

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

**CASE NO. C 09-03467 JAM-DAD**

EDWARD CLARKE, individually and on behalf of a class of all other persons similarly situated,

PLAINTIFF,

v.

MICHAEL LINDEMAN, LORRAINE LINDEMAN, DAVID NICKUM, VALLEY AGGREGATE TRANSPORT, INC., THE BOARD OF DIRECTORS OF VALLEY AGGREGATE TRANSPORT, INC., AND THE ADMINISTRATION COMMITTEE FOR THE VALLEY AGGREGATE TRANSPORT, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

DEFENDANTS.

**NOTICE OF CLASS ACTION SETTLEMENT**

TO: ALL PERSONS who were participants or beneficiaries in the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan (ESOP) on January 9, 2004, or at any time thereafter (other than the individual Defendants Michael Lindeman, Lorraine Lindeman and David Nickum, and the immediate family, legal representatives and assigns of any such excluded persons).

**PLEASE READ THIS NOTICE CAREFULLY AND COMPLETELY. If you are a member of the Class to whom this Notice is addressed, the settlement will affect your legal rights.**

**A FEDERAL COURT HAS AUTHORIZED THIS NOTICE. This is not a solicitation from a lawyer. You have not been sued.**

The parties to the above case (the "Lawsuit"), have reached a proposed settlement (the "Settlement"). The United States District Court, Eastern District of California, has given its preliminary approval of this Settlement. The Settlement will provide for a payment to the ESOP and for allocation of that payment to the accounts of members of the Class. This notice informs you about the terms of the Settlement and about your rights under the Settlement.

A hearing will be held on December 14, 2011, at 9:30 a.m. before the Honorable John A. Mendez, United States District Court for the Eastern District of California, at the United States Courthouse, U.S. District Court, 501 I Street, Sacramento, CA 95814, to determine whether the Settlement is fair, reasonable and adequate and should be finally approved. A hearing on Plaintiff's Motion for Attorneys' Fees and Costs and for an incentive payment to the Named Plaintiff will be held at the same time.

You have the right to appear at the hearing to object to any part of the Settlement.

However, you WILL NOT be heard unless you submit a written objection with the Court no later than **November 3**, 2011. The procedure for objecting is described below. **If you do not object to the Settlement, you do not need to file any papers with the Court, nor do you have to appear in Court on December 14, 2011.**

This Notice contains summary information about the Settlement. The full terms and conditions of the Settlement are contained in a Settlement Agreement. The Settlement Agreement and additional information about this lawsuit are available at [www.lewisfeinberg.com](http://www.lewisfeinberg.com) or by contacting Class Counsel.

### **Summary of Settlement**

The Lawsuit raised claims on behalf of ESOP participants and beneficiaries under a federal law called the Employee Retirement Income Security Act (“ERISA”). The Lawsuit challenged the terms of the January 9, 2004 purchase of Valley Aggregate Transport, Inc. (“VAT”) stock by the ESOP from Defendants Michael and Lorraine Lindeman, as well as the subsequent purchase of the ESOP promissory note by Defendant David Nickum and the ESOP’s associated pre-payment of the note. Defendants deny any liability and do not admit any wrong doing by entering into the Settlement.

The proposed Settlement will resolve all of the claims that Plaintiff and other participants and beneficiaries in the Valley Aggregate ESOP brought or could have brought against the Defendants for alleged overpayment by the ESOP for VAT stock, Defendants’ alleged failure to remedy such overpayment, the subsequent pre-payment of the ESOP note and purchase of the note by David Nickum, and Defendants’ alleged failure to remedy David Nickum’s purchase of the note and the pre-payment of that note, as well as any other claims arising out of the facts, transactions and allegations in the Lawsuit. Under the terms of the Settlement, which are described in more detail later in this Notice, Defendants will collectively pay a Settlement Amount of \$2,200,000 in cash and Defendants David Nickum and Michael Lindeman will forfeit their ESOP accounts.

### **What is a Class Action?**

A class action is a lawsuit in which the claims and rights of many people are decided in a single court proceeding. One or more representative plaintiffs, also known as “class representatives,” file a lawsuit asserting claims on behalf of the entire class.

### **Who is Included as a Member of the Class?**

The “Class” is defined as follows:

All persons who were participants in the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan (ESOP) on January 9, 2004, or at any time thereafter, and/or beneficiaries of ESOP participants on January 9, 2004, or at any time thereafter. Excluded from the Class are the individual Defendants Michael Lindeman, Lorraine Lindeman and David Nickum and the immediate family, legal representatives and assigns of any such excluded persons.

### **Why Did I Get This Notice?**

You or someone in your family was a participant or beneficiary of the ESOP during the period from January 9, 2004 to the present. The Court caused this Notice to be sent to you because, if you fall within the definition of the Class, you have a right to know about the Settlement and your right to object to the Settlement before the Court decides whether to approve it.

### **What Is This Case About?**

The Lawsuit was brought by Plaintiff Edward Clarke, who is a participant in the ESOP. The claims against Defendants arise primarily from the January 9, 2004, sale of stock to the ESOP. Plaintiff alleges that Defendants breached their fiduciary duties by causing the ESOP to pay more than fair market value for the VAT stock. Defendants deny these allegations, and assert that the price paid by the ESOP for the stock was fair. Certain Defendants also deny any fiduciary responsibility relating to the January 9, 2004 sale of stock and deny any involvement in that transaction whatsoever.

The ESOP paid for the stock it bought in 2004 with a promissory note issued by Michael and Lorraine Lindeman. The Lawsuit also challenges the subsequent sale of that promissory note by Michael and Lorraine Lindeman to David Nickum, and the ESOP's associated pre-payment of \$1.5 million on the note. Plaintiff alleges that this transaction was prohibited under ERISA and was also a breach of Defendants' fiduciary duties to the ESOP. Defendants deny these allegations and do not admit any wrongdoing by entering into the Settlement.

### **What Are The Terms Of The Settlement Agreement?**

Defendants will deposit \$2,200,000 in cash into an interest-bearing escrow account no later than September 22, 2011. In addition, upon final Court approval of the Settlement, Defendants David Nickum and Michael Lindeman will forfeit the shares held in their ESOP accounts (the "Forfeiture Amount"). The cash payment of \$2,200,000 and the Forfeiture Amount together constitute the "Settlement Amount."

If the Court approves the Settlement and no appeals are taken, or if the Court's approval is affirmed on appeal, then any Court-approved attorneys' fees, costs, and compensation to the Named Plaintiff will be paid out of the Settlement Amount as will the costs of Settlement administration. The remaining amount of cash, including interest ("Net Settlement Amount") will be paid to the ESOP. The Net Settlement Amount will be allocated among Class members according to a plan to be determined by an Independent Fiduciary. The Independent Fiduciary will be selected and retained by Defendant Valley Aggregate Transport, Inc. and will also review the Settlement for approval on behalf of the ESOP.

In exchange for the Settlement Amount, Plaintiff and the Class will release each of the Defendants from any and all claims relating in any way to or arising out of the purchase of stock by the ESOP in 2004, the subsequent sale of the promissory note to David Nickum and the associated pre-payment of the note, and any other claims that were

asserted or could have been asserted in the Lawsuit. If the Settlement is finally approved, the Court will enter an order dismissing with prejudice all claims against the Defendants and barring the right to sue them in the future on the released claims. The Settlement does not release your right to benefits under the terms of the ESOP.

### **Why and How Did the Parties Reach This Settlement?**

Counsel for the Plaintiff and Defendants exchanged relevant documents, conducted depositions, and retained financial experts to analyze the potential damages in the case. The parties then agreed to participate in a mediation session to attempt to resolve the case at an early stage of the litigation, before assets available to pay a judgment were further depleted by litigation costs. On February 10, 2011, the parties met with the Honorable Layne Phillips (Ret.), a retired judge and highly experienced mediator. As a result of this meeting and subsequent negotiations between the parties' counsel and Judge Phillips, the parties reached this Settlement on behalf of the Plan and all of its participants.

The Settlement is a compromise of disputed claims. Defendants asserted various defenses to Plaintiff's claims, including, but not limited to: (1) the price paid for the stock purchased by the ESOP in January 2004 was fair, (2) Defendant David Nickum was not a fiduciary of the ESOP at the time he purchased the promissory note from Michael and Lorraine Lindeman or at the time the ESOP made the prepayment on the note, (3) Defendant David Nickum did not have a duty to remedy any overpayment for stock purchased by the ESOP prior to the date he became a fiduciary of the ESOP and should not be held liable for any breach of fiduciary duty by a prior fiduciary, (4) Defendant David Nickum prudently investigated the January 2004 purchase of VAT stock and concluded it was based on an appropriate valuation of VAT, (5) none of the Defendants other than the Lindemans participated in the initial purchase of VAT stock by the ESOP, (6) Defendant David Nickum's purchase of the note was not prohibited under ERISA and/or did not result in any losses to the ESOP, and (7) Plaintiff's claims were barred by the applicable statute of limitations. If the parties had not reached a settlement and Defendants had prevailed on any of these defenses, then the Class could have recovered nothing. Conversely, if litigation continued and Plaintiff prevailed, Defendants may have been liable for more than the Settlement Amount. All parties have determined that given the uncertainty and risks inherent in litigation, and the limited resources available to satisfy any judgment, it is desirable to settle the case on the terms set forth in the Settlement.

This is only a summary of the Settlement. For its complete terms, interested persons are encouraged to contact Class Counsel (contact information provided below), to view information about the case and the Settlement on Class Counsel's website at [www.lewisfeinberg.com](http://www.lewisfeinberg.com), or to review the Settlement Agreement on file with the Clerk of the Court.

### **Attorneys' Fees and Expenses**

In prosecuting this case on behalf of the Class, Class Counsel investigated the facts of the case, interviewed and deposed witnesses, reviewed documents produced in

discovery, prepared briefs and legal pleadings, and participated in a mediation that ultimately resulted in the Settlement. They have not been paid for their time and had no guarantee that they would be paid for their efforts. As a result, they have applied to the Court for an award of fees, not to exceed 25% of the Settlement Amount less the Forfeiture Amount, i.e., \$550,000. Class Counsel has also spent money prosecuting the case. Their motion requests reimbursement of these actual costs and expenses, not to exceed \$50,000. Finally, Class Counsel have applied to the Court for a payment to Plaintiff Edward Clarke of up to \$5,000, to compensate him for the considerable amount of time he has spent on this case. In particular, Plaintiff Edward Clarke assisted in Class Counsel's investigation of the case, gathered documents and responded to discovery requests, prepared for his deposition, consulted with Class Counsel on the progress of the litigation, and participated in mediation. Any compensation awarded to Plaintiff Edward Clarke will be paid from the Settlement Amount.

The motion for attorneys' fees and costs is available on Class Counsel's website, [www.lewisfeinberg.com](http://www.lewisfeinberg.com).

Any Class Member who objects to the request by Class Counsel for payment of these attorneys' fees and costs may state that objection in writing and may appear at the hearing, as set forth below.

#### **How Much Will My Payment Be, and How Will I Receive Payment?**

The Net Settlement Amount will be paid to the ESOP. How much of the Net Settlement Amount will go into your account will be determined by the Independent Fiduciary. In general, your share of the Settlement Amount will depend on your proportionate share of the stock held by the ESOP (i.e., how many shares are in your account compared to the total number of shares in the Plan). If you terminated employment with Valley Aggregate without a balance in your ESOP account or before your balance was vested (and thus you forfeited your account balance), you will not receive a share of the Settlement Amount.

You are not responsible for calculating the amount you are entitled to receive under the Settlement. This calculation will be made by the Independent Fiduciary in accordance with the Settlement terms.

You do not need to file a claim. If you are a Class member entitled to a share of the Net Settlement Amount, your share will be deposited in your ESOP account after the Settlement is finally approved and no longer subject to any appeals to any court.

Your rights to take a distribution of your ESOP account, or to roll it over into another qualified retirement plan, depend on the terms of the Plan. Please consult the Summary Plan Description and/or the Plan, or contact the Plan administrator, with any questions about your ESOP account.

The Settlement may be terminated on several grounds, including if the Court does not approve the Settlement. If this occurs, the Settlement Amount will be returned to Defendants, and the Litigation will proceed as if the Settlement had not been entered into.

## **Fairness Hearing**

On December 14, 2011, at 9:30 a.m. or as soon thereafter as practicable, Judge Mendez will hold a hearing in his courtroom at the United States Courthouse, U.S. District Court, 501 I Street, Sacramento, CA, 95814.

At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Court will listen to people who have asked to speak at the hearing. The Court may also decide how much Class Counsel and the named Plaintiff will be compensated for their efforts to secure the Settlement. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

You do not have to attend the hearing. The attorneys representing the Plaintiff and the Class will present the Settlement to the Court and answer any questions the Court may have. If you file a written objection, you do *not* have to attend the hearing in order for it to be considered by the Court.

You are welcome to come to the hearing at your own expense. You may arrange for your own counsel to attend on your behalf. You may also ask the Court for permission to speak at the hearing. To do so, you must send a letter or other paper called a "Notice of Intention to Appear at Fairness Hearing in *Clarke v. Lindeman*, Case No. 09-03467-JAM-DAD" to Class Counsel and the Clerk of the Court. Be sure to include your name, address, telephone number, and signature. Your Notice of Intention to Appear must be sent to Class Counsel and the Clerk of the Court at the following addresses and must be received by no later than **November 3, 2011**.

Office of the Clerk  
U.S. District Court, Eastern District of California  
501 I Street, Suite 4-200  
Oakland, CA 95814

Daniel Feinberg  
Nina Wasow  
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.  
476 9th Street  
Oakland, CA 94607

The time and date of this hearing may be changed, so please contact Class Counsel prior to the date of the hearing if you plan to attend.

## **Objections to Settlement**

You (or your attorney) can tell the Court that you do not agree with the Settlement or some part of it, including the attorneys' fees and expenses Class Counsel seeks. To object to the Settlement, you must send a letter or other written statement saying that you object to the Settlement in *Clarke v. Lindeman*, Case No. 09-03467 JAM-DAD. Be sure

to include your name, address, telephone number, signature, and a full explanation of all the reasons you object to the Settlement.

**Your written objections must be sent by certified mail to the following addresses and must be postmarked no later than **November 3, 2011**, which is 35 days following the date on which notice of the Settlement was sent to Class Members:**

Office of the Clerk  
U.S. District Court, Eastern District of California  
501 I Street, Suite 4-200  
Oakland, CA 95814

Daniel Feinberg  
Nina Wasow  
Lewis, Feinberg, Lee, Renaker & Jackson, P.C.  
476 9th Street  
Oakland, CA 94607

Zachary M. Smith  
Weintraub Genshlea Chediak  
400 Capitol Mall, 11<sup>th</sup> Floor  
Sacramento, CA 95814

R. Bradford Huss  
Virginia Perkins  
Trucker Huss, APC  
100 Montgomery Street, 23rd Floor  
San Francisco, CA 94104-4398

If you do not object to the Settlement or the request for attorneys' fees or reimbursement of expenses, then you do not need to file any papers with the Court.

### **Can I Opt Out of the Settlement?**

You do not have the right to exclude yourself from the Settlement. The Lawsuit was certified under Federal Rule of Civil Procedure 23(b)(1) as a “non-opt-out” class action because the Court determined the requirements of those rules were satisfied. As a result, it is not possible for any participants or beneficiaries to exclude themselves from the benefits of the Settlement. As a Class member, you will be bound by any judgments or orders that are entered in the Lawsuit for all claims that were or could have been asserted in the Lawsuit or are otherwise included in the release under the Settlement.

Although you cannot opt out of the Settlement, you can object to the Settlement as described above.

### **What Happens if I Do Nothing At All?**

If you do nothing at all, you will remain a part of the Class, and, if the Court

approves the Settlement, you will receive the payment described in this Notice and release your claims against the Defendants as described in this Notice.

### **Examination of Pleadings and Papers**

This Notice does not contain all of the terms of the proposed Settlement or all of the details of these proceedings. If this Notice conflicts with the terms of the Settlement Agreement, the Settlement Agreement will be controlling. For more detailed information, you may refer to the pleadings, documents, and papers on file with the Court. This file may be inspected during the hours of each Court business day at the Office of the Clerk, U.S. District Court, 501 I Street, Suite 4-200, Sacramento, CA 95814. You also may view papers relating to the Settlement on the website for Class Counsel at [www.lewisfeinberg.com](http://www.lewisfeinberg.com), or make an appointment to examine during reasonable business hours the underlying documents, pleadings, and papers relating to the Lawsuit or Settlement, at the offices of the Class Counsel. Call them at the telephone number listed below to make an appointment.

### **Further Information**

Further information regarding this case, the Settlement, and this Notice may be obtained by contacting Class Counsel:

Daniel Feinberg  
dfeinberg@lewisfeinberg.com  
Nina Wasow  
nwasow@lewisfeinberg.com  
LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.  
476 9th Street  
Oakland, CA 94607  
(510) 839-6824  
[www.lewisfeinberg.com](http://www.lewisfeinberg.com)

### **Legal Advice**

Any questions you may have about this Notice should be raised with your own attorney or advisor, and/or directed in writing to the Class Counsel at the address listed above. Do NOT call the Court or Defendants' Counsel with questions regarding this Notice or the proposed Settlement.