UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA

THOMAS E. PEREZ, **UNITED STATES SECRETARY OF LABOR,** **Plaintiff,** **v.** **BAT MASONRY COMPANY, INC., WAYNE BOOTH, GREGORY BOOTH, MELVIN HINTON, JOHN ROSSER, JAMES JOYNER, WAYNE BOOTH REVOCABLE TRUST, BAT MASONRY COMPANY, INC. EMPLOYEE STOCK OWNERSHIP PLAN & TRUST, WAYNE B. BOOTH INVESTMENTS, LLC, BST ENTERPRISES, LLC, M.H. MASONRY & ASSOCIATES, INC., SHELDRICK, MCGEHEE & KOHLER LLC,** **Defendants.**	)	**CASE No.:** **ERISA, 29 U.S.C. § 1001 et seq.**

COMPLAINT

Plaintiff Thomas E. Perez, United States Secretary of Labor (the "Secretary"), alleges the following:

JURISDICTION AND VENUE

1. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., and is brought by the Secretary under ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate relief for breaches of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109, and to obtain such other further relief as may be appropriate to redress violations and enforce the provisions of Title I of ERISA.

2. This Court has subject matter jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

3. Venue with respect to this action lies in the Western District of Virginia, pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the plan at issue in this action was administered in this district, several defendants reside in this district, and several fiduciary defendants breached their duties to the plan in this district

PARTIES

4. The Secretary is charged with enforcing the provisions of Title I of ERISA. ERISA §§ 502(a)(2) and (5), 29 U.S.C. §§ 1132(a)(2) and (5), vest the Secretary with the authority to bring actions to obtain remedies to redress violations of ERISA and enforce the provisions of Title I of ERISA by, among other means, filing civil actions, and prosecuting claims against persons who violate ERISA.

5. The BAT Masonry Company, Inc. Employee Stock Ownership Plan & Trust ("ESOP" or "Plan") is a pension plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and is named as a defendant in this action for the purpose of ensuring complete relief among the parties under Rule 19 of the Federal Rules of Civil Procedure.

6. The ESOP was sponsored by BAT Masonry Company, Inc. ("BAT" or "Company"), a Virginia corporation engaged in masonry and construction work with its principal place of business in Lynchburg, Virginia. BAT is also the named Plan Administrator of the ESOP. Therefore, BAT is a party in interest with respect to the Plan pursuant to ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C), and a fiduciary pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1)

7. Defendant Wayne Booth, a resident of Lynchburg, Virginia, is named as a trustee of the Plan and was the President of BAT. Therefore, he is a fiduciary with respect to the ESOP pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a party in interest pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H).

8. Defendant Gregory Booth, a resident of Forest, Virginia, is also named as a trustee of the Plan and was a Vice President of BAT. Therefore, he is a fiduciary with respect to the Plan pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a party in interest pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H).

9. Defendant Melvin Hinton, a resident of Forest, Virginia, is also a named trustee of the Plan and was a Vice President of BAT. Therefore, he is a fiduciary with respect to the Plan pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a party in interest pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H).

10. Defendant John Rosser, a resident of Rustburg, Virginia, was a member of BAT's Board of Directors and Secretary/Treasurer and Controller of the Company. He also acted as the ESOP's plan administrator during his tenure at BAT by exercising discretionary authority or control over plan management or administration. Therefore, he was a fiduciary with respect to the Plan pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a party in interest pursuant to ERISA §§ 3(14)(A) and (H), 29 U.S.C. §§ 1002(14)(A) and (H) .

11. Wayne Booth, Gregory Booth, Melvin Hinton, and John Rosser appointed James Joyner as the Special Independent Trustee for the ESOP transaction in which the Plan purchased all of the stock of BAT. By appointing Joyner as a ESOP fiduciary, Wayne Booth, Gregory Booth, Melvin Hinton, and John Rosser exercised discretionary authority or discretionary control

respecting management or administration of the Plan and therefore are fiduciaries to the Plan pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

12. Defendant James Joyner was appointed the Special Independent Trustee of the Plan in July 2010 for the purpose of assessing the fairness of a proposed purchase by the Plan of BAT shares. The Plan thereafter purchased those shares based on Joyner's assessment and approval of the transaction. Therefore, Joyner was a fiduciary with respect to the Plan pursuant to ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), because he exercised authority or control respecting management or disposition of the ESOP's assets and exercised discretionary authority or control respecting the management of the Plan.

13. BAT, Wayne Booth, Gregory Booth, Hinton, and Rosser executed a resolution approving, confirming, and ratifying the ESOP's July 2010 purchase of BAT shares at the proposed price. BAT, Wayne Booth, Gregory Booth, Hinton, and Rosser, therefore, were fiduciaries with respect to the ESOP pursuant to ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), because they exercised authority or control respecting management or disposition of the ESOP's assets or exercised discretionary authority or control respecting the management of the Plan.

14. M.H. Masonry & Associates, Inc. ("MH Masonry"), is a Virginia corporation with its principal place of business in Lynchburg, Virginia. MH Masonry is owned by Melvin Hinton and Gregory Booth, and is the continuation or successor of BAT. MH Masonry is a party in interest pursuant to ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G), because 50 percent or more of the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of MH Masonry is owned directly or indirectly by Melvin Hinton and Gregory Booth, who are themselves fiduciaries and parties in interest pursuant to ERISA

§ 3(14)(A), 29 U.S.C. § 1002(14)(A). MH Masonry is also a party in interest pursuant to ERISA § 3(14)(C), 29 U.S.C. § 1002(14)(C), because it employs employees covered by the ESOP.

15. On information and belief, BST Enterprises, LLC ("BST"), is a party in interest pursuant to ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G), because 50 percent or more of the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of BST Enterprises, LLC, is owned directly or indirectly by Wayne Booth, who is himself a fiduciary and a party in interest pursuant to ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

16. Wayne B. Booth Investments, LLC ("WB Investments"), is a party in interest pursuant to ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G), because 50 percent or more of the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of Wayne B. Booth Investments, LLC, is owned directly or indirectly by Wayne Booth, who is himself a party in interest pursuant to ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A).

17. On information and belief, Wayne B. Booth Revocable Trust ("WB Trust") is a party in interest pursuant to ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G), because 50 percent or more of WB Trust's beneficial interest was owned directly or indirectly by Wayne Booth, who is himself a party in interest pursuant to ERISA § 3(14)(A), 29 U.S.C. § 1002(14)(A). Through July 20, 2010, Wayne Booth, either personally or through WB Trust, was at all times the sole owner of BAT Masonry. Upon information and belief, Wayne Booth was the trustee of the WB Trust and exercised full control over the assets in the WB Trust.

18. Sheldrick, McGehee & Kohler LLC ("SMK") is a party in interest pursuant to ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B), because it provided valuation services to the ESOP.

FACTUAL ALLEGATIONS

The ESOP Transaction

19. BAT established the ESOP effective May 1, 2009, through a December 23, 2009 adoption agreement. According to the Plan document, the ESOP trustees are Wayne Booth, Gregory Booth, and Hinton, and the Company was the Plan Administrator. As stated in the Plan documents, the purpose of the ESOP was to enable Participants to acquire a proprietary interest in the Employer and to develop in its Employees an increased interest in the Employer's successful operation.

20. On July 22, 2010, BAT's Board of Directors (Wayne Booth, Greg Booth, Hinton, and Rosser) confirmed, ratified, and approved the ESOP's purchase of the Company from the WB Trust for $13,499,920.57 ("Board Resolution"). In accordance with the Board Resolution, the ESOP purchased 123,000 shares of BAT stock from the WB Trust on July 22, 2010.

21. In accordance with the Board Resolution, the WB Trust received from the ESOP $1,599,971.52 in cash and two promissory notes totaling $11,899,848.05. The WB Trust then transferred the $1,599,971.52 in cash it had received from the ESOP to BAT and assigned one of the two promissory notes (valued at approximately $5.8 million) it had received from the ESOP to BAT ("ESOP Transaction.")

22. Prior to the ESOP Transaction, Wayne Booth owed BAT $7,360,157. Of this liability amount, approximately $5.8 million was incurred prior to December 31, 2009, reflected in a promissory note made by Wayne Booth promising to pay BAT ("Wayne Booth $5.8 million Note"). The remaining approximately $1.5 million in liability arose from draws that Wayne Booth made against the Company's bank account between January 1 and July 22, 2010.

23. By orchestrating and executing the ESOP Transaction, BAT, Wayne Booth, Gregory Booth, Rosser, Hinton, and James Joyner ensured that (a) Wayne Booth's $7,360,157 debt to BAT was extinguished; (b) the ESOP would owe approximately $6.1 million to the WB Trust in the form of a promissory note made by the ESOP (the "WB Trust ESOP Note"); and, (c) the ESOP would owe approximately $5.8 million to BAT. All parties to the Board Resolution, including Wayne Booth, Gregory Booth, Hinton, and Rosser, as well as all parties that reviewed the Board Resolution, had actual knowledge that Wayne Booth's $7.36 million debt to the Company would no longer exist at the close of the ESOP Transaction.

24. As part of the ESOP Transaction, the resulting ESOP notes, including the WB Trust ESOP Note, were to be repaid through employer contributions to the Plan, BAT's shares were to be held by the WB Trust as collateral for the loan, and Wayne Booth was required to release the collateralized shares to the Plan in conjunction with the ESOP's loan repayments.

SMK's Valuation

25. Before the ESOP Transaction, BAT contracted with Sheldrick, McGehee & Kohler LLC in February of 2010 to conduct a valuation of the Company as of December 31, 2009.

26. In its resulting report, SMK valued the Company at $15,936,880, or $129.56 per share, as of December 31, 2009.

27. More than six months from the date of the SMK's valuation, on July 22, 2010, the date of the ESOP Transaction, SMK issued a letter opining that the final proposed price of $13,499,920.57, or $109.76 per share, was fair. SMK's revised opinion was purportedly based on financial statements for the five months ending May 31, 2010. SMK did not produce a

complete new report or provide any detail supporting its July 22, 2010 valuation update outside of the July 22, 2010 letter.

28. SMK's valuation as of December 31, 2009, contained errors and reached a value far in excess of fair market value. In particular, SMK: (1) failed to account for the deteriorating fundamentals of the business that were evident in early 2009 and after; (2) focused too heavily on net earnings and net income, rather than cash flows, thus ignoring the effect of serious fluctuations in the Company's cash flows on its value; (3) made inappropriate adjustments to the "representative earnings base"; (4) treated the cumulative amount of withdrawals by Wayne Booth from the Company's bank account over the years as a viable "officer note receivable" that would provide prospective value to the Company; (5) did not account for non-operating debt; (6) made inappropriate adjustments for non-operating assets by including assets that either did not belong to the Company or provided no value to the Company after the ESOP Transaction; and (7) failed to identify accounting abnormalities in the Company's financial statements.

Deteriorating Business Fundamentals

29. The SMK valuation failed to account for the deteriorating fundamentals of the Company apparent in 2009. Beginning in 2009, the Company backlog, which was the measure of sales the Company had contracted but had not yet earned, began to decline rapidly. As backlog declines, future sales predictions also decline. BAT was a masonry construction business which was heavily dependent on government, state, and municipal contracts, which were facing a fiscal shortfall in 2010 through 2012.

30. The Company's unaudited financial statements show that the Company backlog had been declining precipitously since early 2008. In March 2008, the backlog was

approximately $51.6 million; in December 2009, at the time of SMK's valuation, the backlog had dropped to approximately $18.2 million, a decrease of almost 65 percent.

31. In its December 2009 valuation, SMK acknowledged that the construction industry in the United States declined significantly in 2008 and was expected to continue declining. SMK also acknowledged that growth in public construction was expected to slow. SMK found overall that 2009 was a period of decline in private nonresidential construction and modest growth in public construction. Nonetheless, SMK concluded that despite slow economic growth BAT should continue to operate profitably, especially in light of continuing demand for educational and medical facilities, albeit at lower volumes.

Net Earnings versus Cash Flows

32. SMK's use of a capitalization of earnings method allowed it to disregard the effect of SMK's significant capital expenditures and declining cash flows in its analysis.

33. In fiscal year 2009, the Company had over $4 million in capital expenditures, despite the fact that its backlog was down significantly. By using a capitalization of earnings valuation approach, which focused on net earnings rather than cash flows, SMK's valuation failed to account for the effect of these and other cash expenditures on the Company's value.

Inappropriate Adjustments to Representative Earnings Base

34. SMK improperly adjusted the representative earnings base (and therefore its total valuation number) to reflect lower BAT officer salaries than those actually paid. For example, for fiscal year 2009, SMK adjusted officer salaries to $1.2 million even though BAT's financial statements reflected officer salaries of $2.7 million. SMK's downward adjustments ranged from 35 to 57 percent of the salaries reflected in BAT's financial statements. SMK provided no

justification for these adjustments in its report. BAT retained the same officers after the ESOP Transaction as it had before the transaction at comparable or higher salaries.

Inappropriate inclusion of the Wayne Booth Note

35. SMK treated the Wayne Booth $5.8 million Note under which Wayne Booth owed the Company $5,828,344 as of December 31, 2009, as increasing the fair market value of the Company by $5,828,344.

36. The Wayne Booth $5.8 million Note, however, simply represented the total amount of money Wayne Booth withdrew from the Company's bank account over the years for himself and entities he controlled, including WB Investments. Although the Company and SMK treated the total amount of these withdrawals as an officer note receivable, Wayne Booth never made and never intended to make any payments in satisfaction of the so-called loans.

37. As detailed above, the ESOP Transaction was structured so that the Wayne Booth $5.8 million Note would not exist at the close of the transaction. Therefore, the Wayne Booth $5.8 million Note provided no value whatsoever to the Company after the ESOP Transaction.

Inappropriate Adjustments for Non-Operating Assets

38. To arrive at the Company's total value, SMK added the value of certain items it deemed to be "non-operating" assets to BAT's purported value as an operating entity. These items included: (1) an airplane allegedly held by the Company; (2) a condominium; (3) the value of certain life insurance policies allegedly owned by the Company; and (4) the Wayne Booth $5.8 million Note held by the Company with a face value of $5,828,344.

39. At least some of these purportedly "non-operating" assets were operating assets because they were used in the day-to-day operation of the Company, and some were characterized as "operating" assets in the Company's financial statements.

40. By adding in these purportedly "non-operating" assets, SMK nearly doubled the value of the Company in its December 2009 valuation.

Non-Operating Debt

41. While SMK added the face value of BAT's purported "non-operating assets" to its valuation figure, it failed to subtract its non-operating liabilities.

42. As of December 31, 2009, BAT's non-operating liabilities totaled at least $3,325,587. Had SMK accounted for these non-operating liabilities as well as non-operating assets, its fair market value for the Company as of December 31, 2009 would have been reduced by at least $3.1 million.

Accounting Abnormalities

43. SMK failed to identify accounting abnormalities in the financial statements supplied by the Company. For example, in 2009, the Company's financial statements estimated profit margins significantly higher than those in the preceding three years, even though the Company's backlog had fallen dramatically in 2009. The Company's financial statements further estimated that profit margins would increase to over 25 percent going into 2010. Even ignoring the declining backlog issue, these projected margins were abnormally higher than typical construction company margins.

Appointment of James Joyner

44. On July 19, 2010, just three days before the finalized ESOP Transaction, BAT's Board appointed James Joyner as the Plan's Special Independent Trustee to assess the fairness of the ESOP's purchase of the Company. The resolution appointing Joyner, which was signed by all four Board members (Wayne Booth, Gregory Booth, Hinton, and Rosser), stated that Joyner's

sole responsibility was assessing the fairness of the proposed purchase of the Shares by the Plan and implementing such purchase if appropriate.

45. Joyner's engagement letter, dated July 14, 2010, was not counter-signed by Gregory Booth until July 21, 2010, the day before the ESOP transaction.

46. On July 21, 2010, Joyner executed a letter resigning as Special Independent Trustee, effective 12:01 a.m. July 23, 2010. Gregory Booth also executed the resignation letter on July 21, 2010, acknowledging Joyner's July 23, 2010, resignation and accepting it in advance. As such, Joyner was appointed as Special Independent Trustee for a period of less than 48 hours.

47. Joyner reviewed SMK's valuation and the Company's financial statements, among other documents, before approving the ESOP's purchase of BAT shares at the proposed price.

Wachovia's Concerns About BAT's Financial Condition

48. Gregory Booth and John Rosser had notice prior to the ESOP Transaction that at least one of BAT's creditors – Wachovia Bank – had concerns about the effect of the ESOP Transaction on BAT's debt loads.

49. On July 22, 2010, the morning of the ESOP Transaction, Wachovia emailed Gregory Booth and Rosser expressing concerns about the ESOP Transaction and its effect on the Company's debt covenants with Wachovia. Wachovia expressed concern that BAT was in violation of Wachovia's lending covenant due to BAT's declining net worth and because the ESOP Transaction might impair the Company's net worth further by adding significant debt to the Company's balance sheet.

50. On information and belief, neither the Special Independent Trustee, Joyner, nor SMK were notified of Wachovia's concerns, and the ESOP Transaction went forward without any of them being afforded an opportunity to address Wachovia's concerns.

Declining Company Value After the ESOP Transaction

51. In December 2010, the Company retained another valuation firm, Pisagh Financial, LLC, which issued an opinion valuing the Plan stock at $1.33 per share, for a total Company value of $163,590 – over $13 million less than the ESOP had paid for the Company stock only six months before.

Wayne Booth's Post-ESOP Withdrawals and Rent Payments

52. After the ESOP Transaction, Wayne Booth continued drawing cash out of the Company, even though he no longer held any ownership interest in it. During this time, Booth transferred at least $1.25 million from the Company's general operating account to WB Investments, to BST, and to his ex-wife for child support payments.

53. BAT treated these withdrawals as payments from the ESOP to Wayne Booth as Rosser recorded the draws as payments from the ESOP to Wayne Booth. In doing so, BAT and Rosser reduced the ESOP's liability to WB Trust on the WB Trust ESOP Note.

54. Wayne Booth was aware that Rosser treated these draws as payments from the ESOP.

55. The governing loan documents and the Department of Labor's regulations, 29 C.F.R. § 2550.408b-3(h), implementing and interpreting the applicable ERISA provisions, required the WB Trust to release shares to the ESOP whenever the ESOP made payments on the WB Trust ESOP Note. The WB Trust, however, did not release any BAT shares to the ESOP in conjunction with the ESOP's payments to Wayne Booth.

56. The timing and amount of the ESOP's payments to Wayne Booth bore no relationship to the terms of the WB Trust ESOP Note.

57. Wayne Booth was aware that no shares were released to the ESOP upon the ESOP's payments to him on the WB Trust ESOP Note.

58. Neither BAT's Board nor the ESOP approved Wayne Booth's withdrawals after the ESOP Transaction.

59. In a December 30, 2010, resolution, the Board explicitly recognized the deteriorating market conditions and significant reductions in BAT's sales volume and margin, and agreed to suspend principal payments on the WB Trust ESOP Note. Wayne Booth nonetheless continued to transfer money from the Company and through the ESOP to himself or for his personal benefit after December 30, 2010, directly resulting in a decrease in the value of BAT stock held by the ESOP.

60. In addition, after the ESOP purchased BAT from the WB Trust, the Company and Rosser caused the ESOP to lend plan assets to Wayne Booth in connection with the Company's rental of properties owned by Wayne Booth. In particular, instead of transferring cash to Wayne Booth to satisfy the Company's obligations to him under the rental contract, BAT, under the control of Wayne Booth, and Rosser caused the balance on the WB Trust ESOP Note to increase on a monthly basis by the amount of rent due from the Company to Wayne Booth. Because the ESOP's right to the release of shares depended on the balance of the WB Trust ESOP Note, this treatment of the rent payments interfered with the ESOP's ability to have BAT shares released to it after the ESOP Transaction. This use of the ESOP as a pass-through vehicle for the Company's liabilities to Wayne Booth provided no benefit to the ESOP's participants and beneficiaries.

Abandonment of the Company and the ESOP and Misappropriation of BAT's Value and Goodwill to MH Masonry

61. In July 2012, there were no longer sufficient assets to continue BAT, and it ceased operations under its name. No formal action was taken to wind up the Company.

62. No formal action was taken to wind up the ESOP. Instead, trustees Wayne Booth, Gregory Booth, and Hinton simply abandoned the Plan, without notifying any of the Plan's participants, *i.e.*, BAT's employees.

63. At or around the same time that Gregory Booth and Hinton abandoned the ESOP and BAT, they formed a successor company, M.H. Masonry & Associates, Inc., under the laws of Virginia and appropriated the remaining assets, value, and goodwill of BAT for their benefit and for the benefit of MH Masonry.

64. The owners of MH Masonry are Gregory Booth, Melvin Hinton, Darrell Shifflett and Chris Albrecht, each of whom previously worked for BAT. Hinton is the majority owner of MH Masonry.

65. MH Masonry operates with much of the same management team as BAT. At all relevant times, Hinton served as MH Masonry's President and Gregory Booth served as its Vice President. MH Masonry's board consists of Gregory Booth (Vice President), Hinton (President), Daryl Shifflet (Vice President), and Chris Eckhart (Vice President), all former management members of BAT.

66. MH Masonry maintains its offices at the same location occupied by BAT at 22473 Timberlake Road in Lynchburg, Virginia.

67. MH Masonry hired back many of the same people employed by BAT. In particular, 60 to 75 percent of MH Masonry employees were BAT employees.

68. MH Masonry also purchased equipment formerly owned by BAT from BAT's lender, at a significant discount.

69. Just as BAT did, MH Masonry leases equipment from Gregory Tractor and Equipment, an equipment leasing company owned by Gregory Booth.

70. Most of MH Masonry's clients were also BAT clients.

71. On information and belief, the ESOP does not own MH Masonry and MH Masonry never paid BAT or the ESOP anything in exchange for its appropriation of BAT's goodwill, value, and assets.

COUNT I

By causing the ESOP to purchase BAT's stock for more than adequate consideration, BAT, Joyner, Wayne Booth, Gregory Booth, and Hinton caused a prohibited sale of property between the Plan and a party in interest in violation of ERISA.

72. Paragraphs 1 through 71 are incorporated by reference.

73. BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner caused the Plan, of which they were fiduciaries, to acquire stock in the ESOP's corporate sponsor by purchasing the shares from a party in interest, within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

74. The ESOP's acquisition of stock from a party in interest violated ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D), which prohibit a fiduciary from causing 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; or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

75. By approving this party in interest transaction on behalf of the ESOP, BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner caused the ESOP, of which they were fiduciaries, to engage in prohibited transactions.

76. ERISA § 408(e), 29 U.S.C. § 1108(e), provides an exemption to the prohibited transaction requirements by allowing the acquisition by a plan of qualifying employer securities as long as the acquisition of the qualifying securities does not exceed adequate consideration. Adequate consideration is defined under ERISA § 3(18), 29 U.S.C. § 1002(18) as the "fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with the regulations promulgated by the Secretary [of Labor]." The Department of Labor, the agency with delegated authority to issue legislative rules implementing ERISA, interprets the statutory term "adequate consideration" to mean that the value assigned to an asset must reflect its fair market value and the value assigned to an asset must be the product of a determination made by the fiduciary in good faith. 53 Fed. Reg. 17,632, 17,633 (proposed rule) (May 17, 1988).

77. By causing the ESOP to acquire stock at a price that exceeded the fair market value, BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner failed to meet the conditions of any of the exemptions in ERISA § 408, 29 U.S.C. § 1108, including ERISA § 408(e), 29 U.S.C. § 1108(e). In addition, BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner failed to comply with the Department of Labor's requirements for meeting the definition of adequate consideration in the purchase of employer stock.

78. By cause the ESOP to acquire stock without following a prudent and good faith investigation process before purchasing the stock, BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner failed to meet the conditions of any of the exemptions in ERISA § 408, 29 U.S.C.

§ 1108, including ERISA § 408(e), 29 U.S.C. § 1108(e). In addition, BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner failed to comply with the Department of Labor's requirements for meeting the definition of adequate consideration in the purchase of employer stocks.

79. As a result of the fiduciary breaches described above, BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner caused the ESOP, of which they were fiduciaries, to suffer financial losses for which they are personally, jointly, and severally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

COUNT II

BAT, Wayne Booth, Gregory Booth, and Hinton breached their fiduciary duties of prudence and loyalty to the Plan in connection with the ESOP Transaction in violation of ERISA.

80. Paragraphs 1 through 79 are incorporated by reference.

81. In connection with the ESOP Transaction, BAT, Wayne Booth, Gregory Booth, and Hinton breached their duties to the ESOP, of which they were fiduciaries, to act solely in the interests of participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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, in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), by, among other things:

a. Failing to conduct a prudent investigation into Joyner's qualifications prior to retaining him to provide services to the Plan;

b. Failing to conduct any investigation or failing to conduct a prudent investigation into SMK's qualifications prior to retaining it to provide services to the Plan;

c. Failing to provide Joyner and the entities he relied on, including SMK, with complete and accurate information regarding the Company and the proposed ESOP Transaction;

d. Relying on Joyner's and SMK's opinions, even though: (i) they had conducted little or no investigation into Joyner's and SMK's qualifications; and (ii) they knew or had reason to know that Joyner and SMK lacked complete and accurate information regarding the Company and the proposed transaction; and,

e. Approving the ESOP's purchase of the Company at the proposed price when they knew or should have known that the transaction price far exceeded the fair market value.

82. As a result of the fiduciary breaches described above, BAT, Wayne Booth, Gregory Booth, and Hinton caused the ESOP, of which they were fiduciaries, to suffer financial losses for which they are personally, jointly, and severally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

COUNT III

Joyner breached his fiduciary duties of loyalty and prudence to the Plan in connection with the ESOP Transaction in violation of ERISA.

83. Paragraphs 1 through 82 are incorporated by reference.

84. In connection with the ESOP Transaction, Joyner breached his duties to the Plan, of which he was a fiduciary, to act solely in the interests of participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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, in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), by, among other things:

a. Resigning from his appointment as a Special Independent Trustee to the Plan on July 19, 2010, effective at 12:01 am July 22, 2010, even though: (i) he had not yet conducted any investigation into the fairness of the proposed $13.499 million ESOP Transaction; and, (ii) pursuant to this advance resignation, he had less than 48 hours to investigate and evaluate the fairness of the proposed ESOP Transaction;

b. Approving the ESOP Transaction under the proposed terms, even though he failed to understand adequately the methodologies used, the factual bases relied upon, and the conclusions reached in the SMK valuation;

c. Failing to conduct any meaningful inquiry into serious problems with the SMK valuation that were evident from the face of the documents he was appointed to review, including:

    i. the degree and relevance of BAT's declining backlog;

    ii. SMK's inclusion of the Wayne Booth $5.8 million Note as a non-operating asset, even though the Company's financials listed the Note as an operating asset and even though the transaction documents made clear that the Note would be extinguished as part of the ESOP Transaction; and

    iii. SMK's decision to add the value of the Company's "non-operating" assets to the value of the Company but not reduce the value of the Company by its "non-operating liabilities," even though both non-operating assets and liabilities were evident in the Company's financial statements;

d. Failing to delay the transaction to allow sufficient time to investigate prudently the fairness of the proposed terms and the completeness and accuracy of the valuation;

e. Approving the ESOP's purchase of stock at the proposed transaction price, despite knowing or having reason to know that the valuation that purported to support the proposed price was unrealistic, incomplete, inaccurate, inflated, and facially flawed; and,

f. Causing the Plan to pay vastly more than fair market value for the stock.

85. As a result of the foregoing imprudent and disloyal acts and omissions, Joyner caused losses to the ESOP, of which he was a fiduciary, for which he is personally liable pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a).

86. Because Joyner's breaches also enabled Wayne Booth, Gregory Booth, and Hinton, who were ESOP trustees, to approve and ratify the ESOP Transaction at a price in excess of adequate consideration, Joyner is also jointly liable with Wayne Booth, Gregory Booth, and Hinton for all losses to the Plan resulting from the ESOP transaction, pursuant to ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2).

COUNT IV

SMK knowingly participated in a prohibited transaction in violation of ERISA.

87. Paragraphs 1 through 86 are incorporated by reference.

88. SMK knowingly participated in the fiduciary breaches of BAT, Wayne Booth, Gregory Booth, Hinton, and Joyner that caused and enabled the ESOP to purchase the Company's stock at a price in excess of adequate consideration by, among other things:

a. Choosing a valuation methodology that concealed the deterioration in BAT's business fundamentals;

b. Treating the Wayne Booth $5.8 million Note as a non-operating asset, even though the Company's audited financials characterized the Note as an operating asset;

c. Adding the value of non-operating assets to the Company's enterprise value without subtracting the value of the Company's non-operating liabilities from the Company's enterprise value; and,

d. Treating the Wayne Booth $5.8 million Note as adding $5.8 million in value to the Company, even though SMK knew the Note would disappear as part of the ESOP Transaction.

89. Because SMK knowingly participating in the ESOP Transaction that resulted in the acquisition of employer securities at a price far in excess of adequate consideration, SMK is subject to appropriate equitable relief, including disgorgement of unjust enrichment, pursuant to ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

COUNT V

Co-Fiduciary Liability

90. Paragraphs 1 through 89 are incorporated by reference.

91. BAT, Wayne Booth, Gregory Booth, Hinton, Rosser, and Joyner each (a) participated in the fiduciary breaches of their co-fiduciaries, (b) enabled their co-fiduciaries to breach their own duties relating to the ESOP Transaction, (c) knew or should have known of their co-fiduciaries' breaches of fiduciary duty and failed to take action to prevent their co-fiduciaries' breaches of fiduciary duty, and (d) failed to make reasonable efforts under the circumstances to remedy those breaches of duty. Accordingly, BAT, Wayne Booth, Gregory

Booth, Hinton, and Joyner are each liable as co-fiduciaries for the losses caused to the ESOP by the other co-fiduciaries. ERISA §§ 405(a)(1), (2) and (3), 29 U.S.C. §§ 1105(a)(1), (2), and (3).

92. Wayne Booth, Gregory Booth, and Hinton failed to exercise reasonable care to prevent their co-fiduciaries from committing fiduciary breaches of duty to the ESOP. Accordingly, Wayne Booth, Gregory Booth, and Hinton are, as to each transaction in which each was involved as a fiduciary, liable under ERISA § 405(b)(1), 29 U.S.C. § 1105(b)(1) for losses suffered by the Plan.

COUNT VI

Prohibited transactions relating to the withdrawing of money from BAT and through the ESOP and charging rent to the Company and through the ESOP after the ESOP Transaction

93. Paragraphs 1 through 92 are incorporated by reference.

94. BAT, Wayne Booth, Rosser, WB Trust, WB Investments, and BST, are all parties in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14), and each knowingly participated in the non-exempt prohibited transactions as described herein.

95. After the ESOP Transaction, Wayne Booth continued drawing cash out of BAT through the ESOP, including $1.2 million that was treated as payment from the ESOP's assets, and caused payment of the drawn cash to WB Investments and BST, even though Wayne Booth no longer had an ownership interest in the Company.

96. By dealing with at least $1.25 million in ESOP plan assets in his own interest or for his own account, Wayne Booth breached his fiduciary duties of prudence and loyalty to the Plan in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), and engaged in transactions prohibited by ERISA §§ 406(a)(1)(A), (B) and (D) and 406(b)(1), 29 U.S.C. §§ 1106(a)(1)(A), (B) and (D) and 1106(b)(1).

97. BAT and Rosser treated Wayne Booth's draws on the Company as payment from the ESOP to Wayne Booth, but Wayne Booth, WB Trust, BAT, and Rosser failed to cause the release of shares to the ESOP, in violation of the Plan documents and the governing regulation at 29 C.F.R. § 2550.408b-3(h). Wayne Booth, WB Trust, BAT, and Rosser were aware that no shares were released to the ESOP upon the ESOP's payments to Wayne Booth.

98. By enabling Wayne Booth to deal with assets of the ESOP in his own interest or for his own account, Wayne Booth, BAT, and Rosser violated their duties of loyalty and prudence to the ESOP in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B).

99. After the ESOP purchased BAT from the WB Trust, the Company and Rosser caused the ESOP to lend plan assets to Wayne Booth in connection with the Company's rental of properties owned by Wayne Booth. BAT, under the control of Wayne Booth, and Rosser caused the balance on the WB Trust ESOP Note to increase on a monthly basis by the amount of rent due from the Company to Wayne Booth.

100. By causing the ESOP to assume liability for BAT's rent obligations to Wayne Booth following the ESOP Transaction without ensuring that the ESOP received any corresponding benefit, Wayne Booth, Rosser, and BAT breached their fiduciary duties of prudence and loyalty to the Plan in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), and caused the Plan to engage in a series of transactions they knew or should have known constituted a direct or indirect: (i) sale or exchange, or leasing, of property between the Plan and a party in interest; and, (ii) lending of money or other extension of credit between the plan and a party in interest, which are prohibited by ERISA §§ 406(a)(1)(A), (B) and (D) and 406(b)(1), 29 U.S.C. §§ 1106(a)(1)(A), (B) and (D) and 1106(b)(1).

COUNT VII

WB Trust, WB Investments, and BST knowingly participated in prohibited transactions.

101. Paragraphs 1 through 100 are incorporated by reference.

102. WB Trust, owned by Wayne Booth, knowingly participated as a party in interest in the ESOP Transaction, which was a prohibited transaction under ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D).

103. WB Trust, WB Investments, and BST, all owned by Wayne Booth, knowingly participated as parties in interest in Wayne Booth's post-ESOP Transaction cash draws from BAT through the ESOP, in violation of the governing regulation requiring the release of securities, 29 C.F.R. § 2550.408b-3(h), and in violation of the prohibited transactions provisions under ERISA §§ 406(a)(1)(A), (B) and (D), 29 U.S.C. §§ 1106(a)(1)(A), (B) and (D).

104. Because WB Trust, WB Investments, and BST knowingly participated in these prohibited transactions, they are subject to appropriate equitable relief, including disgorgement of unjust enrichment, pursuant to ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5).

COUNT VIII

BAT, Gregory Booth, and Hinton abandoned the Plan and misappropriated, or failed to prevent the misappropriation of, BAT assets, value, and goodwill for the benefit of Gregory Booth and Hinton and for the benefit of BAT's successor, MH Masonry.

105. Paragraphs 1 through 104 are incorporated by reference.

106. BAT, Gregory Booth, and Hinton abandoned the ESOP in violation of the procedural requirements under ERISA § 402(b), 29 U.S.C. § 1102(b), and they breached their fiduciary duties to ensure a prudent and loyal termination of the Plan in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B).

107. BAT, Gregory Booth, and Hinton breached their duties of loyalty and prudence to the ESOP in violation of ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), by, among other things, (i) failing to take any action to stop Wayne Booth's continued self-dealing after the ESOP Transaction at the expense of BAT and the ESOP; (ii) abandoning the ESOP and the Company; and, (iii) appropriating all that remained of BAT's equity value to form a successor company, MH Masonry, which is the continuation of BAT.

108. Gregory Booth and Hinton's ownership interests in MH Masonry and their profits arising from those interests arose out of and were made possible because of their fiduciary breaches of duty to the ESOP. Therefore, Gregory Booth and Hinton's interests in MH Masonry and any profits therefrom are unjust enrichment, which should be disgorged to the ESOP, under ERISA §502(a)(5), 29 U.S.C. § 1132(a)(5).

109. Through the actions of its owners and officers, who were ESOP fiduciaries, MH Masonry was a knowing participant in the fiduciary breaches of BAT, Gregory Booth, and Hinton.

110. Through the actions of its owners and officers, who were ESOP fiduciaries, MH Masonry is liable for remedying the fiduciary breaches of BAT as the successor and continuation of BAT because MH Masonry purchased the assets of BAT and benefited from the fiduciary breaches of BAT, Gregory Booth, and Hinton, with knowledge of these fiduciary breaches.

111. Through the actions of its owners and officers, who were ESOP fiduciaries, MH Masonry is liable for remedying the fiduciary breaches of BAT as the successor and continuation of BAT because (i) many of the same corporate officers from BAT formed MH Masonry under Virginia law; (ii) MH Masonry purchased the assets of BAT; (iii) MH Masonry continues to operate in the same location as BAT; (iv) MH Masonry services the same customers as BAT; (v)

MH Masonry continued the leases of equipment from the same service provider with whom BAT contracted; and, (vi) MH Masonry employs many of the same employees from BAT, who were and are beneficiaries under the ESOP.

112. Based on MH Masonry's knowing participation in transactions involving the fiduciary breaches of BAT, Gregory Booth, and Hinton, MH Masonry is also liable for restitution to the ESOP under ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), including monetary compensation for losses resulting from fiduciary breaches of BAT, Gregory Booth, and Hinton.

PRAYER FOR RELIEF

WHEREFORE, the Secretary of Labor prays that this Court enter an Order:

113. Requiring each of the fiduciary defendants, BAT, Joyner, Wayne Booth, Gregory Booth, Hinton, and Rosser, jointly and severally to restore all losses caused to the ESOP as a result of their fiduciary breaches;

114. Requiring each of the fiduciary defendants, BAT, Joyner, Wayne Booth, Gregory Booth, Hinton, and Rosser, to disgorge to the ESOP any and all unjust enrichment they have received as a result of their fiduciary breaches;

115. Requiring the party in interest defendants WB Trust, WB Investments, BST Enterprises, MH Masonry, and SMK to disgorge any and all unjust enrichment they have received as a result of the fiduciary breaches;

116. Enjoining Wayne Booth, Gregory Booth, Hinton, and Joyner from serving as fiduciaries or service providers to ERISA plans in the future; and

117. Granting such other relief as may be equitable, just and proper.

Date: August 28, 2015

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

OSCAR L. HAMPTON III
Regional Solicitor

ASHTON PHILLIPS
Trial Attorney

s/ Geoffrey Forney

GEOFFREY FORNEY
Trial Attorney
PA Bar No. 202870
NJ Bar No. 03623-2006

United States Department of Labor
Office of the Solicitor
Suite 630 East, The Curtis Center
170 South Independence Mall West
Philadelphia, PA 19106-3306
Telephone: (215) 861-5137
Facsimile: (215) 861-5162
forney.geoffrey@dol.gov