESOP millions of dollars. *See* Bowers Test., ECF No. 628, PageID # 20433; Gregory K. Brown Test., ECF No. 631, PageID # 21049. In the end, the ESOP did not pay more than the fair market value for the Company, and the Government does not identify damage to the ESOP.

As this court acknowledged earlier, the Government's concerns are understandable. The Government was looking at a high sale price that had been shared ahead of time with the ESOP trustee. But knowing what a seller wants does not make a buyer complicit in wrongdoing. The Government was also faced with an appraiser who had initially been dealing with the sellers who were forming the ESOP, then transferred its services to the trustee, ultimately providing an appraisal in a fairly short time that was fairly close to the limited valuation set by GMK. For his part, the trustee documented only about 30 hours of work. That the Government had suspicions and opened an investigation appears entirely warranted. But when the Government filed this lawsuit, it took on the burden of proving that its suspicions were reflected in fact. What has happened in the trial of this case is that the Government failed to carry that burden, not for want of effort but for what appears to be a want of evidence.

The Government simply does not prove that Bowers or Kubota should have better monitored Saakvitne to ensure that he was acting in the best interests of the ESOP and to prevent the ESOP from being damaged.

D. Bowers and Kubota Are Not Liable for Breaches of Fiduciary Responsibilities by Other Fiduciaries under 29 U.S.C. § 1105(a)(1)-(3) (Complaint ¶¶ 40- 43).

Paragraphs 40 to 43 of the Complaint assert violations of 29 U.S.C. §§ 1105(a)(1) to (3), which provide:

> a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Paragraphs 40 to 43 of the Complaint assert that Bowers and Kubota are liable for breaches of fiduciary duties by others. Specifically, the Government asserts that 1) Bowers and Kubota are liable for each other's provision of faulty financial data to LVA; 2) Bowers and Kubota are liable for each other's failure to monitor Saakvitne; and 3) Bowers and Kubota are liable for behavior by another fiduciary (such as Saakvitne) who caused the ESOP to pay more than fair market value to purchase the Company. *See* ECF No. 1, PageID #s 17-18.

2. Bowers and Kubota Are Not Liable for Each Other's Provision of Allegedly Inaccurate Financial Data to LVA in 2012.

In Joint Exhibit 48, the Company estimated its EBITDA for 2012 as $9,284,000. In LVA's valuation of the Company as of December 14, 2012, it relied on this EBITDA. *See* Joint Ex. 47 at DOL 000235 and DOL 255. The Government's expert, Sherman, characterizing this estimated EBITDA for 2012 as being way off the mark, calculated "an adjusted EBITDA projection for 2012 of $4.9 million, more in line with the Company's historical financial performance." *See* Sherman Decl ¶ 187, ECF No. 635, PageID # 21323; Sherman Test., ECF No. 631, PageID # 20923. Sherman was too quick to dismiss Bowers and Kubota's projections as unsupported by historical results.

Joint Exhibit 48 illustrates the projected revenue for 2012 as about only $3 million more than the projected revenue for 2011 ($22,005,000 vs. $24,964,000). Bowers and Kubota knew the Company had contracts due to be paid in 2012 (which Sherman appears not to have taken into account because he did not know about them). Bowers and Kubota generally knew what their expenses would be. The Government does not establish that their projection was unreasonably inflated. *See* Decl. of Ian C. Rusk ¶¶ 22-24, ECF No. 622, PageID #s 20159-60.

Joint Exhibit 49 is LVA's valuation of the Company as of December 31, 2012. It lists the actual EBITDA for the Company in 2012 as $7,050,000 (rounded to the nearest $10,000). *See* Joint Ex. 49 at DOL 000120; Joint Ex. 49, Ex 5, DOL 000138 (listing the 2012 EBITDA as $7,047,000). This actual amount was not calculated until the summer of 2013; it therefore does not prove that Bowers and Kubota are liable for having projected inflated 2012 profits.

In November 2012, Bowers sent LVA revenue growth projections for 2014 through 2017. Those projections used a 5 percent growth rate based on historical averages. *See* Bowers Test., ECF No. 628, PageID # 20402; Def. Ex. 89, Bates No. Pia 010048 or LIBRA-DOL INV 004759. After 2012, the actual growth rate of the company ranged between 10 and 14 percent, meaning that Bowers actually understated the growth rate in November 2012. *See* Bowers Test., ECF No. 628, PageID # 20403.

The circumstances just summarized by this court undercut the Government's assertion that either Bowers or Kubota bears responsibility for the other's provision to LVA of inflated financial projections.

3. Bowers and Kubota Are Not Liable for Each Other's Failure To Monitor Saakvitne.

This court earlier ruled that the Government failed to prove that Bowers or Kubota is liable for having failed to monitor Saakvitne. That ruling makes it impossible for each to be liable for the failure of the other to monitor Saakvitne, there having been no such failure.

4. Bowers and Kubota Are Not Liable for Behavior by Any Other Fiduciary That Caused or Contributed to Payment by the ESOP of More than Fair Market Value for the Company.

Nor does the Government prove its contention that Bowers or Kubota is liable for another fiduciary's actions leading to payment by the ESOP of more than fair market value for the Company. This court has already found that the Government failed to prove that the ESOP paid more than fair market value. Payment of more than fair market value being a necessary predicate for this contention, the contention fails.

E. Bowers and Kubota Did Not Engage in Prohibited Transactions in Violation of 29 U.S.C. § 1106.

The Government alleges that Bowers and Kubota engaged in transactions prohibited by ERISA in 29 U.S.C. § 1106. Under 29 U.S.C. § 1108(e)(1), § 1106 is inapplicable when a sale to an ESOP involves "adequate consideration." With respect to such claims, the Government has the burden of establishing the existence of a transaction that would be prohibited under § 1106. If the Government makes that showing, the burden shifts to Defendants to demonstrate that they satisfied the "adequate consideration" exemption in 29 U.S.C. § 1108(e)(1). *See Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996).

As set forth below, the sale to the ESOP was for "adequate consideration."

1. Prohibited Transactions Between a Plan and a Party in Interest.

Paragraphs 45 to 47 of the Complaint assert violations of 29 U.S.C. § 1106(a)(1)(A), which provides that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . sale or exchange, or leasing, of any property between the plan and a party in interest."

Specifically, paragraphs 45 to 47 of the Complaint assert that Bowers and Kubota engaged in a prohibited transaction by causing or allowing the Company's ESOP to purchase the stock of the Company for more than fair market value.

Defendants meet their burden of demonstrating by a preponderance of the evidence that the Company's shares were worth at least what the Company's ESOP paid for it. Accordingly, there was no improper prohibited transaction for purposes of 29 U.S.C. § 1106(a)(1)(A).

3. Prohibited Transactions with the ESOP.

Paragraphs 49 to 50 of the Complaint assert violations of 29 U.S.C. §§ 1106(b)(1) and (2), which provide:

> A fiduciary with respect to a plan shall not–
>
> (1) deal with the assets of the plan in his own interest or for his own account,[or]
>
> (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.

Specifically, paragraphs 49 and 50 of the Complaint assert that Bowers and Kubota improperly dealt with assets of the Company's ESOP by acting in their own interests. As set forth in paragraphs 44 to 61 of the Government's proposed conclusions of law, these allegations are based on the alleged sale of the Company for more than fair market value. *See* ECF No. 655, PageID # 23595 to 23602.

This court has already determined by a preponderance of the evidence that the Company's ESOP did not pay more than fair market value for the Company. In other words, Bowers and Kubota did not sell the Company to the ESOP in a manner detrimental to the ESOP and favorable to them. Accordingly, this court concludes that Bowers and Kubota cannot be said to have violated § 1106, as they show that the sale was for "adequate consideration" for purposes of § 1108(e)(1).

F. Bowers and Kubota Are Not Individually Liable Under 29 U.S.C. § 1132(a)(5) for Knowingly Participating in Prohibited Transactions.

Paragraphs 52 and 53 of the Complaint assert that Bowers and Kubota are individually liable under 29 U.S.C. § 1132(a)(5) for having participated in transactions prohibited by ERISA.

Under 29 U.S.C. § 1132(a)(5), a civil action may be brought "by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter."

As already set forth above, because the Government fails to prove that Bowers and Kubota violated any provision of ERISA with respect to the sale of the Company to the ESOP, they have no liability under § 1132(a)(5).

G. The Government's Claims Are Not Barred by The Statute of Limitations.

ERISA's statute of limitations states:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of–
>
> six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

Defendants have asserted as an affirmative defense the untimeliness of the Government's claims. Although this affirmative defense is no longer essential given this court's conclusion that the Government has not shown that the ESOP paid more than fair market value for the Company's shares or that Defendants breached any fiduciary duty, this court proceeds to discuss the limitations defense because considerable time and effort was spent on it. This court concludes that Defendants do not meet their burden with respect to their limitations defense.

The Supreme Court last year, in *Intel Corporation Investment Policy Committee v. Sulyma*, 140 S. Ct. 768, 776 (2020), discussed when a plaintiff can be said to have had "actual knowledge" of an ERISA breach or violation such that the three-year limitation period begins running. "[P]otential, possible, virtual, conceivable, theoretical, hypothetical, or nominal" knowledge does not, without more, qualify as "actual knowledge." *Id.* Section 1113(2) "requires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information. . . . To meet § 1113(2)'s 'actual knowledge' requirement, however, the plaintiff must in fact have become aware of that information." *Id.* at 777.

In *Sulyma*, the Court noted that actual knowledge could be proven in the usual way, such as through testimony and inferences from circumstantial evidence. *Id.* at 779. The Court also noted that its decision did "not preclude defendants from contending that evidence of 'willful blindness' supports a finding of 'actual knowledge.'" *Id.* (citing *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)).

In *Global-Tech*, the Court saw "willful blindness" as occurring when a person subjectively believed there was a high probability that a fact existed but deliberately avoided learning about that existence. 563 U.S. at 769. *Sulyma* recognizes that willful blindness can support a finding of actual knowledge. 140 S. Ct. at 779.

This court has taken judicial notice of the agreement by the Government, the Company, and Bowers and Kubota in their individual capacities to toll the statute of limitations under ERISA from October 16, 2017, to April 30, 2018. *See* ECF No. 367- 2, PageID #s 7607-12 (copy of tolling agreement was Defense Ex. 241 but was not introduced into evidence). The present Complaint was filed on April 27, 2018. *See* Joint Ex. # 1; *see also* ECF No. 1.

1. Actual Knowledge.

Bowers and Kubota argue that § 1113(2) bars the Government's claims because the Government had actual knowledge of the facts underlying those claims more than three years before this lawsuit was filed, even taking into account the parties' tolling agreement. Bowers and Kubota point to Form 5500 (the Annual Return/Report of Employee Benefit Plan), filed with the Internal Revenue Service and submitted to the Department of Labor via EFAST2 on October 15, 2013. *See* ECF No. 654, PageID #s 23517-18.

For the claims in this case to be timely, the Government cannot have had actual knowledge of the facts underlying them more than three years before October 2017, when the tolling agreement took effect. Thus, if actual knowledge flowed from a filing in October 2013, then the claims in this lawsuit are time-barred. However, this court is not persuaded that the mere filing of the Form 5500 in 2013 provided the Government with actual notice. As the Supreme Court held in *Sulyma*, "§ 1113(2) requires more than evidence of disclosure alone." 140 S. Ct. at 777.

According to Marianne Gibbs, the ERISA Filing Acceptance Program Manager for the Office of the Chief Information Officer in the Department of Labor, the Government electronically receives a million filings per year via EFAST2 and does not have people reading those filings. *See* Test. of Marianne Gibbs, ECF No. 632, PageID

#s 21217-18, 21231. Moreover, the record establishes that Michael Wen, Senior Investigator for the United States Department of Labor, Employee Benefits Security Administration, first read the Form 5500 for the ESOP in December 2014, which falls within the three-year period before the tolling agreement took effect in October 2017. Decl. of Michael Wen ¶ 1, ECF No. 637, PageID #s 21345; Depo. Desig. of Michael Wen, ECF No. 643-4, PageID #s 21934-35; Decl. of Crisanta Johnson ¶ 53, ECF No. 623, PageID #s 20185; *See* Depo. Desig. of Robert Prunty, ECF No. 643-2, PageID #s 21712-13. The tolling agreement bars claims that the Government had actual knowledge of on or before October 16, 2014. The filing of Form 5500 in 2013 did not provide actual knowledge as that concept has been explained in *Sulyma*. Instead, Form 5500 was only a disclosure that was not actually reviewed by anyone in the Government until December 2014. Given the nature of the information on the form and the volume of such forms filed, it is understandable that it was pulled up and actually reviewed more than a year after it was filed.

2. Willful Blindness.

Bowers and Kubota argue that the Government cannot deny having had actual knowledge simply by ignoring facts staring the Government in the face. It is, of course, true that if the Government is willfully blind, actual knowledge will be attributed to the Government. Bowers and Kubota base their willful blindness argument on what they say was the Government's ignoring of Saakvitne's conduct with respect to other ESOPs. *See* ECF No. 654, PageID #s 23518-19. On this matter, the burden is on Bowers and Kubota to prove their point. They do not meet their burden.

This court does have before it evidence that, in mid-2014, Robert Prunty of the Department of Labor spoke with Saakvitne concerning the investigation into the Hot

Dog on a Stick ESOP. *See* Depo. Desig. of Robert Prunty, ECF No. 643-2, PageID # 21686. Prunty testified that a Government investigator interested in a particular person could conceivably use the EFAST2 system to look up Form 5500s in aid of gathering information about that person's work. *Id.*, PageID # 21715. While other Government employees testified that, when investigating ESOPs, they did not generally ask about other ESOPs a person might be involved in, they also conceded that there was no policy prohibiting such questions. *See* Depo. Desig. of Jerome Raguero, ECF No. 643-7, PageID #s 22442, 22488, 22491; Depo. Desig. of Paul Zielinski, ECF No. 643-8, PageID # 22647. *See* also Depo. Desig. of Ty Fukumoto, ECF No. 643-9, PageID # 22649. The problem facing this court is that the ability of Government investigators to ask about other ESOPs Saakvitne was involved with does not necessarily make the investigators willfully blind when they do not do that.

Willful blindness requires more than a failure to do everything possible. The willfully blind person must have believed there was a high probability or wrongdoing and must have deliberately avoided learning about that. *Global-Tech*, 563 U.S. at 769. At best, Bowers and Kubota have demonstrated that Government employees did not, but could have, inquired into other ESOPs Saakvitne was involved in when those employees spoke with Saakvitne in 2014. With the burden on Bowers and Kubota, this alone does not demonstrate willful blindness.

IV. CONCLUSION.

Based on the above findings and conclusions, this court rules that the remaining Defendants (i.e., Defendants other than Saakvitne and his law firm) did not violate any provision of ERISA with respect to the sale of the Company to the Company's ESOP. Accordingly, the Clerk of Court is directed to enter judgment in favor of the remaining Defendants and against the Government and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 17, 2021.

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MARTIN J. WALSH, Secretary of Labor, United States Department of Labor, Plaintiff, vs. BRIAN BOWERS, an individual; DEXTER C. KUBOTA, an individual; BOWERS + KUBOTA CONSULTING, INC., a corporation; BOWERS + KUBOTA CONSULTING, INC. EMPLOYEE STOCK OWNERSHIP PLAN, Defendants.	CIVIL NO. 18-00155 SOM-WRP ORDER ADOPTING IN PART AND MODIFYING IN PART FINDINGS AND RECOMMENDATION TO GRANT IN PART DEFENDANTS' BILL OF COSTS (ECF No. 682); ORDER ADOPTING FINDINGS AND RECOMMENDATION TO DENY ATTORNEYS' FEES AND NONTAXABLE COST (ECF NO. 648)

ORDER ADOPTING IN PART AND MODIFYING IN PART FINDINGS AND RECOMMENDATION TO GRANT IN PART DEFENDANTS' BILL OF COSTS (ECF NO. 682); ORDER ADOPTING FINDINGS AND RECOMMENDATION TO DENY DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND NONTAXABLE COSTS (ECF NO. 684)

February 7, 2022

I. INTRODUCTION

Defendants Brian Bowers and Dexter Kubota created an Employee Stock Ownership Plan ("the ESOP") to which they sold, for $40 million, all the shares in Bowers + Kubota Consulting, Inc. (the "Company").

The Government filed suit, alleging that Bowers and Kubota had violated the Employee Retirement Income Security Act of 1974 ("ERISA") by causing the ESOP to pay more for the Company than the Company's fair market value. The Company and the ESOP were joined under Rule 19(a) of the Federal Rules of Civil Procedure. During the bench trial before this judge and throughout the course of this litigation, the Company, the ESOP, Bowers, and Kubota (the "Remaining Defendants") acted in concert, presenting a joint defense even though they were separate Defendants.[1]

On September 17, 2021, this court issued its posttrial findings of fact and conclusions of law, determining that no ERISA violation had been established and ordering that judgment be entered in favor of the Remaining Defendants. *See* ECF No. 657.

On October 1, 2021, Bowers, Kubota, and the Company filed a Bill of Costs, seeking $78,341.39 in taxable costs. *See* ECF No. 660. It is the court's understanding that the Company paid all of the costs incurred in this case, even the costs billed to Bowers and Kubota's attorneys. Apparently, there is an agreement that the Company will pay such costs on behalf of Bowers and Kubota. *See*, *e.g.*, Joint Exhibits 44 and 53 (not received into evidence). Accordingly, even though most of the bills submitted along with the Bill of Costs were sent to the

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[1] The Government had earlier settled its claims against the estate of an attorney who was the ESOP trustee and his law firm. *See* ECF No. 507.

attorneys for Bowers and Kubota,[2] there is no dispute that the Company paid those bills.

On November 18, 2021, Magistrate Judge Wes Reber Porter issued his Findings and Recommendation to Grant in Part and Deny in Part Defendants' Bill of Costs ("F&R re Taxable Costs"), recommending that this court award the Company $72,962.95 in taxable costs. *See* ECF No. 682. On December 2, 2021, the Government filed objections to the F&R re Taxable Costs. *See* ECF No. 683. On *de novo* review, this court adopts the F&R re Taxable Costs in part and modifies it in part by reducing the award to $41,810.46 and awarding that amount of taxable costs to Bowers, Kubota, and the Company.

Bowers, Kubota, and the Company also sought an award of attorneys' fees and nontaxable costs. *See* ECF No. 669. On December 12, 2021, Magistrate Judge Porter issued his Findings and a Recommendation that that request be denied. *See* ECF No. 684 ("F&R re Attorneys' Fees and Nontaxable Costs"). Bowers, Kubota, and the Company objected. *See* ECF No. 688. On *de novo* review, this court agrees with and adopts the F&R re Attorneys' Fees and Nontaxable Costs, determining that the Government was substantially justified in bringing this action and that it did not proceed in bad faith. The court also determines that Bowers, Kubota, and the Company are not entitled to fees and costs under 29 U.S.C. § 1132(g)(1).

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[2] Nearly all of the receipts submitted to the court show that bills were invoiced to counsel for Bowers and Kubota, with the exceptions being six bills that were sent to counsel for the Company. These six were from HON Discovery Group in the amounts of $1,884.82, $1,884.82, $5,026.18, $2,513.09, and $1,570.68 and from Capital Reporting Company in the amount of $200.94. *See* ECF No. 661-3, PageID #s 23766 and 23781; ECF No. 661-4, PageID #s 23788 and 23796; and ECF No. 661-5, PageID #s 23801 and 23807.

II. STANDARD OF REVIEW.

A district judge reviews de novo those portions of a magistrate judge's findings and recommendation to which an objection is made and may accept, reject, or modify, in whole or in part, the findings and recommendation made by the magistrate judge. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); Local Rule 74.1; *Kealoha v. Totto*, 2017 WL 1839280, *2 (D. Haw. May 8, 2017); *Paco v. Meyers*, 2013 WL 6843057, *1 (D. Haw. Dec. 26, 2013). In other words, a district judge "review[s] the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered." *Freeman v. DirectTV, Inc.*, 457 F.3d 1001, 1005 (9th Cir. 2006). The district judge may accept those portions of the findings and recommendation that are not objected to if the district judge is satisfied that there is no clear error on the face of the record. *United States v. Bright*, 2009 WL 5064355, *3 (D. Haw. Dec. 23, 2009); *Stow v. Murashige*, 288 F. Supp. 2d 1122, 1127 (D. Haw. 2003).

III. ANALYSIS.

A. This Court Adopts the F&R re Taxable Costs in Part and Modifies it in Part by Reducing the Award to $41,810.46, and by Awarding Those Costs to Bowers, Kubota, and the Company.

The F&R re Taxable Costs recommended an award of taxable costs to the Company. The Government objects to this recommendation, arguing that the Company was not the prevailing party because no claim was asserted against it and that the amount of any award should have been reduced. According to the Government, only Bowers and Kubota would qualify as prevailing parties for purposes of 28 U.S.C. § 2412(a)(1). However, the Government argues that, even as prevailing parties, Bowers and Kubota are not entitled to the taxable costs that the Company, rather than Bowers and Kubota as individuals, paid under an indemnification agreement. The court disagrees with the Government's arguments with respect to entitlement to taxable costs, but agrees that the recommended taxable costs should be reduced.

Under Rule 54(d) of the Federal Rules of Civil Procedure, there is ordinarily a presumption that a prevailing party will be awarded taxable costs. Fed. R. Civ. P. 54(d) ("Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law."). While there is no such presumption under Rule 54(d) in cases involving the United States, the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(a)(1), provides for a discretionary award of taxable costs. *See Neal & Co. v. United States*, 121 F.3d 683, 687 (Fed. Cir. 1997) ("EAJA vests the trial court with considerable discretion to award costs. This discretion authorizes the trial court to consider a wide variety of factors, including the conduct of the parties during trial, in reaching its costs decision."). The "EAJA partially waives the sovereign immunity of the United States" for such taxable costs. *W. Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983, 985 (9th Under § 2412(a)(1), Cir. 2010).

Under § 2412(a)(1),

> a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the

> prevailing party for the costs incurred by such party in the litigation.

Under the plain language of the statute, this court may award costs to a prevailing party in a civil action brought by the Government if the costs are limited to "reimbursing . . . the prevailing party for the costs incurred by such party in the litigation."

1. Bowers, Kubota, and the Company are "Prevailing Parties."

The Supreme Court has noted that the term "prevailing party" is a "legal term of art" that means "a 'party in whose favor a judgment is rendered, regardless of the amount of damages awarded.'" *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 (2001) (quoting Black's Law Dictionary 1145 (7th ed. 1999)); *see* also *United States v. Milner*, 583 F.3d 1174, 1196 (9th Cir. 2009) ("To be a prevailing party, the party must have received an enforceable judgment on the merits or a court-ordered consent decree."); *Cadkin v. Loose*, 569 F.3d 1142, 1144–45 (9th Cir. 2009) ("prevailing party status turns on whether there has been a material alteration of the legal relationship of the parties" (quotation marks and citation omitted)).

The Government argues that the Company is not a "prevailing party" because the Government's Complaint asserted no claim against the Company in the Complaint. This court disagrees with the Government's contention that an express claim must have been asserted against a party for that party to be considered a "prevailing party."

On September 5, 2018, the Company sought dismissal of the Complaint with respect to it because it was "not a party to any of the direct claims alleged in the Complaint." ECF No. 26- 1, PageID # 307. It further argued that "the Complaint does not allege any acts or omissions giving rise to any liability against [it] and seeks no damages from [it].” *Id.* The Company contended that it was named as a Defendant only to assure that complete relief could be granted. *See id.*, PageID # 309.

The Government opposed dismissal, arguing that “any remedy that the Secretary seeks in this action will implicate the Company. For example, and as stated in the Complaint, the Secretary may seek to modify ESOP agreements and related documents to correct harm to the ESOP caused by other named Defendants.” ECF No. 30, PageID # 325. The Government said it might seek to restructure the Company and was seeking restoration of ESOP losses, to the extent the Company was responsible for the losses. *Id.*

On January 18, 2019, this court denied the Company’s motion to dismiss, agreeing that this court might be unable to accord complete relief in the Company’s absence. *See* ECF No. 47, PageID # 459. The court noted that the Complaint sought to have agreements through which the Company agreed to indemnify Bowers and Kubota declared void and to enjoin the agreements from causing or allowing the Company to indemnify Bowers and Kubota. The court noted that the Company’s presence was necessary if the ESOP’s governing documents had to be modified and the Company had to be restructured if the Government prevailed on its claims. *Id.*, PageID # 461.

Ultimately, this court ruled that Bowers and Kubota did not violate ERISA. *See* ECF No. 657, PageID # 23701. This, of course, meant that this court did not need to take any further action with respect to the Company, the ESOP, or its administration and plan documents. Under these circumstances, even though the Company did not prevail on an express claim asserted against it, this court considers the Company to be a “prevailing party,” as a judgment was entered in its favor that preserved the very status quo the Government was seeking to change. *See Buckhannon Bd. & Care Home*, 532 U.S. at 603

(2001); *Milner*, 583 F.3d at 1196; *Cadkin*, 569 F.3d at 1144–45.

This court also considers the Company to be a "prevailing party" because the Remaining Defendants jointly and in concert defended this action. Throughout this litigation, this court observed the Remaining Defendants coordinating their defense. It comes as no surprise that the Company paid for all costs incurred by itself, Bowers, and Kubota.

Even if the Company is not a prevailing party, there can be no doubt that Bowers and Kubota are prevailing parties, as they prevailed on the Government's ERISA claims. As discussed in more detail below, this court would award the same taxable costs to Bowers and Kubota, who presumably would repay the Company for the costs fronted by it. Of course, only a single award of taxable costs is awarded to Bowers, Kubota, and the Company.

2. Bowers, Kubota, and the Company Are Entitled to Be "Reimbursed" for the Taxable Costs They "Incurred" With Respect to This Action.

The Government argues that Bowers and Kubota may not be awarded taxable costs because they did not actually pay any of the costs. In other words, the Government contends that Bowers and Kubota did not "incur" any expenses for which they need to be "reimbursed." This argument ignores what actually happened in this case.

The EAJA does not define the terms "reimburse" or "incur." Accordingly, this court interprets those words using their ordinary meanings. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning" (internal quotation marks and citation omitted)); *Animal Legal Def. Fund v. United States Dep't of*

Agric., 933 F.3d 1088, 1093 (9th Cir. 2019) (same); accord *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012) ("Because the TVPA does not define the term 'individual,' we look first to the word's ordinary meaning."). The Ninth Circuit has explained that, in determining the ordinary meaning of a word, courts usually consult dictionary definitions. When the word has a plain meaning or is unambiguous, the statutory interpretation inquiry ends. *Animal Legal Def. Fund*, 933 F.3d at 1093.

The American Heritage Dictionary of the English Language defines "incur" as "[t]o become liable or subject to as a result of one's actions." https://www.ahdictionary.com/word/search.html?q=incur (last visited January 24, 2022). The Merriam-Webster dictionary similarly defines "incur" as "to become liable or subject to." https://www.merriam-webster.com/dictionary/incur (last visited January 24, 2022).

All but six of the charges included in the Bill of Costs had been sent by the billing entities to counsel for Bowers and Kubota. *See* ECF No. 661. It would therefore be difficult to say that Bowers and Kubota did not "incur" these bills, even if the Company ultimately paid them. David R. Johanson, counsel for Bowers and Kubota, states, "The Company paid all costs incurred by the Remaining Defendants, whether incurred directly by the Company or through Messrs. Bowers and Kubota." Decl. of David R. Johanson ¶ 4, ECF No. 661, PageID # 23748. While this court does not have before it the agreements between Bowers and Kubota and their attorneys, it appears that Bowers and Kubota would have been liable for these bills had the Company not paid them. Similarly, because the Remaining Defendants presented what amounted to a joint defense, and because the Company paid the bills sent to counsel for Bowers and Kubota, this court also rules that, along with Bowers and Kubota, the Company also "incurred" those expenses.

Even with respect to the six bills sent to counsel for the Company rather than to counsel for Bowers and Kubota, this court rules that Bowers and Kubota "incurred" those expenses along with the Company to whose counsel the bills were sent. Bowers and Kubota would have "incurred" those expenses had the Company not been billed for them. The Remaining Defendants coordinated their defense, acting jointly, making it clear that the six bills sent directly to the Company were also "incurred" by Bowers and Kubota. Sending the bills to the Company's counsel was an act of convenience, rather than a restriction on who "incurred" those bills.

The more interesting issue is whether Bowers and Kubota should be "reimbursed" for taxable costs that they incurred but that the Company paid under an indemnification agreement. The American Heritage Dictionary of the English Language defines "reimburse" as "[t]o repay (money spent); refund" or "[t]o pay back or compensate (another party) for money spent or losses incurred." https://www.ahdictionary.com/word/search.html?q=reimburse (last visited February 7, 2022). The Merriam-Webster dictionary similarly defines "reimburse" as "to pay back to someone" or "to make restoration or payment of an equivalent to." https://www.merriam-webster.com/dictionary/reimburse (last visited February 7, 2022).

Bowers and Kubota are entitled to "reimbursement" by the Government of the taxable expenses they "incurred," even if those expenses were paid for by the Company under an indemnification agreement. Such a "reimbursement" effectively compensates Bowers, Kubota, and the Company, assuming that Bowers and Kubota would turn around and repay the Company for any taxable expenses it fronted. In other words, a "reimbursement" would "pay back" Bowers and Kubota for the expenses caused by the Government's Complaint--expenses that they would have had to pay themselves had the Company not fronted the expenses on their behalf.

This court rejects the Government's argument that this court's analysis would result in a windfall to its opponents. To the contrary, construing the Government's waiver of sovereign immunity as barring the taxation of costs to the Remaining Defendants as a group would result in a windfall to the Government.

Imagine a case in which the Government sues a minor who ultimately wins the case. Assuming that the minor's parents paid the taxable costs of the case, the Government's position would bar the minor's parents from ultimately recovering the taxable costs through an award of costs to the minor. If the Government lost the very same case to an adult, the adult would be entitled to a discretionary award of taxable costs. It makes no sense to treat the minor differently simply because the minor did not write the check for the expenses.

The Ninth Circuit faced a similar issue in the context of a party whose costs were paid for by an insurer. In that case, the Ninth Circuit held that a company whose costs were paid for by an insurer was nevertheless entitled to seek the costs under Rule 54(d) of the Federal Rules of Civil Procedure. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 633 F.3d 1218, 1219–1220 (9th Cir. 2011), *rev'd on other grounds*, 566 U.S. 560 (2012); *see also Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1991) (holding that a city may recover costs even though the costs were paid for by an insurance company); 10 *Moore's Fed. Practice* – Civil § 54.101[a] (Lexis 2022) (stating that, under Rule 54(d), a prevailing party is entitled to costs "even if the costs were actually paid by some third party, such as an insurer, and not by the prevailing litigant").

3. This Court Declines to Award Taxable Costs Associated With the Statute of Limitations Defense To the Extent Those Costs Were Incurred After This Court's Order Denying Defendants' Motion for Summary Judgment on Limitation Grounds ($28,932.77).

On January 15, 2021, Bowers and Kubota filed a motion seeking summary judgment on the Government's ERISA claims on statute of limitations as well as other grounds, arguing in relevant part that the claims were time-barred, either because IRS Form 5500 had given the Government actual knowledge of the facts underlying the sale of stock to the ESOP, or because the Government had been willfully blind to those facts. *See* ECF Nos. 359 and 360. The Company joined in the motion. *See* ECF No. 362.

On March 12, 2021, this court denied that motion, ruling in relevant part that questions of fact precluded summary judgment on the limitations issues. *See* ECF No. 412, PageID #s 9158-63. With respect to the actual knowledge argument, this court ruled:

> Bowers and Kubota argue that the Government gained actual knowledge of the alleged violations from Form 5500 (the Annual Return/Report of Employee Benefit Plan) filed with the Internal Revenue Service and submitted to the Department of Labor via EFAST2 on October 15, 2013. However, *Sulyma* states that "§ 1113(2) requires more than evidence of disclosure alone." 140 S. Ct. at 777. Jerome Raguero of the Department of Labor explains that EFAST2 is an automated system in which officials do not automatically read submissions upon receipt. 30(b)(6) Depo. of Jerome Raguero, ECF No. 363-1, PageID # 6783. This raises a question of fact as to whether the Government had actual

> knowledge of the contents of Form 5500 or whether the EFAST2 submission amounted to only a disclosure.
>
> Additionally, the court notes that Form 5500 shows only a possible decrease in the value of the Company stock, rather than establishing on its own an actual ERISA violation in the form of a sale of stock for more than fair market value. At the hearing, Bowers and Kubota explained that what appears to be a decrease in the value of the Company stock was actually an accounting of the debt related to the loan taken out to purchase the stock. Whatever the explanation, this court cannot conclude that Form 5500, without more, provides actual notice of a possible ERISA violation. Bowers and Kubota fail to show on the present record that the Government had actual knowledge of the alleged ERISA violations in this case from the Form 5500 submitted via the EFAST2 system.

ECF No. 412, PageID #s 9160-61.

The Remaining Defendants fail to show that, given this court's summary judgment ruling, depositions of Government officials were necessary to allow the Remaining Defendants to explore whether the Government could be said to have had actual knowledge. None of the Government officials deposed after this court's order testified differently with respect to actual knowledge. While this court understands that the Remaining Defendants may have been uncertain what the deponents would say, the depositions appear to have been a fishing expedition with respect to establishing actual knowledge.

In addressing the willful blindness argument, this court ruled:

A question of fact similarly precludes summary judgment with respect to Bowers and Kubota's argument that the Government's alleged willful blindness counts as actual knowledge of the alleged ERISA violations. Bowers and Kubota argue that the Government willfully ignored Saakvitne's conduct, having received a tip in July 2014 that Saakvitne may have done something improper with respect to the Hot Dog on a Stick ESOP. *See* Depo. of Robert Prunty, ECF No. 363-5, PageID #s 6898- 6900, 6906; Depo. of Crisanta Johnson, ECF No. 363-3, PageID # 6850. Bowers and Kubota also argue willful blindness based on the Kennedy Fabricating investigation, which began in November 2013, and led to a November 2015 investigation into Saakvitne. *See* Depo. of Harold W. LeBrocq, III, ECF No. 363-6, PageID # 6937; ECF No. 364-3, PageID # 7230. Citing Miguel Paredes, a former Department of Labor supervisory investigator, Bowers and Kubota argue that the Government should have investigated Saakvitne's conduct in other cases, including this one. Paredes testified, "I would expect that if an investigator has uncovered what they think is a fiduciary breach by a fiduciary, they would want to know whether or not that fiduciary is a fiduciary of other plans because they would be concerned that this provider is breaching a fiduciary duty in other--in other--in the provision of services to other plans." Depo. of Miguel Paredes, ECF No. 363-4, PageID # 6889. What an investigator might want to know about other ESOPs is not actual knowledge for purposes of § 1113(2).

There are questions of fact as to whether the Hot Dog on a Stick and Kennedy Fabricating investigations show willful blindness on the Government's part. Raguero of the Department of Labor testified that, although an investigator may inquire about other ESOPs that a particular service provider may be involved with, Department of Labor investigators do not generally make such inquiries. *See* Depo. of Jerome Raguero, ECF No. 363-1, PageID # 6800; *see also* Johnson Depo., ECF No. 363-3, PageID #s 6840- 41; Prunty Depo., ECF No. 363-5, PageID #s 6895, 6908. For example, with respect to the Kennedy Fabricating investigation, LeBrocq testified that, when he was investigating the Kennedy Fabricating ESOP, he did not ask Saakvitne about other ESOPs Saakvitne was involved with. *See* LeBrocq Depo., ECF No. 363-6, PageID # 6933. Similarly, Wen testified that, when he was investigating the ESOP at issue in this case, he did not ask Saakvitne about other ESOPs Saakvitne was involved with. Wen explained that he focused only on the ESOP transaction he was working on. *See* Wen Depo., ECF No. 363-2, PageID #s 6824-25.

On this motion, Bowers and Kubota fail to establish that other investigations were red flags to which the Government was willfully blind. It might be that it would have been a good practice for individuals to have considered Saakvitne's involvement with other ESOPs, but willful blindness requires more than a failure to do what is best. At a minimum, there is a question of fact as to whether the Government investigators were deliberately ignoring those alleged red flags or were instead reasonably focusing on the

> potential ERISA violations they were investigating.

Id., PageID #s 9161-63.

Nor do the Remaining Defendants show that depositions of Government officials were necessary after this court's order with respect to willful blindness. The Remaining Defendants should have known that the Government's investigation of Saakvitne with respect to other companies would not necessarily cause the Government to examine all of the ESOPs Saakvitne was involved with. In short, the Remaining Defendants submitted no testimony from those depositions that tended to show willful blindness. Nothing established that Government officials were deliberately ignoring red flags that should have caused them to earlier examine the sale of the Company to the ESOP. At best, the evidence established that it might have been good practice to examine ESOPs Saakvitne had been involved with, but examinations of those ESOPs were certainly not required. Absent such a requirement, the depositions of Government officials were unnecessary, as they could not reasonably have been expected to establish facts demonstrating willful blindness.

"[T]here is no rule requiring courts to apportion costs according to the relative success of the parties." *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1348 (Fed. Cir. 2006). However, 10 *Moore's Federal Practice* - Civil § 54.101 (Lexis 2022) notes that costs may be limited if they "were unreasonably incurred or unnecessary to the case." This court exercises its discretion, declining to award taxable costs with respect to the depositions taken solely to establish the Remaining Defendants' statute of limitation defense. These depositions were unnecessary and unreasonably increased the cost of this litigation. *See Pierce v. Cty. of Orange*, 905 F. Supp. 2d 1017, 1049 (C.D. Cal. 2012) ("the Court may reduce an award of taxable costs [under Rule

54(d)(1)] to reflect only partial success"); *Federal Practice & Procedure*, § 2667 (West 2022) (noting that courts have discretion to reduce awards of cost under Rule 54(d) to reflect partial success).

The Government represents that the depositions of nine Government officials were limited to the statute of limitations defense. *See* ECF No. 683, PageID # 24133. These include the following:

Last Name of Deponent and Citation	**Invoice Date**	**Bill From**	**$ Amount**
Fukumoto, ECF No. 661-3, PageID # 23768	9/28/20	Ralph Rosenberg	1,729.26
Hanzich, ECF No. 661-4, PageID # 23791	12/2/20	Ralph Rosenberg	1,991.31
Johnson, ECF No. 661-3, PageID # 23783	11/7/20	Ralph Rosenberg	2,651.52
LeBroq, ECF No. 661-3, PageID # 23784	11/7/20	Ralph Rosenberg	1,652.46
Palacios, ECF No. 661-3, PageID # 23782	11/7/20	Ralph Rosenberg	1,899.42
Palacios (Vol. 2) and Johnson (Vol. 2), ECF No. 661-4, PageID # 23790	12/1/20	Ralph Rosenberg	1,832.88

Paredes, ECF No. 661-3, PageID # 23767	9/26/20	Ralph Rosenberg	1,856.39
Paredes (Vol. 2), ECF No. 23795	12/23/20	Ralph Rosenberg	834.55
Prunty (Vol. 2), ECF No. 661-4, PageID # 23793	12/11/20	Ralph Rosenberg	550.05
Prunty, ECF No. 661-3, PageID # 23769	9/29/20	Ralph Rosenberg	2,086.99
Raguero, ECF No. 661-4, PageID # 23794	12/14/20	Ralph Rosenberg	2,271.94
Zielinski, ECF No. 661-4, PageID # 23789	11/21/20	Ralph Rosenberg	2,036.75
Johnson, Palacios, LeBroq (Video), ECF No. 661-3, PageID # 23781	11/1/2020	HON Discovery Group	1,884.82
Paredes, Fukumoto, and Prunty (Video), ECF No. 661-3, PageID # 23766	9/22/2020	HON Discovery Group	1,884.80

Zielinski, Hanzich, Johnson, Palacios, Prunty, Ragero, Paredes (Video), ECF No. 661-4, PageID # 23796; Court not deducting for Wen or Hansen ($5,026.18 - $1,256.55 = $3,769.63)	12/23/2020	HON Discovery Group	3,769.63
Total			28,932.77

The court declines to award $28,932.77 in costs for the depositions of these Government officials that went solely to the Remaining Defendants' statute of limitations defense.[3]

4. The Court Adopts the F&R re Costs' Recommendation to Decline to Award Costs for Michael Wen's Deposition Due to Misconduct.

The F&R re Costs recommended that this court decline to award taxable costs with respect to the Deposition of Michael Wen because of counsel's alleged misconduct at that deposition. *See* ECF No. 682, PageID # 24110. No objection has been made to that recommendation. Accordingly, this court adopts it, no clear error being apparent from the record. This court declines to

[3] The Government says the cost of the depositions pertaining to the statute of limitations was $29,403.91. *See* ECF No. 683, PageID # 24132. This court's calculation of those deposition costs differs from that amount by $471.14.

award the $2,789.95 requested for Wen's deposition. *See* ECF No. 661-3, PageID # 2,789.95.

5. The Court Awards as Taxable Costs Expenses Incurred for Both Video and Stenographic Depositions, But Declines to Award Expenses With Respect to Synchronizing Those Depositions.

This court's local rules allow taxable costs with respect to "a stenographic **and**/or video original and one copy of any deposition transcript necessarily obtained for use in the case." Local Rule 54.1(f)(2) (emphasis added). Given the express allowance in this court's local rules for an award of taxable costs for both stenographic and video deposition expenses, this court rejects the Government's argument that costs for only one format should be allowed, not both.

The court also allows taxable expenses associated with real-time and daily transcripts during trial, as those were reasonably necessary for trial counsel to effectively litigate this case given travel restrictions and other difficulties caused by the pandemic. The court remembers such transcripts being provided to expert witnesses prior to their testimony via Zoom. These experts were then able to comment about fact witnesses' statements and other expert testimony, as well as assist trial counsel with the presentation of evidence. Given the difficulty of trying this case during the height of the COVID-19 pandemic, this court finds the cases cited by the Government distinguishable.

The court declines to award as taxable costs expenses associated with synchronizing the stenographic and video depositions. Synchronizing stenographic and video depositions was not necessary for litigating matters before this court. Accordingly, this court does not award $2,513.09 for the invoice from HON Discovery Group dated February 1, 2021, which states that it is for synchronizing 16 deposition transcripts. *See* ECF No. 661-3, PageID # 23801. Nor does this court award $314.14 ($300 plus GET of $14.14) for the synchronizing of the Mark Johnson and Steven Sherman depositions. *See* ECF No. 661-5, PageID # 23807. The total not awarded for deposition synchronization is $2,827.23 ($2,513.09 + $314.14).[4]

6. The Court Awards $3,347.65 for Taxable Copying Costs.

Local Rule 54.1(f)(4) provides that the court may award taxable costs of copies necessarily obtained for use in the case at $0.15 per page or the actual cost charged by commercial copiers, provided the charges are reasonable. Counsel submitted a declaration indicating copying charges at $0.15 per page for three print jobs in June 2021. The court awards these costs, which total $3,347.65 ($752.40 + $2,972.10 + $1,623.15).

7. Other Taxable Costs.

The court awards $151.89 for costs relating to the service of summonses and subpoenas. The court also awards $80 for witness fees.

The Bill of Costs also seeks reimbursement of four receipts from Staples for commercial copying costs. The court awards those costs minus the express pick-up fees charged because Bowers, Kubota, and the Company fail to demonstrate that the express fees were necessary. The court declines to award costs for duplicate receipts that appear to have been submitted by mistake.

To be specific, the court refers to the request by Bowers, Kubota, and the Company for an award of taxable costs for a Staples receipt dated October 21, 2020, in the amount of $115.94. *See* ECF No. 661-6, PageID #s

[4] The Government says the cost of deposition synchronization was $3,113.09. *See* ECF No. 683, PageID # 24138 n.5. This differs from this court's calculation by $285.86.

23815-16. With respect to that receipt, the court disallows the express pick-up charge of $24.27, plus pro-rated tax of $2.49.[5] The court allows copying costs of $80.89, plus pro-rated tax of $8.29, for a total of $89.18. With respect to duplicate receipts, Bowers, Kubota, and the Company have submitted identical Staples receipts dated October 21, 2020, in the amount of $115.94. *See* ECF No. 661-6, PageID #s 23815-16 and 23817-18. Duplicate costs are disallowed. It may well be that Bowers, Kubota, and the Company intended to attach a receipt for $44.92, as listed in ECF No. 661, PageID # 23755. However, the court will not tax costs for commercial copying when the wrong receipt is submitted to the court.

Bowers, Kubota, and the Company seek an award of taxable costs for a Staples receipt dated October 22, 2020, for $80.56. *See* ECF No. 661-6, PageID #s 23819-20. With respect to this receipt, the court disallows the express pick-up charge of $16.86, plus pro-rated tax of $1.73. The court allows copying costs of $56.21, plus pro-rated tax of $5.76, for a total of $61.97.

Bowers, Kubota, and the Company seek an award of taxable costs for a Staples receipt dated November 4, 2020, in the amount of $176.83. *See* ECF No. 661-6, PageID #s 23821. The court disallows the express pick-up charge of $36.85, plus pro- rated tax of $3.78. The court allows copying costs of $122.83, plus pro-rated tax of $12.59, for a total of $135.42.

Bowers, Kubota, and the Company seek an award of taxable costs for a Staples receipt dated June 6, 2021, in the amount of $22.04. *See* ECF No. 661-6, PageID # 23822. The court does not award copying costs for this

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[5] All of the receipts from Staples submitted in connection with the Bill of Costs reflect taxes paid at a California location. These taxes are higher than what would have been incurred had the underlying services been performed in Hawaii.

receipt. The receipt states that it is for "HAMMERMILL COPYPLU," which may be a reference to printer paper, rather than copying costs. Bowers, Kubota, and the Company have not provided sufficient detail with respect to this receipt for this court to include it in copying costs.

8. The Court Awards the Following Taxable Costs.

Description	Citation	Date	$ Amount
ACE Attorney Service, Inc. for Subpoena Duces Tecum on Steven Rosebaugh	ECF No. 661 ¶ 6, PageID # 23749; ECF No. 661-2, PageID # 23764	July 7, 2020	151.89
Paul Vallone Deposition	ECF No. 661-3, PageID # 23770	October 7, 2020	876.05
Gary Kuba Deposition	ECF No. 661-3, PageID # 23771	October 12, 2020	1,172.88
Dexter Kubota Deposition	ECF No. 661-3, PageID # 23772	October 14, 2020	1,375.81
Dawn Muragame Deposition	ECF No. 661-3, PageID # 23773	October 14, 2020	815.81
Thomas Nishihara Deposition	ECF No. 661-3, PageID # 23774	October 15, 2020	694.24

Motion to Dismiss Transcript	ECF No. 661-3, PageID #s 23775-76	January 22, 2019	220.26
Brian Bowers Deposition (R. 30(b)(6))	ECF No. 661-3, PageID # 23778	October 22, 2020	1,042.09
Brian Bowers Deposition	ECF No. 661-3, PageID # 23779	October 22, 2020	1,093.30
Marcus Piquet Deposition	ECF No. 661-3, PageID # 23780	October 22, 2020	1,716.10
Gregory Kniesel Deposition	ECF No. 661-3, PageID # 23786	November 13, 2020	2,444.70
Gregory Kniesel Deposition	ECF No. 661-4, PageID # 23788	November 13, 2020	200.94
Greg Hansen Deposition	ECF No. 661-4, PageID # 23792	December 7, 2020	1,239.84
Michael Wen and Gregory Hansen Video Deposition	ECF No. 661-4, PageID # 23796	December 23, 2020	1,256.55
Ian Rusk Deposition	ECF No. 661-4, PageID # 23797	January 12, 2021	1,626.62

2d Greg Hansen Deposition	ECF No. 661-4, PageID # 23798	January 14, 2021	622.41
2d Marcus Piquet Deposition	ECF No. 661-4, PageID # 23799	January 22, 2021	464.45
Gregory Brown Deposition	ECF No. 661-5, PageID #s 23802-03	January 26, 2021	2,686.30
Summary Judgment Hearing Transcript	ECF No. 661-5, PageID # 23804	March 4, 2021	294.55
Steven Sherman Deposition	ECF No. 661-5, PageID # 23805	March 5, 2021	2,098.27
Mark Johnson Deposition	ECF No. 661-5, PageID # 23806	March 8, 2021	2,243.56
Steven Sherman and Mark Johnson Video Deposition	ECF No. 661-5, PageID # 23807	March 15, 2021	1,256.54
Kenneth Pia Deposition	ECF No. 661-5, PageID # 23808	March 26, 2021	1,465.85
Pretrial Conference and Motion in	ECF No. 661-5, PageID # 23809	May 25, 2021	485.08

Limine Transcript			
Daily Trial Transcripts	ECF No. 661-5, PageID # 23811	June 14, 2021	17,172.77
Partial Reimbursement for Daily Trial Transcripts	ECF No. 661-5, PageID # 23812	June 28, 2021	-6,772.51
Taxable Copying Costs	*See* above discussion		3,347.65
Subpoena	*See* above discussion		151.89
Witness Fees	*See* above discussion		80.00
Staples	ECF No. 661-6, PageID #s 23815-16	October 21, 2020	89.18
Staples	ECF No. 661-6, PageID #s 23819-20	October 22, 2020	61.97
Staples	ECF No. 661-6, PageID # 23821	November 4, 2020	135.42
Total			41,810.46

These taxable costs represent only a fraction of the monetary value at issue at trial. The court expressly finds these costs to have been reasonable, necessary, and sufficiently supported by documentation. The court exercises its discretion under the circumstances presented here and awards taxable costs of $41,810.46 to Bowers, Kubota, and the Company.

B. The Court Adopts the F&R re Attorneys' Fees and Nontaxable Costs.

Bowers, Kubota, and the Company sought an award of attorneys' fees and nontaxable costs under two sections of the EAJA, 28 U.S.C. §§ 2412(b) and (d). *See* ECF No. 669. On December 8, 2021, Magistrate Judge Porter issued his F&R re Attorneys' Fees and Nontaxable Costs, recommending that this court deny the request for attorneys' fees and nontaxable costs. *See* ECF No. 684.

On December 29, 2021, Bowers, Kubota, and the Company objected. *See* ECF No. 688.

On *de novo* review, this court agrees with and adopts the thorough and well-reasoned F&R re Attorneys' Fees and Nontaxable Costs.

1. Bowers, Kubota, and the Company Are Not Entitled to Fees and Costs Under 28 U.S.C. § 2412(d).

Because the Government was substantially justified in bringing this action, Bowers, Kubota, and the Company are not entitled to fees and nontaxable costs under 28 U.S.C. § 2412(d), which provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

This court determines based on the evidence submitted at trial that the Government was substantially justified in bringing this action. As discussed in detail in this court's Posttrial Findings of Fact and Conclusions of Law, ECF No. 657, which the court does not rehash here, the Government had every right to be suspicious of the circumstances surrounding the sale of the Company to the ESOP. While the Government ultimately failed to meet its burden of proving any of its claims by a preponderance of the evidence, it was nevertheless substantially justified in bringing those claims. Accordingly, as discussed in the F&R re Attorneys' Fees and Costs, Bowers, Kubota, and the Company are not entitled to fees or nontaxable expenses § 2412(d)(1)(A).

2. Bowers, Kubota, and the Company Are Not Entitled to Fees and Costs Under 28 U.S.C. § 2412(b).

Bowers, Kubota, and the Company also seek fees and costs under 28 U.S.C. § 2412(b), which states:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Bowers, Kubota, and the Company rely on common law and 29 U.S.C. § 1132(g)(1) (section 502(g)(1) of

ERISA), in arguing entitlement to fees and costs. Neither justifies an award of fees and costs in this case.

3. The Government Did Not Proceed in Bad Faith.

Under the EAJA, "[t]he common law allows a court to assess attorney's fees against a losing party that has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008) (quotation marks and citation omitted). As noted above, the Government was substantially justified in bringing this action. Additionally, Bowers, Kubota, and the Company have not shown that the Government proceeded in bad faith after filing the Complaint. Accordingly, Bowers, Kubota, and the Company are not entitled to fees or costs based on bad faith conduct.

4. Bowers, Kubota, and the Company Are Not Entitled to Fees and Costs Under 29 U.S.C. § 1132(g)(1).

Bowers, Kubota, and the Company contend that they are entitled to fees and nontaxable costs under 29 U.S.C. § 1132(g)(1), which states, "[i]n any action under this subchapter (other than an action described in paragraph (2) [pertaining to actions by a fiduciary on behalf of a plan]) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." However, as Magistrate Judge Porter determined, this action was not brought by Bowers, Kubota, or the Company. Accordingly, 29 U.S.C. § 1132(g)(1) does not support a discretionary award of fees and costs in this case, which was brought by the Government. *See Corder v. Howard Johnson & Co.*, 53 F.3d 225, 229 (9th Cir. 1994) ("we have refused to award attorney's fees in ERISA actions not brought by one of the enumerated parties" in § 1132(g)(1)--"participant, beneficiary, or fiduciary"). Bowers, Kubota, and the Company did not object to this portion of the F&R re Attorneys'

Fees and Costs, and the court adopts this part of it, in which no clear error is apparent from the record.

IV. CONCLUSION.

The court adopts in part and modifies in part the F&R re Taxable Costs, awarding $41,810.46 in taxable costs to Bowers, Kubota, and the Company.

The court adopts the F&R re Attorneys' Fees and Costs and denies the request for such fees and costs by Bowers, Kubota, and the Company.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 7, 2022.

/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge