

1 Daniel Feinberg – CA State Bar No. 135983  
Nina Wasow – CA State Bar No. 242047  
2 LEWIS, FEINBERG, LEE, RENAHER & JACKSON, P.C.  
476 9th Street  
3 Oakland, CA 94607  
Telephone: (510) 839-6824  
4 Facsimile: (510) 839-7839  
Email: dfeinberg@lewisfeinberg.com  
5 Email: nwasow@lewisfeinberg.com

6 *Attorneys for Plaintiff*

7  
8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 EDWARD CLARKE, ) Case No. C 09-03467-JAM-DAD  
11 )  
Plaintiff, ) **DECLARATION OF NINA WASOW IN**  
12 ) **SUPPORT OF PLAINTIFF’S MOTION**  
vs. ) **FOR PRELIMINARY APPROVAL OF**  
13 ) **SETTLEMENT**  
14 MICHAEL LINDEMAN, LORRAINE )  
LINDEMAN, DAVID NICKUM, VALLEY )  
15 AGGREGATE TRANSPORT, INC., the )  
BOARD OF DIRECTORS OF VALLEY )  
16 AGGREGATE TRANSPORT, INC., and )  
ADMINISTRATION COMMITTEE FOR )  
17 THE VALLEY AGGREGATE, INC. )  
EMPLOYEE STOCK OWNERSHIP PLAN. )  
18 )  
Defendants. )  
19 )  
20 )

21  
22 I, Nina Wasow, declare as follows:

23 1. I am a member in good standing of the State Bar of California, admitted to  
24 practice before this Court, and an attorney at Lewis, Feinberg, Lee, Renaker & Jackson, P.C.  
25 (“LFLRJ”), which is counsel for Plaintiff in this matter.

26 2. All the facts stated herein are true and correct within my personal knowledge and  
27 if called as a witness I could and would testify competently to the facts stated herein.

28 3. Attached hereto as Exhibit 1 is a true and correct copy of the parties’ Stipulation

1 and Agreement of Settlement (“Settlement”). All parties and counsel executed the Settlement on  
2 August 23, 2011. Attached hereto as Exhibit 2 is a true and correct copy of Plaintiff’s proposed  
3 Notice of Class Action Settlement.

4 4. Prior to reaching the Settlement, the parties conducted discovery. Plaintiff served  
5 four sets of written requests for production of documents and one set of interrogatories on  
6 Defendants. In response to Plaintiff’s written requests for production, Defendants produced over  
7 27,000 pages of documents.

8 5. Plaintiff also issued a subpoena for documents upon Michael Good, the person  
9 hired to provide a valuation of the stock of Valley Aggregate Transport, Inc. for the purchase of  
10 such stock by the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan (“Plan” or  
11 “ESOP”). In response, Mr. Good produced approximately 4,400 pages of documents.

12 6. Defendants served one set of interrogatories, one set of requests for production of  
13 documents, and one set of requests for admission upon Plaintiff, to which Plaintiff responded.

14 7. Plaintiff deposed Defendants Michael Lindeman and David Nickum on December  
15 21, 2010, and January 18, 2011, respectively.

16 8. Plaintiff is informed and believes that there are approximately 150 members in the  
17 proposed Class.

18 9. On February 10, 2011, the parties and their counsel attended a full-day mediation  
19 in Oakland with mediator and retired Judge Layne Phillips. The parties did not reach agreement  
20 at the mediation, but negotiations continued thereafter. The parties reached an agreement on  
21 April 11, 2011.

22 10. Throughout this litigation, Plaintiff Edward Clarke was involved and committed  
23 to the best interests of the class. Plaintiff prepared for his deposition, which was cancelled the  
24 day before it was scheduled to take place due to ongoing settlement discussions. He also  
25 participated in the mediation. Mr. Clarke traveled to Oakland to attend the mediation in person.  
26 Plaintiff remained available to Class Counsel throughout the litigation, monitored its progress,  
27 and regularly consulted with Class Counsel regarding litigation decisions.

28 11. Plaintiff is informed and believes that the costs of defense in this case have been

1 paid out of Defendants' \$3 million insurance policy, and litigating the case through trial would  
2 likely have used the entire policy.

3 12. LFLRJ and its predecessors have litigated cases under ERISA since 1976. The  
4 firm has engaged in litigation and consulting work throughout the United States on behalf of  
5 participants, plans, employers, unions, trustees and other fiduciaries, and service providers. The  
6 firm handles cases and advises clients on all aspects of employee benefits, including benefit  
7 entitlement, fiduciary responsibility, plan design and administration, federal preemption, service-  
8 provider malpractice, prohibited transactions, and compliance with the requirements of the  
9 Department of Labor, Pension Benefit Guaranty Corporation, IRS and other regulatory agencies.

10 13. The firm has served as class counsel in numerous ERISA class actions, including,  
11 but not limited to, the following:

- 12 • ***Fernandez v. K-M Industries Holding Co., Inc.***, Case No. C 06-7339 CW (N.D.  
13 Cal.): The firm represented as co-counsel a class of employees of Kelly-Moore  
14 Paint Company and CIG (an insurance company which, along with Kelly-Moore,  
15 was owned by K-M Industries Holding Co., Inc.) who were participants and  
16 beneficiaries of the K-M Industries Holding Co., Inc. Employee Stock Ownership  
17 Plan. Plaintiffs alleged that Defendants breached their fiduciary duties under  
18 ERISA by causing the ESOP to purchase sponsoring employer stock at an inflated  
19 price. Plaintiffs settled with the Company and the family trust of its founder,  
20 William Moore, after briefing but before decision on their motion for summary  
21 judgment on the statute of limitations. Plaintiffs settled with the successor trustee  
22 of the ESOP, North Star Trust Company, after briefing but before decision on  
23 North Star's motion for summary judgment on the merits. Class-wide settlements  
24 resulted in the payment of \$55 million.
- 25 • ***Neil, et al., v. Zell, et al.***, 08-6833 (N.D. Ill.). The firm represents participants and  
26 beneficiaries of the Tribune Company Employee Stock Ownership Plan in a  
27 certified class action pending in the Northern District of Illinois. Plaintiffs allege  
28 that defendants breached fiduciary duties and engaged in prohibited transactions  
in the 2007 Leveraged ESOP Transaction which permitted Sam Zell to take  
control of the Tribune Company. Tribune Company filed bankruptcy less than a  
year after the Transaction, and the ESOP's stock is now worthless. The district  
court permitted plaintiffs to proceed with their key claims in denying in part  
defendants' motion to dismiss, *Neil v. Zell*, 677 F. Supp. 2d 1010 (N.D. Ill. 2009).  
Subsequently, the district court granted partial summary judgment for plaintiffs  
on their prohibited transaction claim, *Neil v. Zell*, --- F. Supp. 2d ---, 2010 WL  
4670895 (N.D. Ill. Nov. 9, 2010), and denied the defendant trustee's summary  
judgment motion to cap plaintiffs' damages, *Neil v. Zell*, --- F. Supp. 2d ---, 2011  
WL 722747 (N.D. Ill. Feb. 28, 2011). The court approved plaintiffs' motion for  
class certification and appointed Lewis Feinberg and co-counsel as counsel for the  
class. *Neil v. Zell*, --- F.R.D. ---, 2011 WL 833350 (N.D. Ill. Mar. 4, 2011). A  
class-wide settlement has been reached.

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- ***Horn v. McQueen***, 215 F. Supp. 2d 867 (W.D. Ky. 2002): The firm represented as co-counsel a group of employees of the U.S. Corrections Corp. of America. After trial, the Court held that defendants had breached their fiduciary responsibilities under ERISA by causing the ESOP plan to purchase sponsoring employer stock at an inflated price. Class-wide settlements resulted in the payment of over \$13 million.
  - ***Udd v. Vidinsky, et al.***, Case No. CV 04-05080 JW (N.D. Cal.): The firm represented participants and beneficiaries of the Valin Corporation Amended Employee Stock Ownership Plan, alleging breach of fiduciary duties and a prohibited transaction with respect to a July 12, 2001 purchase by the plan of Valin shares from the family trust of its founder and president, Alan Vidinsky. Mr. Vidinsky acted on behalf of both his family trust and the plan in the transaction, and the suit alleged that the \$6 million the plan paid for 77,250 shares was too high a price. Pursuant to a settlement approved in 2006, the plan received an addition 53,327 additional shares worth approximately \$3.13 million including interest.
  - ***Tatum v. R.J. Reynolds Tobacco Co.***, 392 F.3d 636 (4th Cir. 2004). The firm represents as co-counsel a class of participants and beneficiaries of the R.J. Reynolds Tobacco Company 401(k) Plan. The court of appeals reversed the district court's dismissal of claims alleging that the elimination of the plan's Nabisco stock fund after RJR separated its business from Nabisco was a breach of fiduciary duty that caused the plan to lose millions of dollars. The case went to trial in January 2010; no decision has yet been rendered.
  - ***Lively, et al. v. Dynegey, Inc., et al.***, 2007 WL 685861 (S.D. Ill. March 02, 2007): The firm represents participants and beneficiaries of the Illinois Power Incentive Savings Plan for Collectively Bargained Employees, which was taken over by energy trading company Dynegey, Inc., when Dynegey purchased Illinois Power. The plan was heavily invested in Dynegey company stock, which lost most of its value when accounting improprieties were uncovered in 2002. The suit alleges that Dynegey and the individuals running the plan knew that the accounting improprieties made company stock an imprudent investment for the plan and breached their fiduciary duties by continuing to allow investment in company stock despite that knowledge. Class-wide settlement resulted in the payment of \$17.9 million.
  - ***In re Worldcom, Inc. ERISA Litigation***. In 2004, the United States District Court for the Southern District of New York approved a partial settlement of a nationwide class action lawsuit on behalf of participants in WorldCom's 401(k) plan. Under the terms of the settlement, more than \$47 million will be paid by the settling defendants. The court then gave final approval to settlements with the remaining defendants. In March 2002, even before the bankruptcy of WorldCom, Lewis, Feinberg, Renaker, & Jackson, along with co-counsel, filed the first ERISA lawsuit against fiduciaries of the plan, and then obtained a significant decision from the United States District Court for the Northern District of California rejecting a motion to dismiss the case. See 2002 WL 316440557, 29 Employee Benefits Cases (BNA) 1368 (N.D.Cal. 2002). In November 2002, following consolidation of the case with other lawsuits, Jeffrey Lewis of my firm was appointed by the United States District Court for the Southern District of New York to advise lead counsel for the plan participants with regard to ERISA issues.

- 1           • *Kayes, et al. v. Pacific Lumber Co., et al.*, 51 F.3d 1449 (9th Cir. 1995). The firm  
2 served as counsel for a class of retirees and employees of Pacific Lumber Co. The  
3 complaint alleged that defendants’ selection of Executive Life Insurance  
4 Company to provide annuities to pension plan participants (upon termination of  
5 the plan) violated ERISA’s fiduciary standards. The Ninth Circuit decision  
6 upheld plaintiffs’ standing to pursue the claims, affirmed the lower court finding  
7 that defendant corporate officers were fiduciaries, and broadly defined term “plan  
8 asset” for purposes of ERISA’s prohibited transaction provisions. Of particular  
9 significance to the instant case is the fact that the Ninth Circuit upheld plaintiffs’  
10 rights to pursue class actions in ERISA breach of fiduciary duty cases. *See* 51  
11 F.3d at 1462-1463. On remand, the case settled, resulting in the payment of  
12 millions of dollars to the class members.

13           14. In addition, the firm is litigating putative class actions in various district courts.

14           15. In addition to these class actions, my firm serves and has served as counsel in the  
15 following successful reported ERISA cases, among others:

16           *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (*en banc*).

17           *Comer v. Salomon Smith Barney*, 437 F.3d 1098 (9th Cir. 2006).

18           *Burrey v. Pacific Gas & Electric Co.*, 159 F.3d 388 (9th Cir. 1998).

19           *Clayton v. KPMG Peat Marwick*, 18 EBC 2200 (C.D. Cal. 1994).

20           *Lee v. California Butchers’ Pension Trust Fund*, 154 F.3d 1075 (9th Cir. 1998).

21           *Mongeluzo v. Baxter Travenol Long Term Disability Plan*, 46 F.3d. 938 (9th Cir. 1995).

22           *Mertens v. Kaiser Steel Retirement Plan*, 829 F. Supp. 1158 (N.D.Cal. 1992).

23           *Mertens v. Black*, 948 F.2d 1105 (9th Cir. 1991).

24           *McMunn, et al. v. Pirelli Tire, LLC, et al.*, 161 F. Supp. 2d 97 (D. Conn. 2001).

25           *Weis v. Accidental Death & Dismemberment Ben. Plan of Kaiser Foundation*, 442 F.  
26 Supp. 2d 850 (N.D. Cal. 2006).

27           16. Daniel Feinberg and I are the primary attorneys working on this action. Our  
28 qualifications are discussed below.

          17. Daniel Feinberg received a Bachelor of Arts degree, with high honors, from  
Swarthmore College in 1983. He received a Juris Doctor degree from the Boalt Hall School of  
Law at the University of California at Berkeley in 1988. He was hired by the firm then known as  
Sigman & Lewis as an associate in 1988 and became a partner in 1993. He has specialized in  
employee benefits law since joining the firm. In November 2003, The Recorder newspaper gave

1 him honorable mention in the category of top attorney for ERISA plaintiffs in the San Francisco  
2 Bay Area. He has also been named a "Northern California Super Lawyer" for the last five years.

3 18. Mr. Feinberg's publications include: ERISA Litigation Reporter, "Abatie v. Alta  
4 Health - A Victory for Plaintiffs on the Standard of Review," Vo. 14, No. 5, September-October  
5 2006; The Practical Lawyer, "Independent Contractors, Leased Employees and Other Contingent  
6 Workers," Vol. 47, No. 2, March 2001; ERISA Litigation Reporter, "Wetzel v. Lou Ehlers  
7 Cadillac Group LTD: Distinctions Without a Difference?", October 2000; ERISA Litigation  
8 Reporter, "Varity Corp. v. Howe: The Plaintiff's Perspective", Vol. 5, No. 2, June 1996 (co-  
9 author with Jeffrey Lewis); Labor Center Reporter, "Varity Corp. v. Howe", Vol. 298, Summer  
10 1996 and "Have You Been Denied Health Benefits Recently?", Vol. 303, Spring 1998 (co-author  
11 with Tyler Weaver); Tax Management Compensation Planning Journal, "Claims Against ERISA  
12 Plan Service Providers", Vol. 23, No. 8, August 4, 1995 (co-author with Robert Pizzo).

13 19. I am a sixth-year associate at LFLRJ. I graduated from Columbia University in  
14 2000 and from New York University School of Law in 2005. At NYU, I served as the Executive  
15 Editor of the Review of Law and Social Change and was admitted to the Order of the Coif. I  
16 was a law clerk to the Honorable Susan Graber of the United States Court of Appeals for the  
17 Ninth Circuit in 2005-2006. I am the author of "Appeals Court Considers the Boundaries of  
18 Indemnification for ESOP Fiduciaries," published in the ABA Labor and Employment Law  
19 Section, Employee Benefits Committee Newsletter, Summer 2009, "Plaintiffs Prevail in Johnson  
20 v. Couturier," published in the ABA Labor and Employment Law Section, Employee Benefits  
21 Committee Newsletter, Fall 2009, "Commentary to DOL's Proposed Changes on the Definition  
22 of 'Fiduciary,'" published in the ABA Labor and Employment Law Section, Employee Benefits  
23 Committee Newsletter, Winter 2010, and "A Reasonable Proposal: Treat ESOP Valuers as  
24 Fiduciaries Under ERISA," published in the BNA Pension & Benefits Reporter Daily, July 8,  
25 2011. I was a speaker at the annual meeting of the ABA's Tort, Trial and Insurance Practice  
26 Section in 2010 and at the ABA/JCEB 20th Annual National Institute on ERISA Litigation in  
27 2010. I was named a "Rising Star" by Northern California Super Lawyers in 2011.

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1 I declare under penalty of perjury that the foregoing is true and correct. Executed this  
2 24th day of August, 2011, at Oakland, California.

3 /s/ Nina Wasow  
4 Nina Wasow

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