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

11 EDWARD CLARKE,) Case No. C 09-03467-JAM-DAD
12)
Plaintiff,) **FIRST AMENDED COMPLAINT**
13)
vs.) **CLASS ACTION**
14)
MICHAEL LINDEMAN, LORRAINE)
15 LINDEMAN, DAVID NICKUM, VALLEY)
AGGREGATE TRANSPORT, INC., the)
16 BOARD OF DIRECTORS OF VALLEY)
AGGREGATE TRANSPORT, INC., and)
17 ADMINISTRATION COMMITTEE FOR)
THE VALLEY AGGREGATE, INC.,)
18 EMPLOYEE STOCK OWNERSHIP PLAN)
19 Defendants.)
20 _____)

21 **JURISDICTION AND VENUE**

22 1. This action arises under Title I of the Employee Retirement Income Security Act
23 of 1974 (“ERISA”), 29 U.S.C. §§ 1001 et seq., and is brought by Plaintiff to enjoin acts and
24 practices which violate the provisions of Title I of ERISA, to make good to the Plan losses
25 resulting from fiduciary violations, restore to the Plan any profits which have been made by the
26 breaching fiduciaries through the use of Plan assets, and to obtain other appropriate equitable
27 and legal remedies in order to redress violations and enforce the provisions of Title I of ERISA.

28 2. This Court has subject matter jurisdiction over this action pursuant to ERISA §

1 502(e)(2), 29 U.S.C. § 1132(e)(2).

2 3. Venue is properly laid in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. §
3 1132(e)(2), because the employee benefit plan at issue was administered in this District during
4 the relevant time, some or all of the events or omissions giving rise to the claims occurred in this
5 District, and one or more of the Defendants may be found in this District.

6 **INTRA-DISTRICT ASSIGNMENT**

7 4. This action arises in Sutter County in that the employee benefit plan at issue is
8 administered in Yuba City, California, and some of the breaches alleged took place in Yuba City,
9 California.

10 **PARTIES**

11 5. At all relevant times, Plaintiff Ed Clarke has been a participant, as defined in
12 ERISA § 3(7), 29 U.S.C. § 1002(7), in the Valley Aggregate Transport, Inc. Employee Stock
13 Ownership Plan (“the ESOP”) or its predecessor plan. Plaintiff Clarke resides in Folsom,
14 California. Plaintiff Clarke was employed by Valley Aggregate Transport, Inc., or its
15 predecessor from in or about October 1998, until in or about October 2009.

16 6. At all relevant times, Defendant Valley Aggregate Transport, Inc., or its
17 predecessor, Lindeman Bros. (“Valley Aggregate”), was the Sponsor of the ESOP within the
18 meaning of ERISA § 3(16)(B). Valley Aggregate adopted the ESOP effective January 1, 2004.
19 Defendant Valley Aggregate was a fiduciary of the ESOP under ERISA § 3(21)(A), 29 U.S.C. §
20 1002(21)(A), because it exercised discretionary authority or discretionary control respecting
21 management of the ESOP, and/or had discretionary authority or discretionary responsibility in
22 the administration of the ESOP. Specifically, under the terms of the ESOP and the Trust
23 Agreement, Defendant Valley Aggregate was responsible for appointing the Trustee of the
24 ESOP, and had the authority to remove the Trustee and appoint a new Trustee or Trustees in its
25 place. By virtue of these powers, Defendant Valley Aggregate had the fiduciary responsibility to
26 monitor the Trustee and remedy any fiduciary violations committed by the Trustee.

27 7. At all relevant times, Defendant Board of Directors of Valley Aggregate
28 Transport, Inc., or its predecessor, the Board of Directors of Lindeman Bros. (“Board”), was a

1 fiduciary of the ESOP under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised
2 discretionary authority or discretionary control respecting management of the ESOP, and/or had
3 discretionary authority or discretionary responsibility in the administration of the ESOP.

4 Specifically, Defendant Board was responsible for appointing the Defendant Administration
5 Committee for the Valley Aggregate Transport, Inc. Employee Stock Ownership Plan
6 (“Administration Committee”). By virtue of this power, Defendant Board had the fiduciary
7 responsibility to monitor the Administration Committee and remedy any fiduciary violations
8 committed by the Administration Committee. In addition, Defendant Board approved and
9 ratified Defendant Administration Committee’s direction to the Trustee to borrow funds on
10 behalf of the ESOP for the purpose of acquiring Valley Aggregate stock in January 2004. This
11 constituted the exercise of discretionary authority or control over the ESOP and its assets.

12 8. At some relevant times, Defendant Michael Lindeman (“Lindeman”) was the
13 Trustee of the ESOP, a member of the Board of Valley Aggregate, the sole member of the
14 Administration Committee, and the Chief Executive Officer of Valley Aggregate. Thus, at some
15 relevant times, Defendant Lindeman was a fiduciary of the ESOP within the meaning of ERISA
16 § 3(21)(A), 29 U.S.C. § 1002(21), and a “party in interest” as to the ESOP as defined in ERISA
17 § 3(14), 29 U.S.C. § 1002(14).

18 9. At all relevant times, Defendant Lorraine Lindeman was the spouse of Michael
19 Lindeman. At some or all relevant times, Defendant Lorraine Lindeman was a member of the
20 Board of Valley Aggregate and a fiduciary of the ESOP within the meaning of ERISA §
21 3(21)(A), 29 U.S.C. § 1002(21), as a result of her membership on the Board, which had the
22 fiduciary responsibility to appoint and monitor the Administration Committee. In addition, at
23 some relevant times, Defendant Lorraine Lindeman was a “party in interest” as to the ESOP as
24 defined in ERISA § 3(14), 29 U.S.C. § 1002(14).

25 10. At some relevant times, Defendant David Nickum (“Nickum”) was the Trustee of
26 the ESOP, and the President and/or Chief Executive Officer of Valley Aggregate. Upon
27 information and belief, Defendant Nickum succeeded Defendant Lindeman as trustee of the
28 ESOP and CEO of Valley Aggregate in or about 2004. At some relevant times, Defendant

1 Nickum was a fiduciary of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. §
2 1002(21), because he exercised control over Plan assets and administration including, but not
3 limited to, deciding that the Plan would not purchase the Promissory Note held by the
4 Lindemans, and causing the Plan to accelerate payments on the ESOP Promissory Note in order
5 to facilitate his own purchase of the Promissory Note from the Lindemans. At all relevant times,
6 Defendant Nickum was also a “party in interest” as to the ESOP as defined in ERISA § 3(14), 29
7 U.S.C. § 1002(14), by virtue of his positions as President and CEO of Valley Aggregate.

8 11. At all relevant times, Defendant Administration Committee was the named
9 fiduciary of the ESOP. At all relevant times, Defendant Administration Committee was also a
10 fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it
11 exercised discretionary authority or discretionary control respecting management of the ESOP,
12 and/or exercised authority or control respecting management or distribution of the ESOP’s
13 assets, and/or had discretionary authority or discretionary responsibility in the administration of
14 the ESOP. For example, the Administration Committee directed the Trustee to borrow funds on
15 behalf of the ESOP for the purpose of acquiring Valley Aggregate stock in January 2004.

16 **FACTS**

17 12. Valley Aggregate is a trucking company with operations in Northern and Central
18 California. Valley Aggregate specializes in transporting all forms of aggregate for construction
19 projects.

20 13. On or about January 9, 2004, Defendant Lindeman and/or his wife Defendant
21 Lorraine Lindeman sold 100% of Valley Aggregate to the ESOP. The Lindemans were two of
22 the three members of the Board of Directors of Valley Aggregate and Michael Lindeman was the
23 CEO of Valley Aggregate at that time.

24 14. Defendant Valley Aggregate appointed Defendant Lindeman the Trustee of the
25 ESOP on January 9, 2004, despite the fact that it knew or should have known that Lindeman was
26 operating under a conflict of interest as the seller in the transaction in which the ESOP acquired
27 stock of Valley Aggregate.

28 15. Defendant Board appointed Defendant Lindeman as the sole member of the

1 Defendant Administration Committee on or about January 9, 2004, despite the fact that it knew
2 or should have known that Lindeman was operating under a conflict of interest as the seller in
3 the transaction in which the ESOP acquired stock of Valley Aggregate.

4 16. Defendant Lindeman acted on behalf of both the seller (himself and/or his wife
5 Defendant Lorraine Lindeman) and the buyer (the ESOP) in the transaction. The ESOP had no
6 independent representation in the transaction. There were no negotiations as to the price paid by
7 the ESOP to Defendant Lindeman and/or his wife Defendant Lorraine Lindeman for the Valley
8 Aggregate stock.

9 17. The ESOP paid Defendant Lindeman and/or his wife Defendant Lorraine
10 Lindeman \$7,975,000 for the Valley Aggregate shares purchased on or about January 9, 2004
11 (“January 2004 ESOP Transaction”). The ESOP paid the full amount of the transaction price
12 with a promissory note to Defendant Lorraine Lindeman.

13 18. The Administration Committee directed the Trustee to borrow funds for the
14 purpose of entering into the January 2004 ESOP Transaction. The Board approved and ratified
15 the Administration Committee’s direction. Exhs. 1, 2.

16 19. Defendant Lindeman set the purchase price based on a valuation report prepared
17 by an appraiser. On information and belief, Defendant Lindeman told the valuator what he
18 wanted to be paid for his stock, and the valuator used that number or a number close to it as the
19 concluded value of Valley Aggregate. Exh. 3. The valuation report was not reliable and inflated
20 the value of Valley Aggregate.

21 20. Among other errors, the valuation report used inflated financial results for 2003.
22 The appraiser used the inflated financial information in preparing his report. On information and
23 belief, other officers and employees of Valley Aggregate assisted Lindeman in compiling the
24 inflated 2003 financial information provided to the appraiser.

25 21. Defendants, and each of them, were aware that the valuation report for the
26 January 2004 ESOP Transaction used inflated financial results for valuing Valley Aggregate.
27 However, none of the Defendants took any action to correct the January 2004 ESOP Transaction
28 at any time thereafter.

1 22. Some of the valuation errors in the appraiser's valuation report were pointed out
2 in a letter from an attorney to Defendant Nickum dated March 29, 2004. Exh. 4. The letter
3 notes, *inter alia*, that the Company was valued at nearly 100% greater than book value which
4 "seems excessive," that "[t]he risks associated with the business seem to be substantial," and that
5 the valuation approach didn't make sense.

6 23. On or about January 12, 2004, Valley Aggregate purchased another trucking
7 company, Yuba Trucking. The Yuba Trucking transaction was being negotiated at the same
8 time that Defendant Lindeman was preparing the January 2004 ESOP Transaction. The Yuba
9 Trucking transaction burdened Valley Aggregate with additional debt. However, the valuation
10 for the January 2004 ESOP Transaction did not take the imminent Yuba Trucking transaction
11 into account.

12 24. Within months of the January 2004 ESOP Transaction, Defendant Lindeman
13 and/or Defendant Lorraine Lindeman decided to sell the Promissory Note from the ESOP.
14 Defendant Lindeman proposed this sale to Defendant Nickum. Defendant Lindeman offered to
15 sell the Promissory Note at a substantial discount to face value to either the ESOP or Defendant
16 Nickum.

17 25. In the course of negotiations over the sale of the Promissory Note, Defendant
18 Lindeman informed Defendant Nickum that, if the ESOP were to purchase the Note, the price
19 paid by the ESOP would have to be prudent, but that if the ESOP did not purchase the Note,
20 whoever owned the Note would have a possible conflict of interest with the ESOP. Defendant
21 Lindeman also informed Defendant Nickum that a sale of the Note to the ESOP would be in the
22 ESOP's best interest because it would reduce the principal owed and the term of the Note, both
23 of which would result in substantial reduction in interest expenses. Exhs. 5, 6.

24 26. The fact that Defendant Lindeman wanted to sell the Promissory Note at a
25 substantial discount to face value soon after the January 2004 ESOP Transaction indicates that
26 the ESOP paid more than adequate consideration in the January 2004 ESOP Transaction.

27 27. In late 2004 or early 2005, Defendant Nickum decided to purchase the Promissory
28 Note personally at a substantial discount to face value rather than allow the ESOP to benefit

1 from a reduced debt obligation. In so doing, Defendant Nickum favored his own financial
2 interests over the financial interests of the ESOP.

3 28. Upon information and belief, Defendant Nickum could not afford even the
4 discounted price that Defendant Lindeman was seeking for the Note. Therefore, in late 2004 or
5 early 2005, Defendants Lindeman and Nickum caused the ESOP to accelerate the repayment of a
6 portion of the Promissory Note in order to reduce the outstanding balance to facilitate Nickum's
7 purchase of the Promissory Note. Defendant Nickum purchased the reduced Note at a discount
8 from the face value of the remaining balance.

9 29. Upon information and belief, Defendant Nickum succeeded Defendant Lindeman
10 as the Trustee of the ESOP and Chief Executive Officer of Valley Aggregate when he purchased
11 the Promissory Note.

12 30. On or about June 2006, American Business Resource Corporation ("ABRC"), an
13 administrative service provider to the ESOP, terminated its agreement with Valley Aggregate
14 effective January 1, 2007, based on concerns about Defendant Lindeman's sale of the
15 Promissory Note to Defendant Nickum, stating that "we can no longer in good conscience and
16 fiduciary standing provide services as directed by your firm beyond that date." Exh. 7. Upon
17 information and belief, ABRC's attorney opined that the Note transaction violated ERISA, and
18 ABRC and ABRC's attorney so informed Defendants. Exhs. 7, 8. No Defendant took any
19 action to remedy this ERISA violation.

20 31. Upon information and belief, despite having a duty to monitor Defendant
21 Administration Committee, at no point during the relevant time period did Defendant Board
22 replace Lindeman as the sole member of the Administration Committee or take any action to
23 remedy his breaches of fiduciary duty. Because Defendants Michael and Lorraine Lindeman
24 were members of the Defendant Board, the Board knew or should have known of Defendant
25 Michael Lindeman's breaches of fiduciary duty.

26 32. Upon information and belief, despite having a duty to monitor the Trustee, at no
27 point during the relevant time period did Defendant Valley Aggregate remove Lindeman as the
28 Trustee or take any action to remedy his breaches of fiduciary duty. Because Lindeman was the

1 CEO of Valley Aggregate, the Company knew or should have known of Lindeman's breaches of
2 fiduciary duty.

3 33. After Defendant Nickum became trustee of the ESOP, he knew or should have
4 known that the ESOP paid more than adequate consideration for the Valley Aggregate stock
5 purchased in the January 2004 ESOP Transaction, but failed to take any action to remedy the
6 fiduciary violations committed by Defendant Lindeman and/or other co-fiduciaries or
7 predecessor fiduciaries.

8 CLASS ALLEGATIONS

9 34. Plaintiff brings the First and Second Claims for Relief for violations of ERISA §§
10 503(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2) and 1132(a)(3), as a class action pursuant to
11 Fed. R. Civ. P. 23 (a) and (b), on behalf of all persons other than Defendants who were
12 participants in the ESOP on January 9, 2004 or at any time thereafter, and/or beneficiaries of
13 ESOP participants on January 9, 2004 or at any time thereafter (hereinafter "Plaintiff Class").
14 Excluded from the Plaintiff Class are Defendants and their immediate family; the officers and
15 directors of any Defendant or of any entity in which a Defendant has a controlling interest; and
16 legal representatives, successors, and assigns of any such excluded persons.

17 35. The Plaintiff Class is so numerous that joinder of all members is impracticable.
18 Plaintiff is informed and believes, and on that basis alleges, that over 130 employees and former
19 employees are participants, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the ESOP.
20 Although the exact number and identities of Class Members are unknown to Plaintiff at this
21 time, this information is easily ascertainable from the ESOP through discovery of its records.

22 36. Questions of law and fact common to the Plaintiff Class as a whole include, but
23 are not limited to, the following:

24 i. Whether Defendant Lindeman acted on behalf of both the buyer and seller
25 in the January 9, 2004 transaction with the ESOP;

26 ii. Whether Defendants engaged in a prohibited transaction under ERISA by
27 permitting the ESOP to purchase Valley Aggregate stock from Defendant Lindeman and/or
28 Defendant Lorraine Lindeman in January 2004 for more than adequate consideration;

1 iii. Whether Defendants Michael and Lorraine Lindeman, the Board, and the
2 Administration Committee engaged in a prudent investigation of the proposed sale of Valley
3 Aggregate stock by Defendant Lindeman and/or Defendant Lorraine Lindeman to the ESOP in
4 January 2004;

5 iv. Whether Defendants Michael and Lorraine Lindeman, the Board, and the
6 Administration Committee breached a fiduciary duty to ESOP participants by causing the ESOP
7 to purchase Valley Aggregate stock in January 2004 for more than fair market value;

8 v. Whether Defendants breached a fiduciary duty to ESOP participants by
9 permitting Defendant Nickum to purchase the Promissory Note from Defendant Lindeman
10 and/or Defendant Lorraine Lindeman in late 2004;

11 vi. Whether Defendants breached their fiduciary duties to ESOP participants
12 by failing to remedy the overpayment by the ESOP in the January 2004 ESOP Transaction;

13 vii. Whether Defendants Michael and Lorraine Lindeman and Nickum
14 engaged in a prohibited transaction under ERISA by having the ESOP make an advance payment
15 or payments on the Promissory Note in 2004 in order to facilitate Defendant Nickum's purchase
16 of the Promissory Note from Defendant Lindeman and/or Defendant Lorraine Lindeman.

17 viii. The amount of damages suffered by the ESOP as a result of Defendants'
18 fiduciary violations.

19 37. Plaintiff's claims are typical of those of the Plaintiff Class. For example,
20 Plaintiff, like other ESOP participants in the Plaintiff Class, suffered a diminution in the value of
21 his ESOP account when the ESOP purchased Valley Aggregate stock owned by Defendant
22 Lindeman and/or Defendant Lorraine Lindeman for more than fair market value, and continues
23 to suffer such losses in the present because Defendants have failed to correct the overpayment by
24 the ESOP.

25 38. Plaintiff will fairly and adequately represent and protect the interests of the
26 Plaintiff Class. Plaintiff has retained counsel competent and experienced in complex class
27 actions, ERISA, and employee benefits litigation.

28 39. Class certification of Plaintiff's First and Second Claims for Relief for violations

1 of ERISA is appropriate pursuant to Fed. R. Civ. P. 23(b)(1) because the prosecution of separate
2 actions by individual Class members would create a risk of inconsistent or varying adjudications
3 which would establish incompatible standards of conduct for Defendants, and/or because
4 adjudications with respect to individual Class members would as a practical matter be dispositive
5 of the interests of non-party Class members.

6 40. In addition, Class certification of Plaintiff's First and Second Claims for Relief
7 for violations of ERISA is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants
8 have acted or refused to act on grounds generally applicable to the Class, making appropriate
9 declaratory and injunctive relief with respect to Plaintiff and the Class as a whole. The members
10 of the Class are entitled to declaratory and injunctive relief to remedy Defendants' fiduciary
11 violations.

12 41. The names and addresses of the Plaintiff Class are available from the ESOP.
13 Notice will be provided to all members of the Plaintiff Class to the extent required by Rule 23.

14 **FIRST CLAIM FOR RELIEF**

15 **[Breach of Fiduciary Duty Under ERISA §§ 502(a)(2) and (a)(3),**
16 **29 U.S.C. §§ 1132(a)(2) and (a)(3), Against All Defendants]**

17 42. Plaintiff incorporates Paragraphs 1-41 as though set forth herein.

18 43. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires, *inter alia*, that a plan
19 fiduciary discharge his or her duties with respect to a plan solely in the interest of the
20 participants and beneficiaries and with the care, skill, prudence, and diligence under the
21 circumstances then prevailing that a prudent person acting in a like capacity and familiar with
22 such matters would use in the conduct of an enterprise of a like character and with like aims.

23 44. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a
24 fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or
25 duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the
26 plan any losses to the plan resulting from each such breach, and additionally is subject to such
27 other equitable or remedial relief as the court may deem appropriate, including removal of the
28 fiduciary.

1 45. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring an
2 action for relief under ERISA § 409.

3 46. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring an
4 action to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to
5 enforce the terms of a plan.

6 47. Defendant Michael Lindeman breached his duties under ERISA § 404(a)(1), 29
7 U.S.C. § 1104(a)(1). These breaches include but are not limited to the following: causing the
8 Plan to pay more than fair market value for Valley Aggregate stock; failing to conduct a
9 thorough and independent review and adequately consider whether the January 2004 purchase of
10 Valley Aggregate stock from Defendant Lindeman and/or Defendant Lorraine Lindeman was in
11 the best interests of the Plan participants; failing to undertake an adequate and independent
12 valuation of the Valley Aggregate stock prior to those transactions; failing to secure an
13 independent expert assessment of the fair market value of Valley Aggregate stock prior to the
14 January 2004 ESOP Transaction; failing to investigate adequately the qualifications of any and
15 all valuation experts retained to prepare the valuations of Valley Aggregate stock in connection
16 with the January 2004 ESOP Transaction; failing to provide complete and accurate information
17 regarding Valley Aggregate to such valuation experts for use in the valuations prepared in
18 connection with the January 2004 ESOP Transaction; failing to make certain that reliance on any
19 and all valuation experts' advice was reasonably justified under the circumstances of the
20 transactions; failing adequately to consider how the imminent Yuba Trucking transaction
21 affected the value of Valley Aggregate stock; failing to make an honest, objective effort to read
22 the valuation reports, understand them, and question the methods and assumptions that did not
23 make sense; favoring Defendant Nickum's personal financial interest over the financial interest
24 of the ESOP in the sale of the Promissory Note at a substantial discount to face value; and failing
25 to remedy the ESOP's overpayment for Valley Aggregate stock at any time between January
26 2004 and the present. Defendant Michael Lindeman is also liable as a co-fiduciary with respect
27 to each fiduciary violation by each other fiduciary of the Plan under ERISA § 405, 29 U.S.C. §
28 1105, to the extent that: (a) he participated knowingly in, or knowingly undertook to conceal, an

1 act or omission of any other fiduciary, knowing such action is a breach; (b) by his failure to
2 comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), he enabled such other fiduciary to
3 commit a breach; or (c) if he has had knowledge of a breach by any other fiduciary, unless he has
4 made reasonable efforts under the circumstances to remedy the breach.

5 48. Defendant Lorraine Lindeman breached her duties under ERISA § 404(a)(1), 29
6 U.S.C. § 1104(a)(1). These breaches include but are not limited to the following: as a member of
7 the Board, appointing Michael Lindeman as the sole member of the Administration Committee
8 despite his glaring conflict of interest and failing to properly monitor his activities as the sole
9 member of the Administration Committee; and as a member of the Board, ratifying the
10 Administration Committee's direction to the Trustee to borrow funds for the January 2004 ESOP
11 Transaction despite the inflated price of the stock purchased in that Transaction. Defendant
12 Lorraine Lindeman is also liable as a co-fiduciary with respect to each fiduciary violation by
13 each other fiduciary of the Plan under ERISA § 405, 29 U.S.C. § 1105, to the extent that: (a) she
14 has participated knowingly in, or has knowingly undertaken to conceal, an act or omission of any
15 other fiduciary, knowing such action is a breach; (b) by her failure to comply with ERISA §
16 404(a)(1), 29 U.S.C. § 1104(a)(1), she enabled such other fiduciary to commit a breach; or (c) if
17 she has had knowledge of a breach by any other fiduciary, unless she has made reasonable
18 efforts under the circumstances to remedy the breach.

19 49. Defendant Valley Aggregate breached its duties under ERISA § 404(a)(1), 29
20 U.S.C. § 1104(a)(1). These breaches include but are not limited to the following: appointing
21 Michael Lindeman as the Trustee of the ESOP despite his glaring conflict of interest and failing
22 to properly monitor his activities as Trustee. Defendant Valley Aggregate is also liable as a co-
23 fiduciary with respect to each fiduciary violation by each other fiduciary of the Plan under
24 ERISA § 405, 29 U.S.C. § 1105, to the extent that: (a) it has participated knowingly in, or has
25 knowingly undertaken to conceal, an act or omission of any other fiduciary, knowing such action
26 is a breach; (b) by its failure to comply with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), it
27 enabled such other fiduciary to commit a breach; or (c) if it has had knowledge of a breach by
28 any other fiduciary, unless it has made reasonable efforts under the circumstances to remedy the

1 breach.

2 50. Defendant Board breached its duties under ERISA § 404(a)(1), 29 U.S.C. §
3 1104(a)(1). These breaches include but are not limited to the following: appointing Michael
4 Lindeman as the sole member of the Administration Committee despite his glaring conflict of
5 interest and failing to properly monitor his activities as the sole member of the Administration
6 Committee; and ratifying the Administration Committee's direction to the Trustee to borrow
7 funds for the January 2004 ESOP Transaction despite the inflated price of the stock purchased in
8 that Transaction. Defendant Board is also liable as a co-fiduciary with respect to each fiduciary
9 violation by each other fiduciary of the Plan under ERISA § 405, 29 U.S.C. § 1105, to the extent
10 that: (a) it has participated knowingly in, or has knowingly undertaken to conceal, an act or
11 omission of any other fiduciary, knowing such action is a breach; (b) by its failure to comply
12 with ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), it enabled such other fiduciary to commit a
13 breach; or (c) if it has had knowledge of a breach by any other fiduciary, unless it has made
14 reasonable efforts under the circumstances to remedy the breach.

15 51. Defendant Administration Committee breached its duties under ERISA §
16 404(a)(1), 29 U.S.C. § 1104(a)(1). These breaches include but are not limited to the following:
17 directing the Trustee to borrow the funds for the January 2004 ESOP Transaction despite the
18 inflated price of the stock purchased in that Transaction. Defendant Administration Committee
19 is also liable as a co-fiduciary with respect to each fiduciary violation by each other fiduciary of
20 the Plan under ERISA § 405, 29 U.S.C. § 1105, to the extent that: (a) it has participated
21 knowingly in, or has knowingly undertaken to conceal, an act or omission of any other fiduciary,
22 knowing such action is a breach; (b) by its failure to comply with ERISA § 404(a)(1), 29 U.S.C.
23 § 1104(a)(1), it enabled such other fiduciary to commit a breach; or (c) if it has had knowledge
24 of a breach by any other fiduciary, unless it has made reasonable efforts under the circumstances
25 to remedy the breach.

26 52. Defendant Nickum breached his duties under ERISA § 404(a)(1), 29 U.S.C. §
27 1104(a)(1). These breaches include but are not limited to the following: deciding that the ESOP
28 would not purchase the Promissory Note at a substantial discount to face value and thus favoring

1 his own personal financial interest over the financial interest of the ESOP; and failing to remedy
2 the ESOP's overpayment for Valley Aggregate stock at any time between January 2004 and the
3 present. Defendant Nickum is also liable as a co-fiduciary with respect to each fiduciary
4 violation by each other fiduciary of the Plan under ERISA § 405, 29 U.S.C. § 1105, to the extent
5 that: (a) he participated knowingly in, or knowingly undertook to conceal, an act or omission of
6 any other fiduciary, knowing such action is a breach; (b) by his failure to comply with ERISA §
7 404(a)(1), 29 U.S.C. § 1104(a)(1), he enabled such other fiduciary to commit a breach; or (c) if
8 he has had knowledge of a breach by any other fiduciary, unless he has made reasonable efforts
9 under the circumstances to remedy the breach.

10 53. Defendant Nickum also knowingly participated in the breaches of fiduciary duty
11 and prohibited transactions alleged herein in violation of ERISA § 502(a)(3), 29 U.S.C. §
12 1132(a)(3). Defendant Nickum's knowing participation included but was not limited to deciding
13 that the ESOP would not purchase the Promissory Note at a substantial discount to face value
14 and causing the ESOP to make an advance payment on the Promissory Note for Nickum's
15 benefit.

16 54. ERISA § 410 prohibits agreements that purport to relieve a fiduciary from
17 responsibility or liability for any fiduciary duty. 29 U.S.C. § 1110(a). Specifically, § 410 states
18 that "any provision in an agreement or instrument which purports to relieve a fiduciary from
19 responsibility or liability for any responsibility, obligation, or duty under this part shall be void
20 as against public policy." 29 U.S.C. § 1110(a).

21 55. Any indemnification agreement between the Defendants or any of them, on the
22 one hand, and Valley Aggregate or the ESOP, on the other hand, violates ERISA § 410 and is
23 therefore null and void.

24 56. Defendants' actions caused millions of dollars of losses to the Plan in an amount
25 to be proven more specifically at trial.

26 **SECOND CLAIM FOR RELIEF**
27 **[Engaging in Prohibited Transaction Forbidden by ERISA §§ 406(a)-(b),**
28 **29 U.S.C. §§ 1106(a)-(b), Against Defendants Michael and Lorraine Lindeman, the Board,**
the Administration Committee, and Nickum]

1 57. Plaintiff incorporates Paragraphs 1-41 as though set forth herein.

2 58. ERISA § 406(a), 29 U.S.C. § 1106(a), requires that a plan fiduciary “shall not
3 cause the plan to engage in a transaction, if he knows or should know that such transaction
4 constitutes a direct or indirect sale or exchange, or leasing of any property between the plan and
5 a party in interest,” or a “transfer to, or use by or for the benefit of, a party in interest, of any
6 assets of the plan.”

7 59. ERISA § 406(b), 29 U.S.C. § 1106(b), mandates that a plan fiduciary shall not
8 “act in any transaction involving the plan on behalf of a party (or represent a party) whose
9 interests are adverse to the interests of the plan or the interests of its participants,” or “deal with
10 the assets of the plan in his own interest or for his own account,” or “receive any consideration
11 for his own personal account from any party dealing with such plan in connection with a
12 transaction involving the assets of the plan.”

13 60. ERISA § 408(e), 29 U.S.C. § 1108(e) provides a conditional exemption from the
14 prohibited transaction rules for sale of employer securities to or from a plan if a sale is made for
15 adequate consideration. ERISA § 3(18)(B) defines adequate consideration as “the fair market of
16 the asset as determined in good faith by the trustee or named fiduciary.” ERISA’s legislative
17 history and existing case law make clear that ERISA § 3(18)(B) requires that the price paid must
18 reflect the fair market value of the asset, and the fiduciary must conduct a prudent investigation
19 to determine the fair market value of the asset.

20 61. Defendant Michael Lindeman engaged in a prohibited transaction in violation of
21 ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by failing to ensure that the ESOP paid no more
22 than fair market value for the Valley Aggregate stock purchased from Defendant Lindeman
23 and/or Defendant Lorraine Lindeman in January 2004. Specifically, the ESOP paid more than
24 fair market value for shares sold by the Lindemans, and Defendant Michael Lindeman failed to
25 conduct an independent and prudent investigation into the fair market price before entering into
26 the stock purchase agreement with Defendant Lindeman and/or Defendant Lorraine Lindeman.
27 Defendant Michael Lindeman failed to, among other things, ensure that he secured an
28 independent expert appraisal of the fair market value of Valley Aggregate stock prior to January

1 2004 Transaction; investigate adequately the qualifications of any and all valuation experts
2 retained to prepare the valuations of Valley Aggregate stock in connection with the January 2004
3 Transaction; provide complete and accurate information regarding Valley Aggregate to any
4 valuation experts for use in the valuations prepared in connection with the January 2004
5 Transaction; and make certain that reliance on any and all valuation experts' advice was
6 reasonably justified under the circumstances of the Transaction. In addition, Defendant Michael
7 Lindeman engaged in a prohibited transaction in violation of ERISA §§ 406(a)-(b), 29 U.S.C. §§
8 1106(a)-(b), by having the ESOP make an advance payment or advance payments on the
9 Promissory Note in order to facilitate Defendant Nickum's purchase of the Promissory Note
10 from Defendant Lindeman and/or Defendant Lorraine Lindeman.

11 62. Defendant Lorraine Lindeman engaged in a prohibited transaction in violation of
12 ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by causing the ESOP to purchase Valley
13 Aggregate stock for greater than adequate consideration in January 2004: as a member of the
14 Board, Defendant Lorraine Lindeman ratified the Administration Committee's direction to the
15 Trustee to borrow funds for the January 2004 ESOP Transaction, even though the purchase price
16 was inflated. In addition, Defendant Lorraine Lindeman engaged in a prohibited transaction in
17 violation of ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by taking from the ESOP an
18 advance payment or advance payments on the Promissory Note in order to facilitate Defendant
19 Nickum's purchase of the Promissory Note from Defendant Lindeman and/or Defendant
20 Lorraine Lindeman.

21 63. Defendant Board engaged in a prohibited transaction in violation of ERISA §§
22 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by causing the ESOP to purchase Valley Aggregate stock
23 for greater than adequate consideration in January 2004: Defendant Board ratified the
24 Administration Committee's direction to the Trustee to borrow funds for the January 2004 ESOP
25 Transaction, even though the purchase price was inflated.

26 64. Defendant Administration Committee engaged in a prohibited transaction in
27 violation of ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by causing the ESOP to purchase
28 Valley Aggregate stock for greater than adequate consideration in January 2004: Defendant

1 Administration Committee directed the Trustee to borrow funds for the January 2004 ESOP
2 Transaction, even though the purchase price was inflated.

3 65. Defendant Nickum engaged in a prohibited transaction in violation of ERISA §§
4 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by having the ESOP make an advance payment or advance
5 payments on the Promissory Note in order to facilitate his purchase of the promissory note from
6 Defendant Lindeman and/or Defendant Lorraine Lindeman.

7 66. Defendant Nickum also knowingly participated in the breaches of fiduciary duty
8 and prohibited transactions alleged herein in violation of ERISA § 502(a)(3), 29 U.S.C. §
9 1132(a)(3). Defendant Nickum's knowing participation included but was not limited to deciding
10 that the ESOP would not purchase the Promissory Note at a substantial discount to face value
11 and causing the ESOP to make an advance payment on the Promissory Note for Nickum's
12 benefit.

13 67. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a
14 fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or
15 duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the
16 plan any losses to the plan resulting from each such breach, and additionally is subject to such
17 other equitable or remedial relief as the court may deem appropriate, including removal of the
18 fiduciary.

19 68. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant to bring a
20 suit for relief under ERISA § 409.

21 69. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant to bring a
22 suit to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to
23 enforce the terms of a plan.

24 70. Defendant Lindeman and/or Defendant Lorraine Lindeman have profited in an
25 amount to be proven at trial from the prohibited transaction by receiving more than fair market
26 value for the Valley Aggregate stock sold to the ESOP in January 2004.

27 71. Defendants have caused millions of dollars of losses to the ESOP by the
28 prohibited transactions in an amount to be proven more specifically at trial.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against the Defendants, and each of them, on each Claim for Relief and for the following relief:

As to the First Claim for Relief:

A. Certify this action as a class action pursuant to Fed. R. Civ. P. 23;

B. Declare that the Defendants, and each of them, have breached their fiduciary duties to the Plaintiff Class;

C. Enjoin Defendants, and each of them, from further violations of their fiduciary responsibilities, obligations and duties;

D. Issue a preliminary and permanent injunction removing the Defendants, and each of them, as members of the Administration Committee and Trustees of the ESOP and/or barring the Defendants, and each of them, from serving as members of the Administration Committee or Trustees of the ESOP in the future, and appointing independent fiduciaries as Trustees and members of the Administration Committee;

E. Order that Defendants and each of them, make good to the ESOP and/or to any successor trust(s) the losses resulting from their breaches and restoring any profits they have made through use of assets of the ESOP;

F. Order that Defendants provide other appropriate equitable relief to the ESOP, including but not limited to, by forfeiting their ESOP accounts, providing an accounting for profits, imposing a constructive trust and/or equitable lien on any funds wrongfully held by any of the Defendants;

G. Declare that any indemnification agreement between the Defendants, or any of them, and Valley Aggregate violates ERISA § 410, 29 U.S.C. § 1110, and is therefore null and void.

H. Award Plaintiff reasonable attorneys' fees and costs of suit incurred herein pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the common fund;

I. Order Defendants to pay prejudgment interest; and

1 J. Award such other and further relief as the Court deems equitable and just.

2 **As to the Second Claim for Relief:**

3 A. Certify this action as a class action pursuant to Fed. R. Civ. P. 23;

4 B. Declare that Defendants Michael and Lorraine Lindeman, the Board, the
5 Administration Committee, and Nickum, and each of them, have breached their fiduciary
6 responsibilities and/or duties as parties in interest to the Plaintiff Class;

7 C. Enjoin Defendants Michael and Lorraine Lindeman, the Board, the
8 Administration Committee, and Nickum, and each of them, from further prohibited transactions
9 and violations of their fiduciary responsibilities, obligations and duties;

10 D. Issue a preliminary and permanent injunction removing Defendants Michael and
11 Lorraine Lindeman, the Board, the Administration Committee, and Nickum, and each of them, as
12 members of the Administration Committee and Trustees of the ESOP and/or barring Defendants
13 Michael and Lorraine Lindeman, the Board, the Administration Committee, and Nickum, and
14 each of them, from serving as members of the Administration Committee or Trustees of the
15 ESOP in the future, and appointing independent fiduciaries as Trustees and members of the
16 Administration Committee;

17 E. Declare that Defendants Michael and Lorraine Lindeman, the Board, the
18 Administration Committee, and Nickum and each of them engaged in prohibited transactions
19 in violation of ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by causing the ESOP to purchase
20 Valley Aggregate stock from Defendant Lindeman and/or Defendant Lorraine Lindeman for
21 more than adequate consideration;

22 F. Order Defendants Michael and Lorraine Lindeman, the Board, the Administration
23 Committee, and Nickum, and each of them, make good to the ESOP and/or to
24 any successor trust(s) the losses resulting from their breaches and restoring any profits they have
25 made through use of assets of the ESOP;

26 G. Order that Defendants Michael and Lorraine Lindeman, the Board, the
27 Administration Committee, and Nickum provide other appropriate equitable relief to the ESOP,
28 including but not limited to, by forfeiting their ESOP accounts, providing an accounting for

1 profits, imposing a constructive trust and/or equitable lien on any funds wrongfully held by any
2 of the Defendants, and/or tracing the ESOP assets received by parties-in-interest;

3 H. Order Defendant Lindeman, Defendant Lorraine Lindeman, and/or other parties-
4 in-interest to return the payments they received for Valley Aggregate stock in January 2004 to
5 the ESOP along with any profits that it has earned on these payments, order Defendants to
6 disgorge their profit from the prohibited transaction to the ESOP, impose a constructive trust
7 upon the profits earned by any of the Defendants from violations of fiduciary obligations and
8 duties as parties in interest, order an accounting for profits by Defendants, trace the ESOP assets
9 received by the Defendants, and/or order other appropriate equitable relief.

10 I. Order Defendants to pay prejudgment interest.

11 J. Award Plaintiff reasonable attorneys' fees and costs of suit incurred herein
12 pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), and/or for the benefit obtained for the
13 common fund; and

14 K. Award such other and further relief as the Court deems equitable and just.

15
16 Dated: July 6, 2010

Respectfully submitted,

17
18 LEWIS, FEINBERG, LEE,
19 RENAHER & JACKSON, P.C.

20 By: /s/ Daniel Feinberg
Daniel Feinberg
Attorneys for Plaintiff

Exhibit List

1. Action by Unanimous Written Consent of the Administration Committee of the Lindeman Bros. ESOP, dated January 9, 2004.
2. Action by Unanimous Written Consent of the Board of Directors of Lindeman Bros., dated January 9, 2004.
3. Notes titled "Thoughts on selling out."
4. Letter dated March 29, 2004, from Kevin Long to David Nickum.
5. Letter dated September 20, 2004, from Michael Lindeman to David Nickum.
6. Letter dated September 29, 2004, from Michael Lindeman to David Nickum.
7. Email dated June 16, 2006, from Evan Rhodes of ABRC to, inter alia, David Nickum, and Michael Lindeman.
8. Letter dated June 6, 2006, from Mary Giganti to Kevin Long.