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8 Attorneys for Plaintiff

9 **UNITED STATES DISTRICT COURT**  
10 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
11 **SACRAMENTO DIVISION**

12 DARLEEN STANTON, )

13 Plaintiff, )

14 vs. )

15 CLAIR R. COUTURIER, JR., DAVID R. )  
16 JOHANSON, ROBERT E. EDDY, JOHANSON )  
17 BERENSON LLP, and PENSCO, INC., )

18 Defendants, )

19 and )

20 THE EMPLOYEE OWNERSHIP HOLDING )  
21 COMPANY, INC. EMPLOYEE STOCK )  
22 OWNERSHIP PLAN, NOLL )  
23 MANUFACTURING COMPANY, )  
24 N &NW MANUFACTURING HOLDING )  
25 COMPANY, INC. and THE EMPLOYEE )  
26 OWNERSHIP HOLDING COMPANY, INC., )

Nominal Defendants. )

No. \_\_\_\_\_

**COMPLAINT**

Plaintiff Darleen Stanton alleges as follows:

**THE PARTIES**

1. Plaintiff is a citizen of the State of Washington. At relevant times referred to herein Plaintiff was an employee of Noll Manufacturing Company (“Noll”) and a participant

1 in The Employee Ownership Holding Company, Inc. (“TEOHC”) Employee Stock  
2 Ownership Plan (the “TEOHC ESOP”) and a beneficiary of the TEOHC Employee Stock  
3 Ownership Trust (“the TEOHC ESOT”), which implements and forms a part of the TEOHC  
4 ESOP, (the TEOHC ESOP and the TEOHC ESOT at times referred to herein collectively as  
5 the “ESOP”), which ESOP is the successor to the Noll Manufacturing Company ESOP.

6 2. Defendant Clair R. Couturier, Jr. (“Couturier”) is an individual residing in Gig  
7 Harbor, Washington and Palm Desert, California. At certain relevant times, Couturier was  
8 and is a Trustee and fiduciary of the ESOP and President and member of the Board of  
9 Directors for Noll, TEOHC and related entities.

10 3. Defendant David R. Johanson (“Johanson”) is an individual residing in Napa  
11 County, California, an attorney at law and a member of the State Bar of California. At certain  
12 relevant times, Johanson was and is a named and/or de facto ESOP fiduciary and Secretary  
13 and a member of the Board of Directors for Noll, TEOHC and related entities.

14 4. Defendant Robert E. Eddy (“Eddy”) is an individual residing in Truckee,  
15 California. Eddy was and is, since on or about October 29, 2003, Special Trustee of the ESOP  
16 and an ESOP fiduciary. Eddy was and is also a member of the Board of Directors for  
17 TEOHC.

18 5. Defendant Johanson Berenson LLP (“Johanson Berenson”) is a corporate law  
19 firm with offices in Washington, D.C., California, Virginia, North Carolina, Florida and  
20 affiliated offices in New York. On information and belief, at all relevant times, Johanson has  
21 been a partner in and employee of Defendant Johanson Berenson, LLP (“JBLLP”), and his  
22 actions complained of herein in providing legal representation to Noll, N&NW and/or  
23 TEOHC were in the course and scope of his employment by JBLLP.

24 6. Defendant Pensco, Inc., parent company of, and/or dba, Pensco Trust  
25 Company (“Pensco”), Custodian FBO Clair R. Couturier, Jr. Individual Retirement Account  
26 (“IRA”), is a New Hampshire chartered trust company with offices located in San Francisco,  
California and Portsmouth, New Hampshire. Plaintiff names Pensco in its capacity as  
custodian of Couturier’s IRA which wrongfully received the ill-gotten profits of Couturier’s  
wrongful actions as alleged herein. Plaintiff seeks the imposition of a constructive trust upon  
the Pensco IRA account for the purposes of effectuating Plaintiff’s claim for equitable relief.

1 7. Nominal Defendant ESOP is an employee stock ownership plan governed by  
2 ERISA. Plaintiff names the ESOP as a nominal party defendant which may be necessary to  
3 securing full and fair relief.

4 8. Nominal Defendant Noll Manufacturing Company (“Noll”) is a California  
5 corporation headquartered in Stockton, California. Plaintiff asserts claims herein derivatively  
6 on behalf of Noll.

7 9. Nominal Defendant N&NW Manufacturing Holding Company, Inc.  
8 (“N&NW”) is a California corporation headquartered in Fife, Washington. Plaintiff asserts  
9 claims herein derivatively on behalf of N&NW.

10 10. Nominal Defendant The Employee Ownership Holding Company, Inc.  
11 (“TEOHC”) is a Delaware corporation headquartered in the State of California. Plaintiff  
12 asserts claims herein derivatively on behalf of TEOHC.

### 13 **JURISDICTION AND VENUE**

14 11. Plaintiff’s First Claim for Relief arises under ERISA. This Court has subject  
15 matter jurisdiction over that claim pursuant to 28 U.S.C. § 1331 and Section 502 of ERISA,  
16 29 U.S.C. § 1132. Plaintiff’s Second and Third Claims for Relief arise under state law. This  
17 Court has subject matter jurisdiction over those claims pursuant to 28 U.S.C. § 1367.

18 12. ERISA provides for nation-wide service of process. ERISA § 502(e)(2), 29  
19 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the United States or subject  
20 to service in the United States and this Court therefore has personal jurisdiction over them.  
21 This Court also has personal jurisdiction over them pursuant to Fed. R. Civ. P. 4(k)(1)(A)  
22 because they would all be subject to the jurisdiction of a court of general jurisdiction in the  
23 State of California.

24 13. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b). At all relevant  
25 times, Defendants have been actively conducting business in the State of California and  
26 within the geographic area encompassing the Eastern District of the State of California.  
Venue is further properly laid in this district pursuant to Section 502(e)(2) of ERISA, 29  
U.S.C. § 1132(e)(2) in that the subject employee benefit plan is administered in this district  
and the cause of action arose in this district.

1 **OVERVIEW OF THE CLAIMS**

2 14. Plaintiff brings the First Claim for Relief for breach of fiduciary duty in her  
3 capacity as a plan participant under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of  
4 the ESOP as a whole to recover appropriate relief under ERISA § 409(a), 29 U.S.C. §  
5 1109(a), including restoration to the ESOP of any losses to the plan resulting from any  
6 fiduciary breach, and under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to recover equitable  
7 remedies to redress any violations of, and enforce the provisions of, ERISA.

8 15. Plaintiff brings the Second and Third Claims for Relief derivatively on behalf  
9 of Noll, N&NW and TEOHC to recover damages and appropriate equitable relief for breach  
10 of fiduciary duty by Defendants Couturier, Johanson and Eddy as officers or directors of Noll,  
11 N&NW and/or TEOHC, and for professional negligence by Defendants Johanson and JBLLP.

12 **FACTS COMMON TO ALL CLAIMS**

13 16. Noll was started as a business in or about 1942 by Robert E. Noll to engage in  
14 the manufacture of sheet metal products. Noll was first incorporated in 1956 under the laws of  
15 California. By the year 2000, Noll was a producer of galvanized sheet metal products  
16 consisting primarily of furnace pipe and fittings, rain gutters and downspouts, metal building  
17 products, galvanized ware and plastic ventilation products.

18 17. Upon information and belief, during the 1970's, Robert E. Noll, as the sole  
19 shareholder of Noll, formed the ESOP for the benefit of employees with over one year of  
20 service and not otherwise covered under collective bargaining agreements.

21 18. Prior to 2000, Noll made contributions to the ESOP, which contributions were  
22 utilized to purchase common shares of Noll stock from Noll, from Robert E. Noll before his  
23 death, and from his surviving spouse, Patricia R. Noll, after his death.

24 19. On or about March 15, 1980, Robert E. Noll died and the Robert E. Noll Trust  
25 became the successor to all Noll shares which he owned individually before his death. After  
26 that date, Patricia R. Noll was the controlling shareholder of Noll, and Barry K. Miller was a  
member of the Noll Board of Directors and company President.

1           20.     During 1968, Noll acquired Northwest Metal Products Company (“Norwesco”),  
2 a manufacturing company, as a division of Noll. Norwesco operated in Kent, Washington  
3 until in or about 1998, when it moved operations to Fife, Washington. In 1986, Noll acquired  
4 the assets of General Metal Craft Co. (“General Metal”), a manufacturing operation located in  
5 Portland, Oregon.

6           21.     Defendant Couturier was manager of the General Metal manufacturing plant at  
7 the time Noll acquired General Metal. After the acquisition, Noll closed the Portland, Oregon  
8 plant and moved its operations to Noll's Richmond, California facility and Norwesco's Kent,  
9 Washington plant. Couturier was retained by Noll and appointed Manager for both plants.

10           22.     Prior to 1998, Noll maintained its manufacturing facility in Richmond,  
11 California. During 1998, Noll completed the sale of its Richmond manufacturing facility and  
12 relocated to a new manufacturing facility in Stockton, California, where the operation remains  
13 located today.

14           23.     Upon information and belief, as of June 30, 2000, the ESOP owned 57,573  
15 shares of the company's Common stock which represented approximately 25% of all shares of  
16 Noll Common stock issued and outstanding. At that time, the common shares were the only  
17 class of Noll stock issued.

18           24.     Contributions to the ESOP were determined annually at the discretion of the  
19 Noll Board of Directors. Upon information and belief, contributions in 1999 and 2000 were  
20 \$348,540 and \$356,461 respectively.

21           25.     Independent appraisal firm. Moss Adams Advisory Services prepared an annual  
22 valuation of the Noll common shares, which valuation was \$119.46 and \$112 per share as of  
23 June 30, 1999 and June 30, 2000 respectively.

24           26.     Upon information and belief, Mr. Miller served as a member of the Board of  
25 Directors and Noll President until in or about 2000 when he became ill. In or about 1999,  
26 pursuant to a leadership transition plan, Couturier was elected to the Noll Board of Directors. In  
2000, Mr. Miller appointed Couturier to succeed him as Noll President. In 2001, Mr. Miller  
died.

1 27. Upon information and belief, in or about 2000, Couturier established a business  
2 relationship with attorney Johanson, who explained to Couturier how he could use control of  
3 Noll and its ESOP to enrich himself at the ESOP's expense. Upon information and belief,  
4 Johanson was initially hired to represent the ESOP through its Trustee Glen J. Beauchamp,  
5 Noll's Chief Financial Officer.

6 28. In the spring of 2001, the Noll Board of Directors consisted of Patricia R. Noll,  
7 Thomas J. McIntosh (attorney for Noll, officer of Noll, co-trustee with Patricia R. Noll of the  
8 Robert E. Noll Trust and officer and director of The Noll Foundation, Inc.) and Couturier.

9 29. Upon information and belief, by March 2001, Johanson was purporting to  
10 represent the interests of the ESOP, but instead was using his representation to set in place a  
11 plan that would unjustly enrich Couturier and himself.

12 30. Some time between April and June 2001, Mr. Beauchamp retired and Couturier  
13 replaced him as the sole ESOP Trustee.

14 ESOP Buyout of All Noll Shares

15 31. Upon information and belief, Couturier and Johanson developed a plan under  
16 which the ESOP would acquire all of the issued and outstanding shares of Noll through a  
17 buyout of Patricia R. Noll, the Robert E. Noll Trust and all other non-ESOP shareholders  
18 (collectively the "Selling Shareholders"), Couturier and Johanson would be placed in total  
19 control of the Noll Board of Directors and the ESOP, and the Noll Board of Directors would  
20 then secretly adopt incentive stock option agreements, stock warrant agreements, deferred  
21 compensation agreements and other compensation agreements which would substantially dilute  
22 the ESOP's interest in Noll and unjustly enrich Couturier and Johanson.

23 32. Prior to the Closing of the ESOP's purchase of stock from the Selling  
24 Shareholders, pursuant to the advice and instructions of Johanson, Noll common stock was to  
25 be converted into common stock and preferred stock (the "Recapitalization Plan"). The ESOP  
26 would then purchase all of both classes of stock from the Selling Shareholders, giving the ESOP  
100% ownership and control of the Company.

33. Upon information and belief, on March 26, 2001, Johanson met with the ESOP  
participants, explained the buyout and Recapitalization Plan and requested that the participants

1 exercise their pass-through voting rights to approve the Plan. Upon information and belief, the  
2 Recapitalization Plan was approved by vote of a majority of the participants based upon the  
3 representation that such Plan was in the best interests of the ESOP and that the creation of  
4 preferred stock would benefit participants by allowing plan contributions and annual dividends  
5 on the preferred shares to exceed the 1RC § 415 limitations on annual contributions.

6 34. At no time before the vote did Johanson or Couturier explain to participants  
7 that their plan was to adopt stock options and other incentive agreements for the benefit of  
8 Couturier which would substantially dilute the ESOP's interest in Noll and provide Couturier  
9 excessive and unreasonable compensation.

10 35. Upon information and belief, Couturier, acting as the sole member of the ESOP  
11 Board of Trustees, and the Selling Shareholders entered into an ESOP Stock Purchase  
12 Agreement dated June 2001 under which the ESOP purchased all of the Selling Shareholders'  
13 shares for a total purchase price of \$20,543,446.00. This transaction (the "Transaction") closed  
14 on June 20, 2001.

15 36. Upon information and belief, the purchase price was paid in cash at the Closing  
16 with funds borrowed by Noll from Union Bank of California ("Union Bank") in the amount of  
17 \$23,000,000. Noll loaned to the ESOP Trust the full amount of the purchase price (the "ESOT  
18 Loan"), evidenced by a secured promissory note from the ESOT to Noll in the amount of  
19 \$20,543,446.00 (the "ESOT Note").

20 37. Pursuant to an ESOT Loan and Pledge Agreement, Noll was required to make  
21 contributions to the ESOT in amounts which, when combined with any cash dividends which  
22 were paid on the company preferred stock acquired with the ESOT Note, would be sufficient to  
23 enable the ESOT to make all principal and interest payments on the ESOT Note to Noll and for  
24 Noll to repay Union Bank on its loan to Noll.

25 38. Upon information and belief, at the time of the Transaction, Noll had average net  
26 sales of approximately \$40,000,000, retained earnings of approximately \$44,000,000 and a net  
worth of approximately \$52,000,000 (on a pre-Transaction basis).

39. Upon information and belief, the ESOP's common stock on a minority basis had  
a fair market value of approximately \$120.00 per share and the preferred stock on a majority

1 basis had a fair market value in excess of \$180.00 per share pre-Transaction. Upon  
2 information and belief, the Transaction debt reduced the fair market value of the common stock  
3 and the preferred stock on a majority basis to approximately \$60.00 per share and \$90.00 per  
4 share respectively post-Transaction.

5 40. As in all ESOP leveraged transactions, it was expected that the fair market  
6 value of the common stock and preferred stock owned by the ESOP would rise each year as the  
7 ESOP repaid the ESOT Loan to the Company, which would use these funds to repay its loan to  
8 Union Bank and utilize the tax benefits thereof.

9 Execution of Concealed Couturier Incentive Agreements

10 41. During the course of the Transaction, Johanson was legal counsel for the ESOP  
11 while Thomas J. McIntosh served as legal counsel for Noll, Patricia R. Noll, The Noll  
12 Foundation, Inc. and the Robert E. Noll Trust. In addition, Mr. McIntosh was an officer and  
13 director of Noll at the time of the Transaction, but resigned his positions as officer, director  
14 and legal counsel of Noll shortly after the Transaction closed.

15 42. During the Transaction, Johanson prepared most of the documents and  
16 delivered same to Mr. McIntosh for review. Prior to the Transaction, Johanson provided Mr.  
17 McIntosh with certain agreements entitled the Noll Manufacturing Company 2001 Equity  
18 Incentive Plan and the Noll Manufacturing Company Value Enhancement Incentive Plan.  
19 (collectively the "Couturier Incentive Agreements") which were intended to provide  
20 Couturier with stock options, stock rights and bonus compensation based upon a formula that  
21 measured the increase in the value of Noll stock post-Transaction.

22 43. Upon information and belief, Mr. McIntosh recognized that the formula for  
23 measuring Couturier's benefit to Noll was artificial and unfair because he had been told by  
24 Johanson and the ESOP appraiser that the Transaction would cause the value of the stock to  
25 drop to about half of the \$119.00 per share pre-Transaction value because of the large bank  
26 loan obtained to undertake the Transaction and that the stock value would increase as the loan  
was paid down. Mr. McIntosh called Johanson and expressed his concerns and objections to  
the proposed Couturier Incentive Agreements, which required approval of the Noll Board of  
Directors.

1 44. Upon information and belief, Mr. McIntosh advised Johanson that, as a  
2 director of the company, he would not approve the Couturier Incentive Agreements.

3 45. The Couturier Incentive Agreements were unreasonable, created excessive and  
4 unjust compensation and benefits to Couturier and were not in the best interests of the ESOP.  
5 At the time such agreements were prepared, Johanson was representing Couturier in his  
6 personal capacity and acted with a conflict of interest with respect to the ESOP as a client.

7 46. Upon information and belief, on June 20, 2001, at a pre-closing or closing  
8 meeting held in a conference room at the Monaco Hotel in Seattle, Washington, Couturier  
9 called a Board of Directors meeting for Noll and voted on approval of the Couturier Incentive  
10 Agreements. Upon information and belief, despite Mr. McIntosh's refusal to vote in favor of  
11 the Couturier Incentive Agreements, Johanson's motion to approve the Couturier Incentive  
12 Agreements was passed by Couturier's vote and the vote of another director controlled by  
13 Couturier.

14 47. Upon information and belief, that same day or the day following the meeting,  
15 Couturier and Johanson forced Mr. McIntosh to resign as corporate secretary and elected  
16 Johanson in his place. Johanson prepared the corporate minutes of such meeting.

17 48. Upon information and belief, Johanson was elected a director of Noll soon  
18 after the Transaction and he was also appointed corporate legal counsel to replace Mr.  
19 McIntosh.

20 49. Upon Johanson's request, Mr. McIntosh delivered all of his corporate files and  
21 Transaction documents to Johanson, who has kept them locked away from the ESOP  
22 participants.

23 50. In or about October 1, 2001, less than four months after the Transaction,  
24 Couturier and Johanson incorporated N&NW Holding Company, Inc. ("N&NW") as a  
25 California corporation electing S Corporation status to engage in a stock for stock exchange  
26 with Noll. Couturier caused the ESOP to transfer its 212,187.2707 shares of Noll to N&NW  
in exchange for a similar number of N&NW shares of common stock (the "Tax-Free  
Reorganization").

1 51. As a result of the Tax-Free Reorganization, N&NW owned 100% of all capital  
2 stock of Noll and the ESOP owned all Common stock of N&NW.

3 52. After the Tax-Free Reorganization, the ESOP owned no preferred stock and  
4 received no dividend stream there from. Upon information and belief, Couturier, as ESOP  
5 Trustee, approved the Tax-Free Reorganization but never requested nor received any benefits  
6 from the Company to compensate the ESOP for the loss of the dividend stream associated  
7 with the preferred stock.

8 53. Upon information and belief, N&NW granted Couturier stock options in 2002  
9 at a price substantially below the then current fair market value, vested and exercisable over a  
10 five year period as a result of the Couturier Incentive Agreements. Commencing in 2002, the  
11 share rights associated with the stock options to Couturier began to dilute the per share value  
12 of the ESOP's stock appraised each year by Moss Adams Advisory Services.

13 54. Upon information and belief, Couturier and Johanson elected themselves  
14 Directors and Officers of N&NW. Thereafter, acting as Directors of N&NW, they approved  
15 additional Couturier Incentive Agreements, based upon the issuance of equity rights and/or  
16 compensation or bonuses tied to the amount of debt repayment on the ESOT Loan.

17 55. Upon information and belief, during 2002 and 2003, Couturier received  
18 additional stock options and other benefits resulting from the Couturier Incentive Agreements  
19 which further diluted the per she value of the ESOP's annual stock appraisal and resulted in  
20 retiring or otherwise departing ESOP participants receiving less than the true fair market of  
21 their ESOP shares. By January 2004, Couturier was the largest beneficial owner of ESOP  
22 shares, warrants and other stock interests amounting to approximately 213 of the effective  
23 equity of Noll.

#### 24 Departure of ESOP Participants

25 56. Upon information and belief, Couturier fired employees whenever they raised  
26 questions regarding the handling of the ESOP and/or Couturier's compensation from Noll.

57. In 2003, Couturier pressured a number of key employees of Norwesco, who  
had substantial ESOP accounts, to take an early retirement and receive their ESOP benefits

1 while the per share fair market value was artificially lowered by the leveraged ESOP debt and  
2 Couturier's dilutive option shares and share rights.

3 58. Upon information and belief, Couturier has terminated a number of other long-  
4 term employees who were ESOP participants or has taken action to force their early resignation  
5 or retirement. Upon information and belief, these actions were taken to increase Couturier's  
6 interest in the ESOP stock and to eliminate persons who might assert a cause of action against  
7 him if they learned of his acts of wrongdoing.

8 Plot to Loot Noll of Its Assets

9 59. While the ESOP participants had no knowledge of Couturier's acquisition of a  
10 controlling beneficial interest in Noll or N&NW, Johanson plotted with Couturier in 2003 for  
11 Couturier to secretly sell his controlling beneficial interest in N&NW to the ESOP for millions  
12 of dollars.

13 60. Upon information and belief, this scheme was to be carried out after Noll and  
14 Couturier formed a new entity known as The Employee Ownership Holding Corporation  
15 ("TEOHC"), a Delaware corporation, and then completed a third recapitalization involving  
16 Noll, N&NW and TEOHC (the "Third Recapitalization").

17 61. During the last six (6) months of 2003, Couturier and Johanson began to  
18 announce to employees that Noll and N&NW. needed to engage in the Third Recapitalization  
19 arrangement involving TEOHC so that Noll would have the ability to effectuate early  
20 retirement distributions for the employees that Couturier was encouraging and pressuring to  
21 take early retirement.

22 62. In fact, these announcements were misleading and false. Johanson and  
23 Couturier instead intended to use the Third Recapitalization to cover their plan for Couturier  
24 to secretly receive his personal retirement package amounting to \$15,000,000 or more  
25 secreted from the Noll assets.

26 63. Upon information and belief, Johanson represented to Couturier that he could  
secretly arrange for a private investment company to consummate the ESOP's purchase of  
Couturier's shareholder interests in N&NW and Couturier could then walk away with millions

1 of dollars for his personal retirement package, representing all or substantially all of the equity  
2 of Noll.

3 64. To accomplish this and to personally enrich himself, Johanson, together with  
4 Dan Mytels, formed a company called Zenith Capital Partners LLC (“Zenith”) in January  
5 2004 to contract with Couturier and TEOHC as successor to Noll or N&NW. Under their  
6 contract, Zenith would secure the required lender and/or investor financing to facilitate the  
7 buy-out of Couturier's interest in TEOHC, and would be paid an annual management service  
8 fee of not less than \$100,000, annual board of trustee fees of not less than \$20,000, warrants  
9 equal to 5% of the fully diluted shares of TEOHC capital stock, with an exercise price of  
10 100% of the post-initial closing date fair market value of TEOHC 's capital stock, inter alia.  
11 Johanson intended to reap substantial profits from this transaction and his partial ownership in  
12 Zenith.

13 65. In or about February 2004, Noll and Couturier completed the Third  
14 Recapitalization of Noll & N&NW under which the entity known as TEOHC was formed as a  
15 Delaware corporation and the ESOP then exchanged all of its capital stock in N&NW for all  
16 of the outstanding capital stock in the newly-formed entity TEOHC.

17 66. In a lawsuit styled Zenith Capital Partners LLC v. Clair R. Couturier, Jr. et at,  
18 Case No. 26-28162 in the Superior Court of California, County of Napa (the “Zenith  
19 lawsuit”), Zenith alleged that in or about February 2004, Noll and Couturier created TEOHC  
20 and completed a recapitalization of Noll, by which the ESOP exchanged all of TEOHC's  
21 outstanding capital stock for all stock and other interests held by Couturier, the loan  
22 obligations of the ESOP, and any and all options and warrants held by TEOHC's options and  
23 warrant holders. In the complaint, Zenith alleged that Johanson, as corporate counsel for  
24 TEOHC, conceived, designed and facilitated this transaction which resulted in Couturier  
25 converting all of his share interests except ESOP shares to promissory notes from TEOHC.  
26

27 67. Based upon information and belief from the Zenith lawsuit, Plaintiff avers that  
28 in February 2004, the ESOP exchanged all of TEOHC's outstanding capital stock for all of  
29 Couturier's existing capital stock and other interests in Noll and N&NW. Couturier received  
30 promissory notes from TEOHC in amounts exceeding \$15,000,000.

1           68. This transaction (the “February 2004 Transaction”) was never disclosed to the  
2 ESOP participants and was completed without independent counsel representing the ESOP  
3 and the corporate parties thereto. Rather, upon information and belief, Johanson purported to  
4 represent all parties to the Transaction. Such action of engaging in the February 2004  
5 Transaction by Johanson and Couturier was a blatant conflict of interest and a fraud upon the  
6 ESOP and the corporate participants. The February 2004 Transaction was intended as an  
7 initial step in Couturier's removal of more than \$15,000,000 of Noll assets and Johanson's  
8 receipt of more than \$1,000,000 of compensation for structuring the transaction.

9           69. According to the Zenith lawsuit, in or about April 2004, Couturier requested  
10 that Zenith proceed with a new transaction to convert his TEOHC promissory notes into cash.

11           70. On or about June 19, 2004, Zenith entered into a written agreement with  
12 Couturier, TEOHC and the ESOP under which TEOHC would purchase all of Couturier's  
13 equity and equity-like interests in TEOHC for a purchase price believed to be in excess of  
14 \$15,000,000. In this proposed transaction, Couturier would receive a mixture of cash payable  
15 on or about July 21, 2004, as well as other high value real and personal property.

16           71. Zenith obtained offers for complete financing of the transaction, but, upon  
17 information and belief, Couturier and Johanson decided to breach the contract and proceed on  
18 their own without Zenith. Zenith subsequently filed the Zenith lawsuit to recover damages  
19 from Couturier, Johanson and TEOHC for breach of contract and intentional interference with  
20 contractual relations among other claims.

21           72. Upon information and belief, Johanson and Couturier elected to obtain  
22 financing for the buyout of Couturier's equity interests from sources other than those which  
23 Zenith had obtained. Notwithstanding, Johanson and Couturier obtained bridge loan financing  
24 for the buyout from Bank of America, which was one of the financing sources obtained by  
25 Zenith. Couturier accepted bridge loan financing from Bank of America so that the buyout  
26 transaction could proceed by July 2004.

          73. On or about July 20, 2004, Couturier obtained three separate loans from Bank  
of America, which totaled \$24,785,000, secured by first mortgages on valuable real estate  
owned by Noll and its subsidiaries.



1 Eddy failed to act prudently and solely and exclusively for the best interests of the ESOP.  
2 Rather, Eddy served the interests of Johanson and Couturier as their agent.

3 81. Upon information and belief, Couturier and Johanson have, effective  
4 September 2005, resigned all of their positions with TEOHC, N&NW, Noll and the ESOP  
5 and walked away with millions of dollars misappropriated from Noll and the ESOP, but have  
6 left Eddy in charge of the ESOP to assure that no legal actions will be instituted against them.

#### 7 Recent Developments

8 82. TEOHC was sold in an asset sale on April 10, 2007 to an affiliate of Gibraltar  
9 Industries, Inc. (a public company traded on NASDAQ) and all the participants, including  
10 Plaintiff, have left employment with TEOHC and gone to work for Gibraltar. However,  
11 Plaintiff remains a participant of the ESOP and a shareholder of TEOHC.

12 83. According to a "Notice to Participants," sent by the independent fiduciary of  
13 the ESOP, Consulting Fiduciaries, Inc. to the participants on March 13, 2007, the affairs of  
14 TEOHC will be wound up and the ESOP will ultimately be terminated. However, this cannot  
15 take place for some time, not only because of the time required to wind up the business, close  
16 escrow accounts, obtain regulatory approvals, and so on, but also because of a lawsuit  
17 pending against Defendants in this District, namely, *Johnson v. Couturier*, No. 2:05-cv-02046  
18 RRB KJM. The proceeds of that lawsuit will be either paid into the ESOP itself or to the  
19 company. The same is true of the proceeds of this lawsuit.

#### 20 **FIRST CLAIM FOR RELIEF**

21 84. Plaintiff reasserts the foregoing allegations as if fully rewritten herein.

22 85. Pursuant to Section 404 of ERISA, 29 U.S.C. § 1104, a fiduciary with respect  
23 to a qualified retirement plan is required to discharge his duties solely in the interests of the  
24 participants and beneficiaries of the plan and for the exclusive purpose of providing benefits  
25 to participants and their beneficiaries, with the care, skill, prudence and diligence that a  
26 prudent man acting in a like capacity and familiar with such matters would use for the  
conduct of an enterprise of like character with like aims.

1 86. Pursuant to Section 406 of ERISA, 29 U.S.C. § 1106, transactions between a  
2 plan and a party in interest or a fiduciary are prohibited subject to the exemptions set forth in  
3 Section 408 of ERISA, 29 U.S.C. § 1108 and a fiduciary is prohibited from dealing with the  
4 assets of the plan for his own interests or for his own accounts.

5 87. At all relevant times as set forth herein, Defendants Couturier, Johanson and  
6 Eddy exercised discretion to administer, control and/or manage the ESOP or its assets.

7 88. At all relevant times as set forth herein, Defendants Couturier, Johanson and  
8 Eddy were fiduciaries and parties in interest as defined by ERISA and were required to act  
9 with the highest degree of skill, prudence, diligence, loyalty and due care to the ESOP  
10 participants and beneficiaries with respect to any decisions or acts affecting the ESOP.

11 89. By engaging in the acts and transactions set forth hereinabove, Defendants  
12 Couturier, Johanson and Eddy have engaged in breaches of fiduciary duty and prohibited  
13 transactions in violation of ERISA.

14 90. Pursuant to Section 409 of ERISA, 29 U.S.C. § 1109, Defendants Couturier,  
15 Johanson and Eddy are jointly and severally liable to make good to the ESOP any losses  
16 resulting to the ESOP resulting from each such breach.

17 91. Defendants Couturier, Johanson and Eddy are also liable as co-fiduciaries  
18 under ERISA Section 405(a)(1), (a)(2) or (a)(3), with respect to the above-described  
19 violations where they participated knowingly in their co-fiduciaries' breaches and/or  
20 knowingly undertook to conceal those breaches, enabled their co-fiduciaries to commit the  
21 breaches and failed to make reasonable efforts to remedy the breaches.

22 92. Defendants Couturier, Johanson and Eddy are also liable for failing to sue  
23 themselves by way of a derivative action and/or a legal malpractice action on behalf of the  
24 ESOP to remedy their breaches of duty.

25 93. In breaching their duties and dealing with the ESOP assets for their own  
26 interests as set forth herein, Defendants Couturier, Johanson and Eddy abused and put at risk  
ESOP assets belonging to the entire ERISA plan.

1 94. One of ERISA's overriding goals is to prevent the misuse and mismanagement  
2 of plan assets by fiduciaries.

3 95. To achieve that goal, ERISA Section 409(a), 29 U.S.C. §1109(a) requires a  
4 fiduciary to disgorge to an employee benefit plan any profits he makes through improper use  
5 of the plan's assets.

6 96. A constructive trust remedy is an available remedy under ERISA.

7 97. A constructive trust remedy is necessary to deny the breaching fiduciaries  
8 profits from their breach and to deter future breaches of ERISA's duty of loyalty.

9 98. Defendants Couturier, Johanson and Eddy have personally enriched  
10 themselves by generating profits from the wrongful acts alleged herein.

11 99. A constructive trust in favor of all participants and beneficiaries is the only  
12 available means of removing the ill-gotten profits.

13 100. As a proximate result, the ESOP and its participants and beneficiaries are  
14 entitled to the imposition of a constructive trust upon Defendants Couturier, Johanson and  
15 Eddy's ill-gotten profits in an amount to be determined at or before trial.

16 101. The Pensco Trust Company FBO Clair R. Couturier, Jr. IRA Account Number  
17 COIAH was funded with ill-gotten profits which should be disgorged.

18 102. As a direct and proximate result of the breaches of fiduciary duty by  
19 Defendants Couturier, Johanson and Eddy, the ESOP has been damaged in an amount to be  
20 determined at or before trial.

21 103. By engaging in the breaches of fiduciary duty set forth herein, Defendants  
22 Couturier, Johanson and Eddy at all relevant times acted as conflicted fiduciaries. Unless  
23 Defendants Couturier and Eddy are removed from their current positions as ESOP Trustee  
24 and Special ESOP Trustee respectively, Defendants Couturier, Johanson and Eddy will  
25 continue to engage in wrongful acts including, but limited to, concealment of their breaches,  
26 to the continuing detriment of the ESOP and its participants and beneficiaries.



1 110. Plaintiff has made no demand on the Noll, N&NW or TEOHC Board of  
2 Directors before bringing this action because such demand would be futile and is thereby  
3 excused.

4 111. The members of the Boards upon whom the demand would be served actively  
5 participated or acquiesced in the behavior complained of, and are named as defendants herein.  
6 Their acts served no legitimate purpose and were not the product of good faith business  
7 judgment. Such acts were unlawful and are therefore incapable of ratification. As a result,  
8 neither the business judgment rule nor any pre-suit demand requirement is applicable here.

9 112. Plaintiff has not made any demand on the ESOP, the Noll ESOP or the N&NW  
10 ESOP, which are the shareholders of Noll, N&NW and TEOHC, respectively, because such  
11 demand is not required by law and in any event would be futile as the subject plans are  
12 controlled by one or more of the Defendants.

13 113. Defendants Couturier and Johanson were officers and directors of Noll from  
14 and after approximately June 20, 2001, of N&NW from and after approximately September  
15 17, 2001, and TEOHC from and after approximately June 20, 2004. Defendant Eddy has  
16 been a director of TEOHC since approximately June 20, 2004.

17 114. In their capacities as directors and officers of these entities, the Defendants  
18 owed the entities fiduciary duties of prudence and loyalty. These fiduciary duties included the  
19 obligation to avoid conflicts of interest and to avoid causing the corporations to enter into  
20 transactions to benefit one or more of the Defendants at the expense of the corporations.  
21 These fiduciary duties also included the duty to use due care when acting for or on behalf of  
22 the corporations.

23 115. Defendants' conduct as described herein was in flagrant disregard of these  
24 fiduciary obligations, including, without limitation, in the following regards:

- 25 a. As the sole directors of Noll, Defendants Johanson and Couturier  
26 caused Noll to enter into an employment agreement with Couturier on  
or about June 20, 2001, and then to amend the same from time to time  
thereafter, for the purpose of enormously increasing Couturier's  
compensation. This increase in compensation was in stark contrast

1 with Noll's historical practices regarding executive compensation. The  
2 increases in Couturier's compensation were not supported by any  
3 independent analysis nor were they justified by Noll's financial results  
4 or Couturier's performance. Instead these increases were part of a  
5 scheme devised by Johanson and Couturier to divert substantial  
6 corporate assets to their personal benefit.

- 7 b. In addition to Couturier's employment agreement, as directors of Noll,  
8 Johanson and Couturier caused the corporation to enter into the 2001  
9 Incentive Agreements, which provided for additional unreasonable and  
10 excessive compensation for Couturier.
- 11 c. After the Tax-Free Reorganization of Noll and N&NW, as the sole  
12 directors of N&NW, Defendants Johanson and Couturier caused  
13 N&NW to enter into the 2002 Incentive Agreements, which provided  
14 for unreasonable, excessive and unjust compensation for Couturier.  
15 The elements of this compensation included 80,000 incentive stock  
16 options with an exercise price of \$34.00 per share, an entitlement to  
17 20% of the increase in the Equity Value of Noll from September 30,  
18 2001 through September 30, 2007, and a tax gross-up with respect to  
19 this entitlement.
- 20 d. In January, 2004, Couturier caused Noll to purchase the Palm Desert  
21 Property at a cost in excess of \$5 million, for use by Couturier as a  
22 second home.
- 23 e. In 2002-2004, Johanson and Couturier caused Noll and N&NW to  
24 devote substantial corporate assets pursuing a series of transactions  
25 designed to divert substantial amounts of the value of Noll and N&NW  
26 to Couturier and Johanson. These efforts culminated in the June, 2004  
merger with TEOHC. This merger, together with the subsequent  
transactions described above in paragraphs 85 – 110 above, resulted in  
the transfer to Couturier of over \$26 million in cash, the Palm Desert

1 Property and millions in additional value from Noll, N&NW and  
2 TEOHC.

3 f. In addition to the vast amounts transferred to Couturier, pursuit of these  
4 transactions caused the corporations to incur substantial fees and other  
5 obligations to third parties, with resulting cost to the corporations  
6 believed to be in excess of \$1 million.

7 g. Johanson benefited from these transactions by receiving stock option  
8 grants, as well as by receiving substantial legal fees (through JLLP)  
9 for representing various parties in the transactions, including the  
10 corporations, and upon information and belief substantial additional  
11 fees.

12 116. As a result of the breaches described herein, Noll, N&NW and TEOHC have  
13 suffered damages in the tens of millions of dollars.

14 117. The actions of Defendants complained of in this Second Claim for Relief were  
15 concealed from the participants in the ESOP and the Predecessor ESOPs until 2005, and such  
16 participants neither knew nor had reason to know of Defendants' wrongful actions until such  
17 time

18 **THIRD CLAIM FOR RELIEF – DERIVATIVE CLAIM FOR PROFESSIONAL**  
19 **NEGLIGENCE**

20 118. Plaintiff reasserts the foregoing allegations of paragraphs 1-83 as if fully  
21 rewritten herein.

22 119. Plaintiff asserts this claim for relief derivatively on behalf of and for the  
23 benefit of Noll, N&NW and TEOHC to address injuries suffered as a direct and proximate  
24 result of the wrongdoing alleged herein. Noll, N&NW and TEOHC are named as nominal  
25 defendants solely in a derivative capacity.

26 120. In the various transactions complained of herein, Defendants Johanson and  
JLLP acted as counsel for various parties, including Noll, N&NW and TEOHC, and  
continued to act as counsel to these parties.

1 121. As counsel for Noll, N&NW and TEOHC, Defendants Johanson and JBLLP  
2 had a duty to avoid representing interests adverse to their clients in these transactions.  
3 Despite this duty, Defendants Johanson and JBLLP actively represented and pursued adverse  
4 interests, including their personal interests and the interests of Defendant Couturier, at the  
5 expense of Noll, N&NW and TEOHC.

6 122. Defendants Johanson's and JBLLP breach of their professional duties to Noll,  
7 N&NW and TEOHC have proximately caused the corporations to suffer damages in the tens  
8 of millions of dollars, for which Johanson and JBLLP are jointly and severally liable.

9 123. The continuing representation of Noll, N&NW and TEOHC by Johanson and  
10 JBLLP has tolled any applicable statute of limitations.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff prays for judgment as follows:

13 **As to Count I:**

- 14 A. That the Court hold Defendants Couturier, Johanson and Eddy jointly and  
15 severally liable to restore to the ESOP all losses resulting from their breaches of  
16 fiduciary duty and/or participation in prohibited transactions under ERISA;
- 17 B. That the Court order Couturier, Johanson and Eddy to disgorge and restore to the  
18 ESOP any profits which have been made as a result of their wrongful conduct,  
19 including but not limited to the funds held in the Pensco Trust Company FBO  
20 Clair R. Couturier, Jr. IRA Account Number CO 1AH, through the imposition of  
21 a constructive trust;
- 22 C. That the Court grant such further equitable relief as it may deem just and proper  
23 including removal of Eddy as ESOP Trustee and appointment of a neutral,  
24 institutional trustee with full power including the power to hold assets and to  
25 appoint the Board of Directors;

26 **As to Count II:**

1 D. That the Court hold Defendants Couturier and Johanson jointly and severally  
2 liable for the losses suffered by Noll and N&NW described in the Second Claim  
3 of Relief;

4 E. That the Court hold Defendants Couturier, Johanson and Eddy jointly and  
5 severally liable for the losses suffered by TEOHC described in the Second Claim  
6 of Relief;

7 **As to Count III:**

8 F. That the Court hold Defendants Johanson and JBLLP jointly and severally liable  
9 for the losses suffered by Noll, N&NW and TEOHC described in the Third Claim  
10 for Relief;

11 **As to All Counts:**

12 G. Attorneys' fees and expenses pursuant to the common fund doctrine, ERISA  
13 Section 502(g), 29 U.S.C. § 1132(g), and other applicable law; and

14 H. Such further equitable relief as the Court may deem just and proper.

15 DATED: June 20, 2007.

16 KELLER ROHRBACK, L.L.P.

17 By:/s/ Juli E. Farris

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