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7 **UNITED STATES DISTRICT COURT**  
8 **WESTERN DISTRICT OF WASHINGTON**  
9 **AT SEATTLE**

10 Eric Schlueter, individually and as  
11 representative of a class of all others similarly  
12 situated and on behalf of the BNBuilders, Inc.  
Employee Stock Ownership Plan,

13 Plaintiff,

14 vs.

15 BNBuilders, Inc., Brad Bastian, Rich Finlay,  
16 the BNBuilders, Inc. Board of Directors,  
17 GreatBanc Trust Company, John and Jane  
Does 1-10,

18 Defendants.

Case No.:

**COMPLAINT—CLASS ACTION**

**JURY TRIAL DEMANDED**

19  
20 **I. INTRODUCTION**

21 1. Plaintiff Eric Schlueter brings this action pursuant to the Employee Retirement  
22 Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, seeking plan-wide relief on  
23 behalf of the BNBuilders, Inc. Employee Stock Ownership Plan (the “ESOP” or the “Plan”) and  
24 class-wide relief on behalf of a class of similarly situated ESOP participants and their  
25 beneficiaries as defined below.  
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1           2.       BNBuilders, Inc. (the “Company” or “BNBuilders”) is a Western United States  
2 general contractor that specializes in commercial construction projects.

3           3.       BNBuilders was founded in 2000 and has described itself as “one of the fastest  
4 growing construction firms along the West Coast.” Brad Bastian and the former owners of  
5 BNBuilders have reported that they sold 100% of BNBuilders to the ESOP for \$206,508,990 or  
6 \$29.13 per share on December 23, 2021, through a series of inter-related steps and/or transactions  
7 collectively referred to as the “ESOP Transaction” or the “Transaction.” The sellers of  
8 BNBuilders stock are collectively referred to as the “Sellers” or “Seller Defendants.” The Sellers  
9 created the ESOP for the express purpose of providing them a liquidity event while retaining  
10 ownership and control of the Company.

11           4.       For example, the BNBuilders Board membership did not change at all after the  
12 ESOP purchased the Company. Brad Bastian (the majority owner) has been on the BNBuilders,  
13 Inc. Board since its founding in 2000 and never ceded any control of his Board Chairman seat  
14 through today. Since 2016, Brad Bastian and Rich Finlay have been the only two Board members  
15 through at least July 10, 2024.

16           5.       Plaintiff and other employee-participants (whose ESOP retirement accounts were  
17 used to purchase 100% of BNBuilders stock from the Sellers) were not given an opportunity to  
18 negotiate or otherwise take part in the determination of the price that they paid for BNBuilders  
19 stock. They learned of the ESOP Transaction after it was completed and the \$206 million  
20 purchase price was approved, by which time the ESOP was left deeply in debt and the Sellers  
21 received \$206.5 million.

22           6.       Rather than involving the employees whose retirement accounts would be used to  
23 buy BNBuilders, the Sellers’ advisors (who were paid a commission if the Transaction closed)  
24 identified GreatBanc Trust Company (“GreatBanc” or the “Trustee”) to be the ESOP trustee  
25 because they believed GreatBanc would approve the Transaction and not aggressively negotiate  
26 the purchase price.

1           7.       The ESOP Trustee was supposed to be an independent third party acting with  
2 undivided loyalty to the ESOP and its participants. However, and as discussed *infra*, Defendant  
3 Bastian along with other Board members maintained control over GreatBanc by, among other  
4 things, requiring the Trustee to execute the directions given by the Board, without discretion to  
5 even “question the instructions.” Defendants also set up an ESOP governance structure that  
6 allowed the Board to fire the GreatBanc if it did not carry out the wishes of the Board.

7           8.       The Sellers further cemented their control over GreatBanc by agreeing that  
8 BNBuilders would indemnify GreatBanc for all ERISA fiduciary liability in connection with the  
9 ESOP Transaction. Specifically, BNBuilders agreed in the Trust Agreement with GreatBanc that:

10           [T]he Company and any subsidiaries (collectively, the “Indemnitors”) shall jointly and  
11 severally release, indemnify and hold harmless the Indemnitees for any loss, cost,  
12 expense, or other damage, including (but not limited to) attorneys’ fees, suffered by any  
13 of the Indemnitees resulting from, or incurred with respect to, any legal proceedings,  
14 actions, suits, arbitrations and investigations related in any way to the performance of  
services by any one or more of the Indemnitees pursuant to this Agreement and the  
Trust[.]

15           The indemnification payments are paid from the Company’s assets, which are owned by  
16 the ESOP from at least 2021. This form of exculpation is illegal and void under ERISA. *See*  
17 ERISA § 410(a), 29 U.S.C. § 1110(a); *Johnson v. Couturier*, 572 F.3d 1067, 1080 (9th Cir.  
18 2009); *Hurtado v. Rainbow Disposal Co.*, 2018 WL 3372752, at \*15-16 (C.D. Cal. July 9, 2018).

19           9.       The Sellers, Board Defendants, and the Trustee, took several actions to cause the  
20 newly created ESOP to buy BNBuilders from the Sellers at an inflated price of \$206 million in a  
21 single integrated transaction (referred to as the “ESOP Transaction” or the “Transaction”).

22           10.      There is no recognized market for private stock like BNBuilders’, and the value  
23 of the stock should be determined based on an appropriate valuation report or stock appraisal.  
24 The documents and financial information used to value BNBuilders stock were controlled by the  
25 Board Defendants.

11. Plaintiff and other employee-participants were not given access to the valuation reports underlying the value of the BNBuilders stock in their retirement accounts. Based on Defendants' duty to disclose all relevant information that bears upon their retirement investments in BNBuilders, Mr. Schlueter asked Defendants to provide the valuation reports prior to filing this lawsuit. However, Defendants refused to do so.

12. The ESOP Transaction was structured so that Brad Bastian would keep his seat as Chairman of the Board after the ESOP Transaction, and serve as CEO (as he had previously served as President) after the ESOP Transaction. This allowed him to retain control over BNBuilders' strategy, direction, and other fundamental business decisions. By maintaining control of BNBuilders, Brad Bastian retained the power to amend the Company's bylaws and the ESOP's governing documents to determine the Company's strategy and the direction of the business, to sell the Company in future mergers or corporate transactions, and to determine the amount and timing of dividends and stock distributions.

13. The \$206 million the ESOP paid was more than the fair market value of BNBuilders stock because the Trustee and the stock valuation the Trustee relied on did not adequately take into account that the Brad Bastian kept control over BNBuilders in many material respects, including the strategic decisions of the Company. The purchase price thus should have reflected a steep discount for the lack of control over the Company. But it did not.

14. The Trustee and its valuation advisor also failed to adequately account for persistent inflation and the resulting economic headwinds, including higher interest rates (affecting the demand for their construction projects) and prolonged supply chain disruptions (affecting their ability to complete and be compensated for projects on time). Additionally, the \$206 million price was based on financial information provided by Brad Bastian, who had a personal interest in painting the rosiest picture possible of BNBuilders' financial situation. In addition, BNBuilders failed to apply a sufficient discount for lack of marketability to BNBuilders' equity value.

1           15. In addition to the fact that the ESOP paid too much for BNBuilders stock, the  
2 financing terms were not entered into solely for the benefit of the ESOP and its participants.  
3 According to Department of Labor filings, because the ESOP did not have anywhere close to the  
4 \$206 million the Sellers received for BNBuilders stock, the ESOP had to borrow the entire  
5 purchase price from the Seller Defendants through the issuance of Seller Notes. These Seller  
6 Notes were subsequently reassigned to the Company, and as a result, the ESOP entered into a  
7 note payable with the Company totaling \$ 206,508,990, with a 40-year term.

8           16. This left BNBuilders (and the ESOP) responsible for all \$206 million in ESOP  
9 Transaction debt and required the Company to divert a significant amount of its cash flow  
10 towards annual loan payments following the Transaction. This crippling debt load would hamper  
11 the Company's ongoing operations and profitability. In short, the debt terms and cash flow  
12 requirements needed to pay the debt were not reasonable nor in the best interest of the ESOP  
13 participants.

14           17. GreatBanc—and the Board Defendants responsible for monitoring GreatBanc—  
15 did not give adequate consideration to these and other factors in determining the sale price for  
16 the Company. To the contrary, the Board Chairman was the largest Seller (Brad Bastian), was  
17 focused on promoting the Company's value for his own financial benefit.

18           18. GreatBanc for its part failed to ensure that the ESOP paid no more than fair market  
19 value because it did not sufficiently adjust management projections to account for persistent  
20 inflation and the resulting economic headwinds, including higher interest rates and prolonged  
21 supply chain disruptions; did not ensure that the price the ESOP paid was appropriately  
22 discounted based on the fact that Defendant Bastian and the Board Defendants retained control  
23 of the Company even after the ESOP ostensibly bought 100% of BNBuilders stock; and did not  
24 adequately discount the price despite substantial restrictions on marketability.

25           19. GreatBanc had a fiduciary duty under ERISA to act prudently and in the sole  
26 interest of ESOP participants, see 29 U.S.C. § 1104(a)(1)(A)-(B), and also had a duty to ensure  
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that the ESOP did not engage in prohibited transactions, see 29 U.S.C. § 1106. The Board Defendants similarly had a fiduciary duty to install an appropriate governance structure to ensure that GreatBanc complied with its fiduciary responsibilities. In particular, because the Board Defendants appointed GreatBanc, they had a duty to monitor it and to ensure that it had accurate financial and reasonable projections.

20. Defendants' actions, as outlined herein, financially harmed the ESOP and caused Plaintiff to suffer significant losses in his individual retirement account.

21. Plaintiff brings this action to recover the losses suffered by the ESOP and the participants and beneficiaries of the ESOP, to obtain other equitable and remedial relief as provided by ERISA, and to otherwise remedy Defendants' prohibited transactions and fiduciary breaches in violation of ERISA as outlined herein.

## II. JURISDICTION AND VENUE

22. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(a), 29 U.S.C. § 1132(a).

23. **Personal Jurisdiction.** This Court has personal jurisdiction over Defendants because they transact business in, and have significant contacts with, this District, and because ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) provides for nationwide service of process.

24. **Venue.** Venue is proper in this District and this Division because BNBuilders, Inc. and other Defendants may be found in this District and this Division. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). BNBuilders conducts business operations and employs employees found in this District and Division.

## III. PARTIES

### A. Plaintiff Eric Schlueter

25. Plaintiff Eric Schlueter is a former employee of BNBuilders, who worked for BNBuilders as an IT project manager from approximately 2019 to 2025. Mr. Schlueter is a

1 participant in the ESOP as defined by ERISA § 3(7), 29 U.S.C. § 1002(7). Mr. Schlueter is vested  
2 in the ESOP.

3 26. On December 23, 2021, the Company established the ESOP as a captive buyer for  
4 shares of the Company.

5 **B. Defendant BNBuilders, Inc.**

6 27. Defendant BNBuilders, Inc. is a Western United States general contractor that  
7 specializes in commercial construction projects headquartered in Seattle, Washington with  
8 additional offices in California and Colorado.

9 28. ERISA provides:

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

13 ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

14 29. BNBuilders (or its subsidiaries and affiliates) is or was the current or former  
15 employer of all ESOP participants.

16 30. The written instrument(s) according to which the ESOP was established and  
17 maintained (hereinafter referred to as the “ESOP Plan Document”) provide that the Company is  
18 a “Named Fiduciary” with authority to control and manage the administration of the ESOP other  
19 than the responsibilities expressly delegated to the Trustee in the Plan Document. Because the  
20 Directors (i.e., members of the Board of Directors) have all the powers and responsibility of  
21 Company, they have the responsibilities and duties of the Company as the Named Fiduciary.

22 31. The ESOP Plan Document states that BNBuilders (and the Board members  
23 through whom BNBuilders acts) have the power and duty to “review[] the performance of the  
24 Trustee with respect to the Trustee’s duties, responsibilities, and obligations under the Trust  
25 Agreement.”  
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32. Through the Trust Agreement and Plan Document, BNBuilders (and the Board members through whom BNBuilders acts) have the power to terminate the Trustee on written notice without cause.

33. Accordingly, BNBuilders is an ERISA fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) because it had/has discretionary control over the ESOP and the ESOP assets and it exercised control over ESOP assets.

34. At all relevant times, BNBuilders acted through its Board members. Indeed, the Plan Document recognizes that BNBuilders may delegate its fiduciary responsibilities to members of BNBuilders Board of Directors.

#### **C. Trustee Defendant**

35. Defendant GreatBanc Trust Company (“GreatBanc”) is located in Lisle, Illinois. GreatBanc is the Trustee of the BNBuilders ESOP and holds, manages, and controls the ESOP’s assets. GreatBanc is a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), because it exercises discretionary authority or discretionary control respecting management of the ESOP, exercises authority and control respecting management or disposition of the ESOP’s assets, and/or has discretionary authority or discretionary responsibility in the administration of the ESOP.

36. GreatBanc, on behalf of the ESOP, approved the purchase of BNBuilders stock from the Selling Defendants to the ESOP for \$29.13 per share, which was greater than fair market value. GreatBanc, on behalf of the ESOP, also approved all Transaction terms, including the ESOP’s borrowing of the entire purchase price necessary to complete the Transaction, and the Company guarantee of the borrowed amount.

#### **D. The Board Defendants**

37. Defendant Brad Bastian is Chief Executive Officer and Chairman of the Board of Directors of BNBuilders. Defendant Bastian was a founder of the Company has served on the Board since its founding in or around 2000.



1           38. Defendant Rich Finlay is the Chief Financial Officer and a member of the Board  
2 of Directors of BNBuilders. Defendant Finlay has served on the Board since 2017.

3           39. The BNBuilders Board of Directors, Brad Bastian, and Rich Finlay are  
4 collectively referred to as the “Board” or “Board Defendants.”

5           40. In 2021, Defendant Finlay signed the Trust Agreement (on behalf of the Board  
6 and the Company), which appointed GreatBanc as ESOP Trustee.

7           41. In 2021, Defendant Finlay also signed the governing plan document for the ESOP  
8 Agreement, setting up a governance structure whereby the Board Defendants were responsible  
9 for selecting, appointing, overseeing and monitoring the ESOP Trustee and other fiduciaries they  
10 appointed.

11           42. For example, under the ESOP’s governing documents, the Board had/has the  
12 fiduciary power to appoint the ESOP Trustee and did, in fact, appoint GreatBanc as the ESOP  
13 Trustee.

14           43. Having appointed GreatBanc as the ESOP Trustee, the Board Defendants had a  
15 duty to monitor and oversee GreatBanc and ensure that it had adequately considered complete  
16 and accurate information, was acting in conformance with its fiduciary duties, and did not allow  
17 the ESOP to pay more than fair market value for BNBuilders stock.

18           44. The Trust Agreement provides, “[u]pon resignation or removal of the Trustee, the  
19 Company’s Board of Directors shall appoint a successor trustee or trustees.” The Trust  
20 Agreement also states, “[t]he Company (through its Board of Directors) shall have the right at  
21 any time” to modify or terminate the Trust Agreement.

22           45. Also, because BNBuilders is the ESOP’s Named Fiduciary and the Board may  
23 exercise all of the Company’s powers, the Board and its members acted as the Named Fiduciary  
24 for the ESOP and had the responsibility to ensure that BNBuilders was fulfilling its fiduciary  
25 duties under ERISA.

46. Accordingly, the Board Defendants had and/or exercised discretionary authority or discretionary control respecting management of the ESOP and are fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

47. At all relevant times the Board Defendants were fiduciaries to the ESOP and had a duty to monitor the Trustee: GreatBanc.

**E. Seller Defendants (also referred to as “Sellers”)**

48. Defendant Brad Bastian is the founder, Chief Executive Officer (CEO) and Chairman of the Board of Directors of BNBuilders. He was a majority owner prior to the ESOP Transaction and thus one of the primary Sellers.

49. Defendants John and Jane Does 1-10 are the individuals, entities, or trusts who sold their BNBuilders stock in the ESOP Transaction and received money or other proceeds directly or indirectly from the ESOP Transaction. On information and belief, they were all senior executives who therefore had intimate knowledge of BNBuilders’ financial performance and operations. Therefore, the Sellers knew or should have known that the ESOP overpaid in the Transaction. Given Defendant Brad Bastian’s longstanding role on the Board and as CEO, and the executive positions held by the others, the Sellers facilitated the preparation of materials used to value the Company and the Transaction itself. As such, the Sellers had knowledge of the fiduciary breaches and the prohibited transactions set forth herein, and knowingly participated in and facilitated those prohibited transactions.

50. Defendants John and Jane Does 1-10 are collectively referred to as the “Sellers” or “Seller Defendants.” They sold their interest in BNBuilders to the ESOP for \$206 million in 2021.

**IV. FACTUAL ALLEGATIONS**

**A. The Board Defendants Created a Willing Buyer through the ESOP**

51. According to publicly available documents, BNBuilders was founded in 2000 by Brad Bastian and others.

52. In or around 2021, Brad Bastian and the Seller Defendants decided to sell their stake in the Company by creating a retirement plan (the BNBuilders ESOP) that would borrow hundreds of millions of dollars to purchase 100% of the BNBuilders stock they owned.

53. To effectuate the sale of Brad Bastian's and the other Seller Defendants' interest, they established the ESOP, an ERISA-protected defined contribution plan where employer contributions made on behalf of employees are invested in the employer's stock (here BNBuilders stock). ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6); *see also* 29 C.F.R. § 2550.407d-6 (2024) (definition of the term "employee stock ownership plan").

54. The ESOP is a pension plan within the meaning of § 3(2), 29 U.S.C. § 1002(2), and is subject to ERISA pursuant to ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1).

55. The ESOP is an individual account plan, or defined contribution plan, under which a separate individual account has been established for each participant. Employees of BNBuilders and its subsidiaries participate in the ESOP.

56. As an ERISA-protected ESOP, employer contributions made on behalf of employees are invested in the employer's stock. ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6); *see also* 29 C.F.R. § 2550.407d-6 (definition of the term "employee stock ownership plan").

57. The terms of the ESOP specify that the amount of employer contributions is discretionary and determined by the Company's Board.

58. The employer contributions, invested in employer stock, are part of employee compensation and comprise an important part of employee retirement savings. Courts have long recognized that an "ESOP's assets [are] part of the overall benefits and compensation package offered to employees who participate[] in the Plan," and that "[e]mployee benefits are not a mere gratuity, but a form of deferred wages." *Neil*, 767 F. Supp. at 943 (quoting *Reich*, 837 F. Supp. at 1286-87).

59. The price the ESOP paid for shares of the Company's company stock is a fiduciary decision that has long-term effects on employees' retirement security. Overpaying for Company

1 stock in an ESOP transaction causes the participants to receive fewer pension benefits than they  
2 are entitled to by law. *Chao*, 285 F.3d at 444 (“Defendants, by arguing that the initial price of the  
3 stock does not matter, essentially ignore the fact that the money paid for the Hall Holding stock  
4 was a form of deferred compensation for the participants in the Hall Chemical ESOP. However,  
5 because the Hall Chemical ESOP overpaid for the shares of Hall Holding stock, it suffered a  
6 loss.”).

7 60. Because—and only because—an ESOP contribution qualifies as **employee**  
8 **compensation**, an employer can deduct the total value of its ESOP contribution from its income  
9 tax liability as an ordinary business expense. 26 U.S.C. § 404; 26 C.F.R. § 1.404(a)–1(b) (2022).

10 61. The Company intended the ESOP to qualify for favorable tax treatment and sought  
11 favorable tax treatment from the IRS since the ESOP’s creation.

12 62. The Plan is identified in Department of Labor filings as a “Leveraged ESOP,” and  
13 it is designed to invest in the employer securities of BNBuilders. Because the ESOP is fully  
14 leveraged, under the terms of the ESOP, employer contributions made to the ESOP are used to pay  
15 down the loan taken out by the ESOP to acquire the Company’s stock.

16 63. Under the terms of the ESOP’s governance documents, shares are released for  
17 allocation into participant accounts as the principal once the loan is paid down. Employer  
18 contributions that are used to pay the interest expense of a loan do not result in shares being  
19 allocated to participant accounts. As such, all else equal, the higher the rate of interest on the  
20 acquisition loan, the fewer the shares allocated to participant accounts in a given year.

21 64. Under the terms of the ESOP, participants (including Plaintiff) are entitled to an  
22 allocation of Company stock to their individual accounts generally based on the ratio of the  
23 participant’s compensation to the total compensation of all participants in the respective year. The  
24 amount of employer contributions the participants receive are not dependent on the price of value  
25 of Company stock.

**B. The ESOP Transaction**

65. According to a Form 5500 filed with the Department of Labor, on December 23, 2021, the ESOP purchased over 7,000,000 shares of the Company's stock, for a total price of \$206,508,990. This translates to an average per-share price of \$29.13.

66. To finance the purchase of shares, the ESOP had to borrow the entire purchase price from the Seller Defendants through the issuance of Seller Notes. These Seller Notes were subsequently reassigned to the Company as a loan from the Company to the ESOP. The ESOP thus became obligated to make a note payable to the Company for the full purchase price. The loan agreement provides for the loan to be repaid over 40 years.

67. The Sellers and/or Board members engaged investment banking firm Verit Advisors ("Verit") to advise it through the Transaction. Verit served as a financial advisor to BNBuilders and led the ESOP structuring, financing process, and execution on behalf of the company.

68. BNBuilders, acting through the Board, selected and appointed GreatBanc to serve as the ESOP Trustee. As a trustee charged with approving the terms of the ESOP Transaction, GreatBanc was required to (among other things) perform due diligence into BNBuilders' business and, along with other ESOP fiduciaries—e.g., BNBuilders and the Board—to ensure that the valuation of BNBuilders stock was based on accurate and reasonable information and that the ESOP paid no more than fair market value for the Company's stock.

69. The Company agreed to indemnify GreatBanc for its role in the ESOP Transaction and also agreed to indemnify all Board members for any civil action they become a party to due to their role as members of the Board of Directors, which would include their role as fiduciaries with the responsibility to appoint and monitor the ESOP Trustee with respect to the Transaction.

**C. The ESOP Overpaid for BNBuilders Stock**

70. BNBuilders and its Board members failed to establish and implement a governance structure for the ESOP Transaction that was in the interest of ESOP participants consistent with their fiduciary duties to monitor the Trustee and ensure that the ESOP did not pay more than fair market value.

71. The primary seller and Board Chairman, Brad Bastian, suffered a fundamental, structural conflict of interest. He failed to mitigate his conflicts and failed to adequately monitor and oversee GreatBanc to ensure it was performing its Trustee duties appropriately. Given his severe conflict as a Board member with fiduciary responsibilities to the ESOP and as a Seller who stood to gain from an inflated price, he should have formally delegated responsibility for selecting and then monitoring GreatBanc to a non-conflicted fiduciary; but he failed to do so.

72. The Trust Agreement states that, prior to December 23, 2021, BNBuilders (then controlled by and acting through the Board Defendants) appointed GreatBanc as the ESOP's Trustee, which was a fiduciary act. This appointment required them to monitor GreatBanc and to furnish accurate and complete information concerning BNBuilders' operations and future projected performance in connection with the ESOP Transaction. Thus, there was no governance structure nor fiduciary architecture to protect the ESOP's interest until December 23, 2021 -- the day that GreatBanc approved the ESOP Transaction terms.

73. GreatBanc, as the Trustee, was duty bound to evaluate the Company's operations and zealously negotiate the purchase price and other terms with the Sellers. GreatBanc was further required to thoroughly consider and document the risks associated with the Company's projections, determine that they were reasonable, and if not reasonable, insist that the Company adjust them accordingly.

74. During the ESOP Transaction, GreatBanc and the Board Defendants were duty bound to ensure that the ESOP did not pay more than fair market value for the BNBuilders stock it purchased.

1           75. Yet the Board Defendants did not select the Trustee because they believed  
2 GreatBanc would perform a thorough and rigorous evaluation of the sale price and other  
3 Transaction terms. To the contrary, GreatBanc was identified by the Board and Sellers advisors  
4 (including Verit who would receive a success fee for closing the Transaction) because these  
5 advisors had pre-existing relationships with GreatBanc that led them to believe GreatBanc would  
6 approve the Transaction without aggressively negotiating with the Sellers. And that is what  
7 occurred.

8           76. For example, prior to the ESOP Transaction, GreatBanc understood and agreed  
9 that Brad Bastian would remain Chairman of the Board and CEO even after the ESOP  
10 Transaction. Indeed, Brad Bastian retains these roles to this day, which allows him to retain  
11 control of the Company he sold for \$206 million. Similarly, GreatBanc understood that the Board  
12 members prior to the Transaction (Bastian and Finlay) would not be required to give up their  
13 board seats, nor would there be any new independent (outside) Board members added in  
14 connection with the ESOP Transaction.

15           77. While BNBuilders reported to the government that the Company become **100%**  
16 ESOP owned in 2021, its January 31, 2022 press release states that: “The move to an ESOP  
17 allows us to retain our management and leadership teams through the company. There will be no  
18 immediate change to our leadership teams.”

19           78. In fact, at the time of this filing, BNBuilders website lists eleven (11) senior  
20 executives as “Principals” (i.e., owners) of the Company, which indicates that certain  
21 “Principals” retained an ownership stake in the BNBuilders even after the ESOP reportedly  
22 purchased 100% of the Company.

23           79. Bastian—who was the primary Seller and Chairman of the Board prior to and after  
24 the Transaction—retained control over BNBuilders’ strategy, the amount and timing of dividends  
25 and stock distributions, and other fundamental business decisions. The Board Defendants also  
26 kept the power to amend the Company’s bylaws and the ESOP’s governing documents.

1           80. In addition, the Board Defendants effectively controlled GreatBanc given they  
2 had unilateral power to fire the Trustee if they did not like the decisions the Trustee made.

3           81. The ESOP's governing documents give BNBuilders—which was and is  
4 controlled by the Board Defendants—unilateral power to remove the Trustee “at any time” and  
5 gives the Board the power to pick the replacement for the Trustee.

6           82. The governing documents also provide that the Trustee “shall have no power,  
7 authority, or duty to interpret the Plan or to inquire into the decisions or determinations of the  
8 Plan Administrator, or to question the instructions given by the Plan Administrator.” The  
9 Trustees' role is thus limited to executing the directions given by BNBuilders, acting through its  
10 Board.

11           83. The governing documents further state that the Trustee is not liable for actions  
12 taken under the “proper directions of the Plan Administrator.” The Trustee is effectively shielded  
13 from liability for actions taken at the Company's direction, reinforcing that BNBuilders drives  
14 decisions within the ESOP.

15           84. Together, these provisions show that GreatBanc was not truly “independent.”

16           85. This lack of independence compromised not only GreatBanc's investigation of  
17 the Transaction terms including price, but also the ongoing management of BNBuilders. With  
18 limited exception, Plan participants did not have majority power to vote on shareholder matters.

19           86. As noted above, the Trustee approved a sale price of \$206,508,990 million for  
20 7,090,000 shares of the Company's stock, or \$29.13 per share. This amount exceeded the fair  
21 market value of the Company at the time of the Transaction and is greater than what a buyer,  
22 under no compulsion to buy BNBuilders, would have paid in an arm's length negotiation for the  
23 non-controlling and non-marketable interest sold.

24           87. The purchase price that the ESOP paid in December 2021 (\$206,508,990) far  
25 exceeded the fair market value of the purchased shares.



1 88. According to financial statements filed by the ESOP with the Department of  
2 Labor, the value of the BNBuilders stock in Plaintiff's and the stock purchased by the ESOP for  
3 \$29.13 per share was just \$3.20 per share at year-end 2021, \$9.27 per share at year-end 2022,  
4 and \$10.30 per share at year end 2023.

5 **D. Flawed Valuation Ignored Key Factors Affecting Fair Market Value**

6 89. The purchase price of over \$206 million and GreatBanc's fiduciary process and  
7 due diligence to justify that price suffered from a number of serious flaws that any prudent and  
8 diligent fiduciary, acting in the best interest of the ESOP and its participants, should have  
9 discovered and adjusted for. Here, GreatBanc did not do so.

10 90. First, in determining the purchase price Greatbanc and its valuation advisor failed  
11 to adequately account for persistent inflation and the resulting economic headwinds, including  
12 higher interest rates (affecting the demand for their construction projects) and prolonged supply  
13 chain disruptions (affecting their ability to complete and be compensated for projects on time).

14 91. After years of low inflation, prices began rising rapidly in 2021. Inflation initially  
15 appeared "transitory," with policymakers, such as the Federal Reserve, expecting inflation to  
16 ease as supply chains normalized.

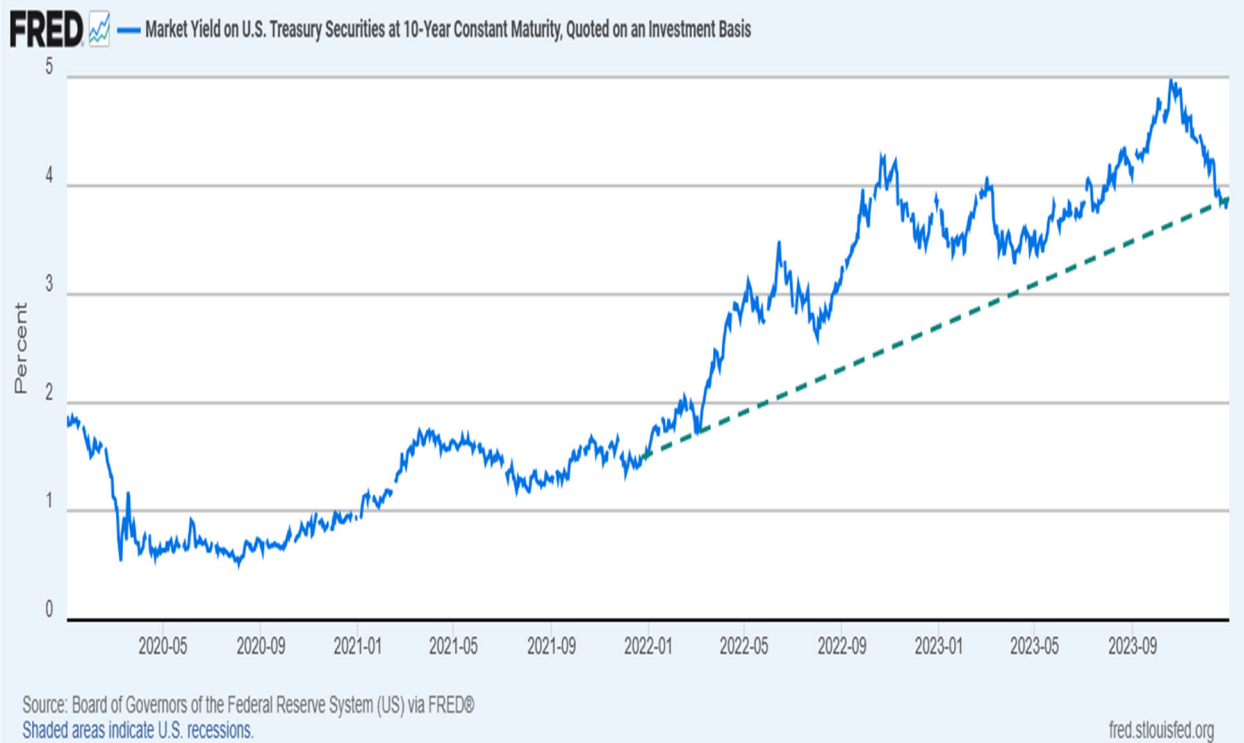
17 92. However, by October 2021 (or earlier), the consumer price index reports showed  
18 that the temporary deceleration of inflation from April to September 2021 was **short lived** and  
19 that **year-over-year inflation had topped 6%**. By mid-December 2021, the Federal Reserve  
20 had announced its view that inflation was not transitory and would require intervention in the  
21 form of increased interest rates.

22 93. Given the Federal Reserve's public statements concerning inflation, Greatbanc  
23 and its valuation advisor knew or should have known that the supply chain issues were not going  
24 to quickly abate and that their financial performance during the 5-year projection period (2022-  
25 2026) would face increased headwinds as higher interest rates impaired economic activity  
26 (particularly debt-sensitive activity like large scale construction projects).

1           94. This is because large scale construction activity—and hence demand for  
2 BNBuilders services—is heavily reliant on affordable financing, which would not exist for the  
3 forecast period used for the valuation of BNBuilders stock (2022-2026). The long-term reality of  
4 high inflation and the Federal Reserve tightening monetary policies were known by December  
5 15, 2021. The Federal Reserve’s public statements that high inflation would be long term should  
6 have caused BNBuilders’ financial projections to be revised downwards to address the depressed  
7 demand for BNBuilders services.

8           95. The Federal Reserve also made clear that it would engage in aggressive interest  
9 rate hikes to stem the surge in inflation. That BNBuilders would be forced to operate in an  
10 environment where the cost of debt skyrocketed was also known by mid December 2021. By that  
11 time, was also known or knowable that the rapid rise in interest rates would have a major impact  
12 on debt-reliant industries, like large scale construction projects and real estate development. The  
13 Federal Reserve did in fact raise rates from near zero to over 4% in 2022, which was the fastest  
14 tightening cycle since the 1980s.

96. As reflected in the following chart, the cost of debt increased substantially during the projection period, starting after the ESOP Transaction closed:



97. As a result of the facts known by mid December 2021, the Company would face substantial headwinds as demand dried up. As just one example, public and semi-public building construction projects depends on municipal bonds or public-private partnerships. When the persistent inflation caused the Fed to hike interest rates, bond issuance became more expensive, which meant governments were forced to delay or restructure long-term public building construction, such as fire stations, libraries, police offices, commuter train stations, and juvenile detention centers, all of which affected demand for BNBuilders' services.

98. Moreover, the main driver of BNBuilders' growth came from entering into partnerships with existing construction companies in West Coast cities, which required capital that would be more expensive in the high interest rate environment. It was therefore known or knowable that the Company's historic growth was not achievable during the projection period.

1           99. Furthermore, much of the Company’s growth came from “partnerships” with  
2 construction companies that were not contractually obligated to contribute their revenue,  
3 EBITDA and profits to BNBuilders, Inc. For example, in 2015 the Company was forced to sue  
4 one of its partners (BNBT) for a declaration that they were indeed “partners” and to establish that  
5 BNBuilders was entitled to the revenue and profits associated with BNBT’s operations. Based  
6 on the governing document for the ESOP, there were several “partnerships” similar to BNBT  
7 that are referred to as “affiliates,” which, on information and belief, were not contractually  
8 obligated to contribute their revenue and profits to BNBuilders, Inc.

9           100. All of these substantial risks and headwinds for BNB's revenues and operations—  
10 which were known prior to closing the Transaction—were not adequately accounted for in the  
11 valuation that GreatBanc relied upon to justify the ESOP’s purchase price of \$206.5 million.

12           101. Second, the sale price failed to adequately take account of the fact that the ESOP  
13 did not purchase a controlling interest in BNBuilders.

14           102. Since 2017, the Company’s Board of Directors has consisted solely of Brad  
15 Bastian, the President, and Rich Finlay, the CFO. That composition did not change in the years  
16 following the Transaction as they retained control of the Board through at least 2024. Despite the  
17 ESOP’s ostensible 100% ownership stake, actual control of BNBuilders Board remained in the  
18 hands of Bastian and Finlay.

19           103. As discussed above, the Sellers and GreatBanc came to an understanding that both  
20 Board members prior to the Transaction (Bastian and Finlay) would retain their board seats and  
21 Bastian would remain Chairman of the Board. Because this allowed the Brad Bastian and the  
22 Board Defendants to retain control over BNBuilders’ strategic direction and management, the  
23 fair market value of BNBuilders stock should have reflected a steep discount for the lack of  
24 control over the Company. But the \$206.5 million purchase price did not.

25           104. Because the ESOP participants did not gain meaningful control over BNBuilders  
26 as a result of the Transaction, the purchase price the ESOP paid should have been heavily  
27

1 discounted to reflect this lack of control. Court decisions have held that discounts for lack of  
2 control as high as 40% are appropriate.

3 105. Had even a minimal discount for lack of control (10%) been applied, the ESOP  
4 would have paid approximately \$20 million less than the ESOP actually did; and a 40% discount  
5 for lack of control would have resulted in the ESOP paying approximately \$80 million less than  
6 the ESOP actually did.<sup>1</sup> Here, the Trustee did not adequately consider which elements of control  
7 were actually being transferred via the sale and did not ensure that an appropriate discount for  
8 lack of control was used in the valuation of BNBuilders stock.

9 106. *Third*, the \$206 million price was based on financial information provided by the  
10 Brad Bastian (who ran and controlled BNBuilders). He had a personal interest in painting the  
11 rosier picture possible of BNBuilders' financial situation and, on information and belief, did so.  
12 GreatBanc had a responsibility to carefully scrutinize the financial projections and other  
13 information supplied by Brad Bastian and other Board Defendants, rather than simply taking  
14 them at face value. However, no evidence of such scrutinization of the valuation was provided  
15 in response to Plaintiff's counsel's pre-litigation request for information relating to valuation of  
16 BNBuilders stock in connection with the Transaction.

17 107. *Fourth*, the Transaction saddled the ESOP with an enormous debt burden that was  
18 effectively underwritten by the Company, which sapped its cash flows and growth potential as  
19 an ongoing business enterprise.

20 108. The entire \$206 million purchase price was debt-financed. This put a tremendous  
21 financial strain on the Company's operations and solvency. In addition, this severe drag on the  
22 Company's operations and solvency were not adequately reflected in the Transaction sale price.

23 109. The Trustee failed to adequately consider the related ESOP loan terms, the  
24 Company loan servicing obligations, and related implications for long term cash flow.  
25

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26 <sup>1</sup> The reductions for lack of control illustrated here assume that the Company did not have a significant debt burden  
27 prior to the ESOP Transaction.

110. The Department of Labor, as expressed through multiple settlement orders with ESOP trustees that abrogated their fiduciary duties, has stressed the importance of analyzing the impact a loan taken out to finance an ESOP transaction has on the company post-transaction. For example, as part of a required analysis pursuant to a settlement between DOL and Greatbanc, the Trustee Defendant here, the trustee was required to analyze:

“[W]hether the ESOP sponsor will be able to service the debt taken on in connection with the transaction (including the ability to service the debt in the event that the ESOP sponsor fails to meet the projections relied upon in valuing the stock); [and] ....the financial impact of the transaction on the ESOP sponsor. . . .”

*Perez v. GreatBanc Tr. Co.*, 5:12-cv-01648-R-DTB, ECF 167-1 at 5 (C.D. Cal. Jun. 2, 2014).

111. *Fifth*, the valuation utilized to value BNBuilders failed to apply a sufficient discount for lack of marketability to BNBuilders’ equity value. As a general matter, an arm’s-length buyer is willing to pay more for a highly liquid asset, and less for a highly illiquid asset.

112. Because BNBuilders’ stock has always been privately held, there is no public market on which it is traded. BNBuilders stock is far less liquid than stock in public companies like Apple or Meta, whose stock can be bought and sold in seconds to willing buyers.

113. The Plan document includes a “put option” which allows employees to sell their shares back to the Company at fair market value subject to certain restrictions. While the valuation relied upon by GreatBanc discussed the “put option” as a key way for employees to sell their shares, that (very limited) liquidity is not available to the ESOP as a whole. In other words, the Plan’s “put option” does not provide liquidity for the ESOP to itself liquidate its interest in BNBuilders. Further, the “put option” has substantial restrictions, such as limitations on the timing of when it can be exercised. Additionally, the Plan document permits the Company to repurchase shares in installments over a period of years, further limiting immediate liquidity.

114. The Plan document also imposes a “right of first refusal” that further limits the marketability of BNBuilders’ shares. Under this provision, prior to any transfer of shares to a third party, an employee must first offer the shares for purchase in writing to the Company, and

1 if the Company does not purchase the shares, to the Trust. The Company and Trust have 14 days  
2 to exercise this right on the same terms offered by an external buyer. The shares are therefore not  
3 as valuable as they would be in an open market, justifying a significant Discount for Lack of  
4 Marketability (“DLOM”).

5 115. Stout Risius Ross’ (“Stout’s”) Restricted Stock Study is a database of private  
6 placements of unregistered common stock issued through public companies and shows DLOMs  
7 as a percentage difference between the private placement price per share and the market trading  
8 price per share. Stout’s study shows mean and median discounts for lack of marketability as 25%  
9 and 21.3% respectively and includes a DLOM as high 91.3%.<sup>2</sup>

10 116. In light of the substantial limitations on marketability, and the empirical data in  
11 the Stout DLOM, GreatBanc should have obtained a massive DLOM for the ESOP. However,  
12 GreatBanc obtained only a small (single-digit) DLOM, insufficient to address BNBuilders’  
13 extremely limited marketability.

14 117. *Sixth*, as part of the Transaction, the Sellers and remaining “Principals” received  
15 warrants (or another form of synthetic equity, such as stock appreciation rights), which allowed  
16 the Sellers to dilute the value of the ESOP’s ownership in BNBuilders and were another  
17 mechanism by which Defendants extracted value for themselves at the expense of the ESOP.

18 118. The synthetic equity which went to Sellers and remaining Principals substantially  
19 diluted the value of BNBuilders stock allocated to employee-participants and were not  
20 adequately valued as a drain on the Company’s share value and cash flows.

21 119. In light of the significant value extracted from the Company via the synthetic  
22 equity, the ESOP should have paid a lower price to reflect the significant dilution of its interest  
23 in BNBuilders.

24 120. Had the Trustee Defendant adequately considered all material facts, it would have  
25 recognized that (a) the purchase price was inflated, (b) it was not prudent and in ESOP  
26

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27 <sup>2</sup> The period of the Stout Restricted Stock Study was an extended period prior to the Transaction.

1 participants' interests to complete the Transaction, and (c) the Transaction was designed to  
2 benefit the Seller Defendants rather than benefit Plan participants and their beneficiaries.

3 **E. The Sellers Knowingly Participated in the ESOP Transaction**

4 121. The Sellers and Board Members also knew or should have known that the ESOP  
5 overpaid in the Transaction. For example, Defendant Brad Bastian was one of the primary sellers  
6 and is CEO and Chairman of the Board of Directors of BNBuilders, on which he has served since  
7 2000. On information and belief, all of the remaining Sellers were senior executives who had  
8 intimate knowledge of BNBuilders' financial performance and operations. In these roles, the  
9 Sellers facilitated the preparation of materials used to value the Company and the Transaction  
10 itself.

11 122. As such, the Sellers had knowledge of the fiduciary breaches and the prohibited  
12 transactions set forth herein, and knowingly participated in and facilitated those prohibited  
13 transactions. The Sellers knew that Brad Bastian was both selling his interest in BNBuilders, and  
14 that he was a fiduciary of the ESOP at the time, and thus a party in interest to the ESOP. The  
15 Sellers also knew that the ESOP was subject to ERISA.

16 123. The Sellers and Board Members also knew or should have known that the ESOP  
17 was overpaying for the Company. For example, both Defendants Bastian and Finlay served on  
18 the Board before and after the ESOP Transaction. Both knew that Defendant Bastian would retain  
19 his role as Chairman of the Board and that both would remain Board members. They therefore  
20 knew that the purchase price should have reflected a steep discount for the lack of control over  
21 the Company, but did not. Similarly, Brad Bastian provided the financial information used to  
22 value the Company, which he used to paint the rosiest picture possible of BNBuilders' financial  
23 situation. Brad Bastian and Finlay also knew the entire \$206 million purchase price was debt-  
24 financed and would put a tremendous financial strain on the Company's operations and solvency.  
25 The Sellers also knew they were receiving warrants and that would significantly dilute the  
26 ESOP's interest in BNBuilders.



124. The Sellers and Board Defendants signed a number of documents in furtherance of the Transaction. For example, Brad Bastian executed amendments to the Company's corporate governance documents in connection with the ESOP Transaction. As a Seller, Bastian also executed the stock purchase agreement pursuant to which he sold his shares to the ESOP. Similarly, Finlay executed the Trust Agreement with GreatBanc and the governing plan document for the ESOP Agreement, which set up a governance structure whereby the Board Defendants were responsible for selecting, appointing, overseeing and monitoring the ESOP Trustee and other fiduciaries they appointed.

**F. The Sellers Retain Their Ill-Gotten Gains in their Possession**

125. The Plan Document contemplated that some or all of the Seller Defendants would invest the proceeds they received from the ESOP Transaction in "qualified replacement property" pursuant to Section 1042 of the Internal Revenue Code ("I.R.C."), in order to avoid capital gains tax on the sale of their BNBuilders stock to the ESOP. Thus, the Seller Defendants invested their proceeds from the Transaction in qualified replacement property and continue to hold such property to avoid the adverse tax consequences.

126. Consistent with Section 1042 of the I.R.C. each Seller Defendant was required to complete a signed Statement of Purchase that identified and declared the specific securities that represent the qualified replacement property that was purchased to avoid taxes on the receipt of proceeds from the ESOP Transaction. The Statement of Purchase for each Seller Defendant who elected I.R.C. § 1042 deferral was filed with their tax return and would identify precisely the qualified replacement property held in the Sellers account along with all investment gains thereon.

127. Thus, each Seller deposited their share of the proceeds from the Transaction in an account designated to hold "qualified replacement property" pursuant to I.R.C. § 1042 to avoid capital gains tax on the sale of their BNBuilders stock to the ESOP. Under I.R.C. § 1042, the gains on the Company stock sold to the ESOP are not taxed until the qualified replacement

property is sold and capital gains taxes can be eliminated entirely if the qualified replacement property is held under the Seller's death.

### V. CLASS ACTION ALLEGATIONS

128. Plaintiff brings his claims on behalf of the Plan pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and as a class action pursuant to Federal Rule of Civil Procedure 23 on behalf of the following Class:<sup>3</sup>

All participants in the BNBuilders ESOP on or after December 23, 2021, and those participants' beneficiaries, excluding Defendants and their immediate family members; any fiduciary of the Plan; the officers and directors of BNBuilders or of any entity in which a Defendant has a controlling interest; and legal representatives, successors, and assigns of any such excluded persons.

129. **Numerosity.** The Class satisfies the numerosity requirement because it is composed of hundreds of persons. At the end of 2023, the ESOP had approximately 508 participants. The number of Class members is sufficiently large that joinder of all its members is impracticable.

130. **Commonality.** This case presents numerous common questions of law and fact, including (among other things):

- a. Whether the ESOP Transaction was a prohibited transaction under ERISA;
- b. Whether the Sellers received more than adequate consideration in connection with the ESOP Transaction;
- c. Whether Defendant GreatBanc was a fiduciary to the ESOP as the ESOP Trustee;
- d. Whether the Trustee engaged in a prudent investigation of the ESOP Transaction and acted in the best interests of the ESOP and its participants in approving the ESOP Transaction;
- e. Whether BNBuilders, operating through Brad Bastian and Rich Finlay imprudently appointed GreatBanc as Trustee, failed to monitor the Trustee, and

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<sup>3</sup> Plaintiff reserves the right to revise the class definition and to propose other or additional classes in subsequent pleadings, after discovery in this action.

imprudently retained the Trustee despite its fiduciary failures, without taking appropriate corrective action;

- f. Whether the Board Defendants or any Seller Defendants were involved in the preparation of the financial projections used in valuations of BNBuilders stock that formed the basis of the ESOP purchase price of \$206 million;
- g. Whether the Board Defendants and Seller Defendants provided misleading or incomplete financial information in connection with the ESOP Transaction;
- h. The amount of losses suffered by the ESOP as a result of the unlawful conduct alleged herein;
- i. The proper form of equitable and injunctive relief; and
- j. The extent to which any non-fiduciary Defendants are subject to equitable remedies and relief.

131. **Typicality.** Plaintiff's claims are typical of the claims of the Class because (among other things): (a) he was employed by BNBuilders and participated in the ESOP; (b) Plaintiff was injured in the same manner as other Class members in connection with the ESOP Transaction and the inflated price that was paid for the Company; and (c) to the extent that Plaintiff seeks relief on behalf of the Plan pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), his claims are not only typical of, but the same as, a claim under § 502(a)(2) brought by any other Class member.

132. **Adequacy.** Plaintiff will fairly and adequately protect the interests of the Class and are committed to the vigorous representation of the Class. Plaintiff's retained counsel, Cohen Milstein Sellers and Toll PLLC, are experienced in class action and ERISA litigation, and Plaintiff and his counsel have no interests antagonistic to or in conflict with the interests of the Class.

133. **Rule 23(b)(1)(A).** Class certification is appropriate pursuant to Federal Rule of Civil Procedure 23(b)(1)(A). Fiduciaries of ERISA-covered plans have a legal obligation to act

consistently with respect to all similarly situated participants and to act in the best interests of plan participants. This action challenges whether Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the ESOP as a whole. As a result, prosecution of separate actions by individual members would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants relating to the ESOP.

134. **Rule 23(b)(1)(B).** Class certification is also appropriate pursuant to Federal Rule of Civil Procedure 23(b)(1)(B). Administration of an ERISA-covered plan requires that all similarly situated participants be treated the same. Resolving whether Defendants fulfilled their fiduciary obligations to the ESOP and engaged in prohibited transactions with respect to the ESOP would, as a practical matter, be dispositive of the interests of the other participants in the ESOP and would substantially impair or impede their ability to protect their interests if they are not made parties to this litigation by being included in the Class. Further, the relief granted by the Court, including any equitable relief, injunctive relief, or accounting of profits, may be dispositive of the interests of other class members.

135. **Rule 23(b)(2).** Additionally and alternatively, class certification is appropriate pursuant to Federal Rule of Civil Procedure 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, making appropriate declaratory and injunctive relief with respect to the Class as a whole. This action challenges whether Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the ESOP as a whole. The members of the Class are entitled to declaratory and injunctive relief to remedy Defendants' fiduciary violations.

136. **Rule 23(b)(3).** Additionally and alternatively, class certification is appropriate pursuant to Federal Rule of Civil Procedure 23(b)(3) because questions of law and fact common to all Class members predominate over any questions affecting individual members of the Class and because a class action is superior to other available methods for the fair and efficient

adjudication of this action. Common questions related to liability will necessarily predominate over any individual questions because Defendants' duties and obligations were uniform as to all ESOP participants and therefore all members of the Class, and whether Defendants breached those duties will center on their conduct rather than the conduct of individual class members. Common questions as to remedies will likewise predominate over any individual issues in light of the plan-wide claims asserted in the action and the nature of the relief sought. Further, a class action is superior to other available methods for resolving the controversy because the claims are brought on behalf of the ESOP, involve an ESOP Transaction impacting all Class members, and the issues in this litigation will be most efficiently resolved in a single proceeding rather than multiple proceedings. The losses suffered by individual Class members are small compared to the expense and burden of individual prosecution of this action. As such, Class members do not have an interest in individually prosecuting their claims, and Plaintiff is unaware of any similar action filed by another member of the Class. Proceeding on a class-wide basis in this forum will be desirable, manageable, and obviate the need for unduly duplicative litigation which might result in inconsistent judgments. The names and addresses of the Class members are available from the ESOP and/or the Company, and notice can be provided to all members of the Class to the extent required by Federal Rule 23.

## **VI. CAUSES OF ACTION**

### **Count I**

#### **Prohibited Transactions in Violation of ERISA § 406(a), 29 U.S.C. § 1106(a) (Against GreatBanc, Board Defendants and BNBuilders)**

137. Plaintiff incorporates the preceding paragraphs as though set forth herein.

138. ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1) requires that a plan fiduciary "shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect (A) sale or exchange, or leasing, of any property between the plan and a party in interest," "(B) lending of money or other extensions of credit between the plan and

a party in interest,” or a “(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.”

139. ERISA § 3(14), 29 U.S.C. § 1002(14) defines a “party in interest” to include

- “any fiduciary . . . of such employee benefit plan”
- “an employer any of whose employees are covered by such plan”
- “an employee, officer, director . . . or a 10 percent or more shareholder” of an employer whose employees are covered by the ESOP
- “a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E)[.]”

29 U.S.C. § 1002(14)(A), (C), (H), (F).

140. Each of the Defendants named in this Count was a fiduciary as discussed in Section III.B-E above.

141. The ESOP Transaction involved the sale of property and lending of money between the ESOP and several “parties in interest,” and transfer of ESOP assets to parties in interest alleged above.

142. As set forth in Section IV above, GreatBanc, approved the ESOP Transaction terms, including the price and financing terms, in violation of ERISA § 406(a)(1)(A), (B), and (D), 29 U.S.C. § 1106(a)(1)(A), (B), and (D).

143. Prior to and through the completion of the ESOP Transaction, BNBuilders, as a Named Fiduciary, Brad Bastian (as Chairman of the Board of Directors), Rich Finlay, and the Board of Directors caused the prohibited transactions to occur through their actions and inactions described above.

144. Further, Brad Bastian received significant consideration in connection with the ESOP Transaction and was familiar with the terms of, and parties to, the Transaction. Richard Finlay executed the Trust Agreement with GreatBanc and the governing plan document for the ESOP Agreement, which set up a governance structure whereby the Board Defendants were responsible for selecting, appointing, overseeing and monitoring the ESOP Trustee and other

1 fiduciaries they appointed. Both Defendants Bastian and Finlay served on the Board before and  
 2 after the ESOP Transaction. Both knew that Defendant Bastian would retain his role as Chairman  
 3 of the Board and that both would remain Board members. Similarly, as Board Members, Bastian  
 4 and Finlay knew the entire \$206 million purchase price was debt-financed and would put a  
 5 tremendous financial strain on the Company's operations and solvency. As such, each of them  
 6 had actual or constructive knowledge that: (i) the Transaction constituted a direct or indirect sale  
 7 of property between the ESOP and parties affiliated with BNBuilders (ERISA "parties in  
 8 interest"); (ii) the ESOP loans constituted a use of Plan assets by or for the benefit of themselves  
 9 and other parties in interest; and, (iii) the ESOP Transaction price was more than fair market  
 10 value as set forth in Section IV, *supra*.

11 145. GreatBanc was hired for the purpose of ensuring the ESOP Transaction was fair  
 12 to the ESOP and thus also knew or should have known the aforementioned facts. Yet, in spite of  
 13 such actual or constructive knowledge, the Board Defendants, GreatBanc, and BNBuilders took  
 14 acts to consummate the ESOP Transaction and/or influenced the Trustee to do so, and are thus  
 15 liable for violations of ERISA § 406(a)(1)(A), (B), and (D), 29 U.S.C. § 1106(a)(1)(A), (B), and  
 16 (D).

17 146. Defendants GreatBanc, Brad Bastian, Rich Finlay, and BNBuilders thus caused  
 18 the ESOP to pay an inflated price and take on \$206 million in debt with unreasonable terms,  
 19 which resulted in substantial losses to the ESOP and Plaintiff's individual account. They each of  
 20 them is subject to appropriate relief under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA  
 21 § 409, 29 U.S.C. § 1109 for these violations of ERISA.

22 147. In addition, or alternatively, each of them is liable as co-fiduciaries as set forth in  
 23 Count IV.

24 **Count II**  
 25 **Prohibited Transaction in Violation of ERISA § 406(b), 29 U.S.C. § 1106(b)**  
 26 **(Against Defendant Brad Bastian)**

27 148. Plaintiff incorporates the preceding paragraphs as though set forth herein.

149. Brad Bastian was a fiduciary as discussed in Section III.E above.

150. ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1) prohibits a fiduciary from “deal[ing] with the assets of the plan in his own interest or for his own account.”

151. As set forth in Sections III.E and IV, *supra*, Brad Bastian sold his interest in BNBuilders and dealt with ESOP assets in his own interest within the meaning of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1). ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2) mandates that a plan fiduciary shall not “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.”

152. As set forth in Sections III.E and IV, *supra*, Brad Bastian acted in his own interests and adverse to the ESOP’s interests in connection with the ESOP Transaction by arranging to receive more than adequate consideration for their shares, in violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

153. ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3) prohibits a plan fiduciary from “receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”

154. As set forth in Sections III.E and IV, *supra*, Brad Bastian orchestrated the ESOP Transaction and caused himself to receive consideration (indeed, more than adequate consideration) for his own personal accounts in connection with the ESOP Transaction, in violation of ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3).

155. Brad Bastian is therefore subject to appropriate relief under ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3) and ERISA § 409, 29 U.S.C. § 1109 for these violations of ERISA.

**Count III**  
**Breach of Fiduciary Duties Under ERISA § 404(a)(1)(A) and (B),**  
**29 U.S.C. § 1104(a)(1)(A) and (B)**  
**(Against GreatBanc and Board Defendants)**

156. Plaintiff incorporates the preceding paragraphs as though set forth herein.



1           157. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) requires that a plan fiduciary  
2 act “for the exclusive purpose of providing benefits to participants and [the] beneficiaries [of the  
3 plan.]”

4           158. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) requires that a plan fiduciary  
5 act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a  
6 prudent [person] acting in a like capacity and familiar with such matters would use in the conduct  
7 of an enterprise of a like character and with like aims.”

8           159. In the context of a sale of the sponsoring company/employer to an ESOP, the  
9 duties of loyalty under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A) and prudence under  
10 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) require a fiduciary ESOP trustee to undertake  
11 a prudent and diligent investigation of the sale price, the financing terms, and other transaction  
12 terms and all underlying financial projections and assumptions, in the exclusive interest of the  
13 ESOP and its participants without regard to the interests of company insiders who retained the  
14 trustee, to ensure that the ESOP and its participants pay no more than adequate consideration for  
15 the company’s assets.

16           160. Each of the Defendants named in this Count was a fiduciary as discussed in  
17 Section III.C–D., *supra*.

18           161. Based on the facts alleged above, Defendant GreatBanc failed to undertake a  
19 prudent and appropriate investigation of the terms of the ESOP Transaction and effectively gave  
20 a wink and a nod to Brad Bastian and the other Seller Defendants who hired Defendant  
21 GreatBanc, instead of serving in a truly independent capacity for the exclusive benefit of the  
22 ESOP and its participants.

23           162. As alleged above, a prudent and loyal investigation of the relevant ESOP  
24 Transaction terms and underlying financial projections and assumptions in connection with the  
25 ESOP Transaction would have revealed that the price the ESOP paid was greater than the fair  
26  
27  
28

1 market value of the BNBuilders stock at the time of the Transaction, as set forth in Section IV,  
2 *supra*.

3 163. By failing to act prudently and loyally in participants' best interests in connection  
4 with the ESOP Transaction and the ongoing management of the ESOP, Defendant GreatBanc  
5 breached its fiduciary duties under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A)  
6 and (B) and caused losses from the ESOP's overpayment in the ESOP Transaction, which caused  
7 losses to the individual retirement accounts of ESOP participants.

8 164. As set forth above, the Board Defendants breached their fiduciary duties in  
9 connection with the ESOP Transaction by, *inter alia*, selecting GreatBanc as Trustee for self-  
10 interested reasons, by providing overly aggressive projections of growth to Defendant  
11 GreatBanc, and by ensuring that Brad Bastian remained Chairman of the Board and retained  
12 control over BNBuilders through his role as CEO.

13 165. As alleged above, the Board Defendants were ESOP fiduciaries who were  
14 responsible for fulfilling BNBuilders' fiduciary duties as set forth in the Plan Document. In  
15 addition, the Board's power to appoint and/or remove the Trustee resulted in their obligation to  
16 monitor the Trustee to ensure that it is acting in compliance with the terms of the Plan and in  
17 accordance with ERISA. *See* 29 C.F.R. § 2509.75-8 (FR-17) (2023). If the appointed fiduciary  
18 has violated or continues to violate ERISA, the monitoring fiduciary must remove the appointed  
19 fiduciary and take any other remedial action necessary to address the ERISA violations.

20 166. None of the Board Defendants adequately monitored the Trustee's performance  
21 prior to the ESOP Transaction. As such, they failed to ensure that the Trustee did not allow the  
22 ESOP to pay more than fair market value for the BNBuilders stock and that the financing terms  
23 were reasonable.

24 167. As such, the Board Defendants breached their fiduciary duty to monitor the  
25 Trustee in compliance with ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B)  
26 and other applicable ERISA regulations. Among other things, the Board Defendants:  
27

- a. failed to monitor and evaluate the performance of the Trustee, or have a system in place for doing so, to ensure that the Trustee conducted a sufficiently rigorous review of the ESOP Transaction;
- b. knew and failed to correct the fact that the Trustee was acting based on unrealistic and unreliable financial projections for BNBuilders’ future revenues, cash flows, and earnings;
- c. knew and failed to correct the fact that the Transaction sale price approved by the Trustee was inflated and exceeded the fair market value of the Company and that the financing terms were unreasonably profitable for the Sellers to the detriment of the ESOP and its sole asset (BNBuilders);
- d. failed to investigate Defendant GreatBanc’s appropriateness and competence as Trustee which would have identified and then avoided the problems associated with its work in connection with other transactions, *see supra* ¶ 75;
- e. failed to remove the Trustee when they knew that the Trustee’s performance was inadequate for the reasons described herein and elsewhere in this Complaint; and
- f. failed to take other appropriate remedial measures to address the Trustee’s fiduciary failures as Trustee and the improper approval of the ESOP Transaction.

168. Had BNBuilders and the Board Defendants properly monitored the Trustee, the ESOP would not have overpaid in the ESOP Transaction.

169. Defendants GreatBanc, Brad Bastian, Rich Finlay, BNBuilders, and the Board of Directors caused substantial losses to the ESOP and thus are subject to appropriate relief under ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3) and ERISA § 409, 29 U.S.C. § 1109 for these fiduciary breaches in violation of ERISA.

**Count IV**  
**Co-Fiduciary Liability Under ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3)**  
**(Against BNBuilders and the Board Defendants)**

170. Plaintiff incorporates the preceding paragraphs as though set forth herein.

171. Each of the Defendants named in this Count was a fiduciary as discussed in Section III.B and D, *supra*.

172. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1) provides that 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 . . . if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary.”

173. ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2) provides that 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 . . . 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.”

174. ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3) provides that 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 . . . if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”

175. The Board Defendants had all management power over BNBuilders and/or were involved in and directed the preparation of the financial projections underlying the stock valuation BNBuilders relied upon in determining the purchase price the ESOP paid for the Company.

176. Given their intimate knowledge of BNBuilders’ business, their unique access to Company financial information (and involvement in the preparation of such information), and their appointment of Defendant GreatBanc, BNBuilders and the Board Defendants knew that the price the ESOP paid for BNBuilders stock was inflated and exceeded fair market value and knew

1 that the Trustee failed to prudently and appropriately carry out their duties in approving the ESOP  
2 Transaction.

3 177. Similarly, by failing to appropriately monitor and address the performance  
4 failures of the Trustee, or have a system in place for ensuring that the Trustee conducted a  
5 sufficiently rigorous review of the ESOP Transaction in compliance with ERISA, the Defendants  
6 named in this Count failed to comply with their fiduciary duties which enabled the Trustee to  
7 facilitate the ESOP Transaction in breach of the Trustee's fiduciary duties to the ESOP.

8 178. As discussed above, the Defendants named in this Count had knowledge of the  
9 facts underlying the Trustee's breaches and knowledge that the Trustee was not appropriately  
10 monitored, but failed to make reasonable efforts under the circumstances to remedy the breaches.

11 179. Under ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3), each of the Defendants  
12 named in this Count are liable as co-fiduciaries for Defendant GreatBanc's fiduciary violations.

13 180. Had Defendants not violated their co-fiduciary duties, the ESOP would not have  
14 suffered the losses alleged herein. They are therefore subject to appropriate relief under ERISA  
15 § 409, 29 U.S.C. § 1109 and ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3) based  
16 on their co-fiduciary liability.

17 **Count V**  
18 **Equitable Relief Under ERISA § 502(a)(3), 29 U.S.C § 1132(a)(3)**  
19 **(Against Seller Defendants)**

20 181. Plaintiff incorporates the preceding paragraphs as though set forth herein.

21 182. Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), a court may award "other  
22 appropriate equitable relief" to redress "any act or practice" that violates ERISA. A defendant  
23 may be held liable under this section regardless of whether it is a fiduciary.

24 183. A non-fiduciary transferee of ill-gotten assets of the Plan is subject to equitable  
25 restitution of ill-gotten ESOP property and disgorgement of any profits thereon if the non-  
26 fiduciary had actual or constructive knowledge of the circumstances that rendered the transaction

1 or payment unlawful or if the transferee paid no consideration for the ill-gotten assets that  
2 belonged (and still belong in good conscience) to the ESOP.

3 184. As discussed in Section IV.E above, the Sellers knowingly participated in the  
4 Transaction and new or should have known that the Transaction violated ERISA § 406(a)(1), 29  
5 U.S.C. § 1106(a)(1). Through their roles as Board members and/or executives, they knew the  
6 ESOP was a plan covered by ERISA, which is evident in the governing Plan Document and Trust  
7 Agreement that the Board members approved and Defendant Finlay executed. The Sellers knew  
8 that Brad Bastian was a party in interest to the ESOP. The Sellers also knew or should have  
9 known that the ESOP overpaid in the Transaction based on the allegations set forth above.

10 185. The Seller Defendants knowingly participated in and profited from the fiduciary  
11 breaches and prohibited transactions alleged herein with full knowledge that their stake in the  
12 Company was being unlawfully acquired for greater than fair market value.

13 186. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), the Court should order  
14 restitution of the ESOP property the Sellers received as a result of the ESOP Transaction and  
15 disgorgement of any profits thereon, regardless of whether or not the Sellers were fiduciaries to  
16 the ESOP. As discussed above, the consideration that the Sellers received impermissibly  
17 exceeded the fair market value of their shares. Moreover, the Sellers had actual or constructive  
18 knowledge that they were receiving greater than fair market consideration based on, *inter alia*,  
19 (i) their personal familiarity with the value of their own equity interests; (ii) their access to the  
20 Company's books and records; (iii) their inside knowledge of confidential business and financial  
21 information pertaining to BNBuilders; (iv) their status as officers or directors of the Company,  
22 to the extent they held those roles; and (v) their close personal and/or family relationships to  
23 other company insiders.

24 **Count VI**  
25 **Illegal Agreement to Exculpate Fiduciary Liability in**  
26 **Violation of ERISA § 410(a), 29 U.S.C. § 1110(a)**  
**(Against Trustee Defendant and Board Defendants)**

27 187. Plaintiff incorporates the preceding paragraphs as though set forth herein.

1 188. ERISA § 410(a), 29 U.S.C. § 1110(a) provides that “any provision in an agreement  
2 or instrument which purports to relieve a fiduciary from responsibility or liability for any  
3 responsibility, obligation, or duty under this part shall be void as against public policy.”

4 189. Indemnification agreements requiring a company owned by an ESOP to indemnify  
5 the ESOP fiduciaries are prohibited as they “would have the same result as an exculpatory clause,  
6 in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by  
7 abrogating the plan’s right to recovery from the fiduciary for breaches of fiduciary obligations.”  
8 29 C.F.R. § 2509.75-4 (1975).

9 190. As stated above, BNBuilders and the Board adopted and/or approved the  
10 Trust Agreement with Defendant GreatBanc, which states that BNBuilders will indemnify  
11 Defendant GreatBanc “for any loss, cost, expense, or other damage, including (but not  
12 limited to) attorneys’ fees, suffered by any of the Indemnitees resulting from, or incurred  
13 with respect to, any legal proceedings, actions, suits, arbitrations and investigations related  
14 in any way to the performance of services by any one or more of the Indemnitees pursuant  
15 to this Agreement and the Trust.”

16 191. BNBuilders’ Articles of Incorporation, as amended in 2020, likewise provide  
17 indemnification to Company directors and officers for any defense costs or liability associated  
18 with acts or responsibilities associated with their role as a Company director or officer.

19 192. The indemnification and defense provisions in the Trust Agreement and Articles of  
20 Incorporation violate ERISA § 410(a), 29 U.S.C. § 1110(a) to the extent that they purport to relieve  
21 the Trustee Defendant and Board Defendants of responsibility or liability for violations of ERISA,  
22 including the ERISA violations alleged herein.

23 193. The Trustee Defendant and Board Defendants are fiduciaries to the Plan within the  
24 meaning of ERISA § 3(21), 29 U.S.C. § 1002(21).

25 194. If the indemnification provisions set forth above were exercised to indemnify  
26 Defendants for the ERISA violations alleged in this case, it would abrogate the ESOP’s right to  
27

1 recovery from a breaching fiduciary and effectively require the ESOP to bear the cost of liability  
2 itself.

3 195. Plaintiff seeks appropriate relief under ERISA §§ 502(a)(2) and/or 502(a)(3), 29  
4 U.S.C. §§ 1132(a)(2) and/or 1132(a)(3) to enjoin Defendants from relying on this indemnification  
5 provision in connection with any liability or costs of defense in this case.

## 6 **VII. PRAYER FOR RELIEF**

7 196. Plaintiff, on behalf of himself, the ESOP, and the Class, prays that judgment be  
8 entered against Defendants on each Count and that the Court grant the following relief:

9 A. Declare that Defendants have violated ERISA as alleged herein;

10 B. Enjoin Defendants from engaging in further such violations of ERISA;

11 C. Order Defendants to restore all losses to the Plan that resulted from their ERISA  
12 violations;

13 D. Order the Seller Defendants to disgorge all ill-gotten ESOP proceeds in  
14 connection with the ESOP Transactions (and profits thereon) and deposit them into a constructive  
15 trust for the benefit of all current and former ESOP participants;

16 E. Order other remedial and equitable relief that the Court deems appropriate,  
17 including but not limited to reforming or rescinding the ESOP Transaction against all  
18 Defendants, a surcharge against Defendants, an accounting for profits, and a constructive trust  
19 and/or equitable lien on any funds wrongfully held by any of the Defendants;

20 F. Remove GreatBanc from its role as ESOP Trustee if it is found to have breached  
21 any of its fiduciary obligation to the ESOP and appoint an independent trustee for the ESOP, who  
22 has no prior relationship or dealings with the Sellers or its advisors.

23 G. Enjoin the Defendants from dissipating any of the proceeds they received from  
24 the ESOP Transaction held in their actual or constructive possession until the ESOP participants'  
25 rights can be adjudicated;



1 H. Enjoin the Defendants from transferring or disposing of any of the proceeds they  
2 received from the ESOP Transaction to any person or entity, which would prejudice, frustrate,  
3 or impair the ESOP participants' ability to recover the same;

4 I. Require Defendants to pay attorneys' fees and costs pursuant to ERISA § 502(g),  
5 29 U.S.C. § 1132(g) and/or order payment of fees and expenses to Plaintiff's counsel on the basis  
6 of the common benefit or common fund doctrine out of any money recovered for the Class;

7 J. Award pre-judgment interest and post-judgment interest as appropriate; and,

8 K. Award such other and further relief that the Court determines is appropriate  
9 pursuant to ERISA §§ 502(a)(2) and/or (a)(3), 29 U.S.C. §§ 1132(a)(2) and/or (a)(3), or pursuant  
10 to Rule 54(c) of the Federal Rules of Civil Procedure, or that is equitable and just.

11 **DEMAND FOR JURY TRIAL**

12 Plaintiff hereby demands trial by jury on all issues so triable, pursuant to Rule 38 of the  
13 Federal Rules of Civil Procedure.

1 DATED: September 5, 2025

Respectfully Submitted,

2 /s Julie G. Reiser

3 Julie G. Reiser, WSBA No. 27485

4 Michelle C. Yau (*pro hac vice* forthcoming)

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