

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

STEPHANIE WOZNICKI,)
on behalf of herself and all others)
similarly situated,)

Plaintiff,)

vs.)

RAYDON CORPORATION, DONALD)
K. ARIEL, DAVID P. DONOVAN, THE)
ESOP COMMITTEE OF THE RAYDON)
CORPORATION EMPLOYEE STOCK)
OWNERSHIP PLAN, LUBBOCK)
NATIONAL BANK, DAVID P.)
DONOVAN 2012 TRUST, ARIEL)
FAMILY TRUST DATED DECEMBER)
18, 2012, PAMELA W. ARIEL, VERNA L.)
DONOVAN 2012 TRUST, DAVID P.)
DONOVAN, JR., IRREVOCABLE TRUST)
DATED JULY 25, 2008, LORI L. WEISS)
IRREVOCABLE TRUST DATED JULY)
25, 2008, NIKI J. DUNCAN)
IRREVOCABLE TRUST DATED JULY)
25, 2008)

Defendants.)

Civil Action No. 6:18-cv-02090-CEM-GJK

CLASS ACTION AMENDED COMPLAINT

I. INTRODUCTION

1. Plaintiff Stephanie Woznicki brings this class action under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 *et seq.*, against the fiduciaries of the Raydon Corporation Employee Stock Ownership Plan (“the ESOP” or “the Plan”) and the persons who sold shares to the ESOP as part of a transaction with the ESOP on

September 30, 2015, on behalf of herself and a Class of participants in and beneficiaries of the Raydon ESOP to restore losses to the Plan, disgorge any profits through the use of Plan assets, and to obtain other remedial and appropriate equitable relief in order to redress violations and enforce the provisions of Title I of ERISA.

2. These claims arise out of a transaction on September 30, 2015 in which Defendants Donald K. Ariel, David P. Donovan, David P. Donovan, Jr., Irrevocable Trust dated July 25, 2008, Lori L. Weiss Irrevocable Trust dated July 25, 2008, Niki J. Duncan Irrevocable Trust dated July 25, 2008, Pamela W. Ariel, Ariel Family Trust dated December 18, 2012, David P. Donovan 2012 Trust and Verna L. Donovan 2012 Trust sold 100% of the stock of Raydon Corporation (“the September 2015 ESOP Transaction”) to the ESOP for \$60,500,000, and breaches by the fiduciaries of the ESOP related to the September 30, 2015 ESOP Transaction. The Transaction was not designed to be in the best interests of the ESOP participants; Raydon and the Director Defendants (Donald K. Ariel and David P. Donovan) failed to disclose material information to the Trustee, Defendant Lubbock National Bank; and Defendant Lubbock National Bank failed to perform adequate due diligence and caused the ESOP to pay in excess of fair market value. As a result of violations of ERISA’s fiduciary rules by the fiduciaries entrusted with their Plan, Plaintiff and the Class have not received all of the hard-earned retirement benefits or the loyal and prudent management of the ESOP to which they are entitled.

3. Through this action, Plaintiff seeks to enforce her rights and the rights of the Class under ERISA, to recover the losses incurred by the Plan as a result of these prohibited transactions and fiduciary breaches. Among the relief sought for these breaches and violations, Plaintiff requests that these prohibited transactions be declared void, that Defendants be ordered

to disgorge any profits or losses incurred by the Plan, and that any monies recovered for the Plan be allocated to the accounts of the Class.

II. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) because this action arises under the laws of the United States and pursuant to 29 U.S.C. § 1132(e)(1).

5. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the breaches and violations giving rise to the claims occurred in this District, the Plan is administered in this District, and one or more of the Defendants may be found in this District.

III. PARTIES

6. Plaintiff Stephanie Woznicki was employed by Defendant Raydon Corporation in various positions, including as a Senior Software Engineer, Training Analytics Manager, and Senior Data Warehouse Engineer, from approximately January 2008 to November 2018. As a result of her employment, Plaintiff became and is a participant, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), in the ESOP. Plaintiff Woznicki resides in Daytona Beach, Florida.

7. Defendant Raydon Corporation (“Raydon”) is and has been at all relevant times the Sponsor of the ESOP within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). Raydon is and has been a fiduciary of the ESOP under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) at all relevant times by virtue of its Board of Directors’ authority to appoint and remove the Trustee and members of the ESOP Committee. In addition, Defendant Raydon is and has been a “party in interest” as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14) at all relevant times.

8. Defendant Donald K. Ariel (“Ariel”) is and has been a member of the Board of Directors of Raydon and Chief Executive Officer of Raydon at all relevant times. As a result of his membership on the Board of Directors, Ariel is and has been at all relevant times a fiduciary of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21), and a “party in interest” as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14). Mr. Ariel resides in or near Port Orange, Florida.

9. Defendant David P. Donovan (“Donovan”) is and has been a member of the Board of Directors of Raydon and Chief Operating Officer of Raydon at all relevant times. As a result of his membership on the Board of Directors, Donovan is and has been at all relevant times a fiduciary of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21), and a “party in interest” as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14). Mr. Donovan resides in or near Port Orange, Florida.

10. Defendant David P. Donovan 2012 Trust and its successor(s) in interest (“David Donovan 2012 Trust”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14). Upon information and belief, Donovan is the trustee and settlor of the David Donovan 2012 Trust and also a beneficiary of the David Donovan 2012 Trust.

11. Defendant Ariel Family Trust dated December 18, 2012 and its successor(s) in interest (“Ariel Family 2012 Trust”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G). Upon information and belief, Ariel is a trustee and settlor of the Ariel Family 2012 Trust and also a beneficiary of the Ariel Family Trust.

12. Defendant Pamela W. Ariel (“Pamela Ariel”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14)(F), 29 U.S.C. § 1002(14)(F). Upon information and belief, Pamela Ariel is the spouse of Defendant Ariel.

13. Defendant Verna L. Donovan 2012 Trust and its successor(s) in interest (“Verna Donovan 2012 Trust”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G). Upon information and belief, Verna L. Donovan is the spouse of Defendant Donovan. Upon information and belief, Donovan is a trustee and/or settlor of the Verna Donovan 2012 Trust, and also a beneficiary of the Verna Donovan 2012 Trust.

14. Defendant David P. Donovan, Jr., Irrevocable Trust dated July 25, 2008 (and its successor(s) in interest (“David Donovan, Jr. 2008 Trust”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G). Upon information and belief, David P. Donovan, Jr., is the lineal descendent of Defendant Donovan, and Donovan is a trustee and settlor of the David Donovan, Jr. 2008 Trust.

15. Defendant Lori L. Weiss Irrevocable Trust dated July 25, 2008 (and its successor(s) in interest (“Lori Weiss 2008 Trust”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G). Upon information and belief, Lori L. Weiss is the lineal descendent of Defendant Donovan, and Donovan is a trustee and settlor of the Lori Weiss 2008 Trust.

16. Defendant Niki J. Duncan Irrevocable Trust dated July 25, 2008 (and its successor(s) in interest (“Niki Duncan 2008 Trust”) is and has been a "party in interest" as to the ESOP as defined in ERISA § 3(14)(G), 29 U.S.C. § 1002(14)(G). Upon information and belief, Niki Duncan is the lineal descendent of Defendant Donovan, and Donovan is a trustee and settlor of the David Donovan, Jr. 2008 Trust.

17. Defendants Ariel, Donovan, Pamela Ariel, David Donovan 2012 Trust, Verna Donovan 2012 Trust, Ariel Family 2012 Trust, David Donovan, Jr. 2008 Trust, Lori Weiss 2008 Trust and Niki Duncan 2008 Trust were the selling shareholders in the 2015 ESOP Transaction and are sometimes referred to herein as the “Selling Shareholders.” Prior to the September 30, 2015 ESOP Transaction, Defendants Ariel and Donovan and the other Selling Shareholders owned Raydon. Defendants Ariel and Donovan are also referred to herein as the “Director Defendants.”

18. Defendant ESOP Committee of the Raydon Corporation Employee Stock Ownership Plan (“ESOP Committee”) is and has been at all relevant times the designated Plan Administrator of the ESOP within the meaning of ERISA § 3(16)(A), § 1002(16)(A), and a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102. At all relevant times, the Defendant ESOP Committee had the authority to control and manage the operation and administration of the ESOP.

19. Defendant Lubbock National Bank is and has been at all relevant times the named Trustee of the ESOP, and a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102. Defendant Lubbock National Bank had actual control over the Plan assets, including the authority and discretion to manage, acquire, dispose of and control the assets and investments of the ESOP, vote shares of common stock held by the ESOP, and evaluate and contract or enter into transactions between itself and another entity or individual for the purpose of acquiring or selling stock of Raydon. Accordingly, Defendant Lubbock National Bank is and has been at all relevant times a fiduciary and party in interest with respect to the ESOP within the meaning of ERISA §§ 3(14) and 3(21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A). Lubbock National Bank is a nationally chartered bank with its headquarters in Lubbock, Texas.

IV. FACTUAL ALLEGATIONS

Raydon's Turbulent History

20. Raydon is a military simulation training contractor located in Port Orange, Florida. Raydon was founded in 1988. Almost all of Raydon's contracts have been with the National Guard.

21. At all relevant times, Raydon has been a closely-held private corporation and its stock has not traded on any public market or exchange. Raydon is not subject to the Securities Act of 1933 or other federal securities laws.

22. Raydon does not have any commercial products. Most of Raydon's products were designed specifically for the National Guard and do not have other potential markets.

23. Prior to the September 2015 ESOP Transaction, Raydon had a history of expansion and contractions. For example, Raydon laid off nearly 100 employees – approximately one-third of its workforce – as a cost-cutting move in July 2007. According to newspaper reports, Raydon cited over-hiring, organizational inefficiencies and delays in contract payments by the military.

24. In 2010, Raydon consolidated all of its operations from four different locations into a new facility in Port Orange. Raydon hired additional workers and had 312 employees in early 2011.

25. In late 2011 and early 2012, Raydon laid off employees. Raydon officials stated that layoffs were caused by the U.S. military's drawdown of troops in Iraq and Afghanistan; however, in 2011 Raydon lost out in bidding for a \$63.4 million contract with the U.S. Army for delivery of Virtual Clearance Training Suites. One of Raydon's competitors, FAAC

Incorporated, won the contract instead. By February 2012, Raydon employed just over 250 workers.

Raydon's Short-Lived U.S. Army Contract

26. In 2013, Program Executive Office for Simulation, Training and Instrumentation (US Army) ("PEO-STRI") awarded Raydon a multi-year contract with a value in excess of \$40 million to design, develop and deliver common driver trainer systems for a variety of tactical vehicles. The common driver trainer systems contract was Raydon's biggest contract to date and Raydon hoped that it would lead to the expansion of its military contracts beyond the National Guard.

27. PEO-STRI was responsible for awarding all US Army military simulation contracts. The Army's budget is vastly larger than the National Guard's budget; therefore, the common driver systems contract opened the door for Raydon to greatly expand its business.

28. In August 2014, Raydon won a \$99.4 million contract – the largest in its history- to provide virtual-reality training simulators to the Army National Guard. Raydon, however, did not have the capacity to successfully execute both the common driver trainer systems contract and the Army National Guard contract.

29. In 2014 and 2015, PEO-STRI expressed dissatisfaction with Raydon's performance on the common driver systems contract in meetings between PEO-STRI and Raydon management. PEO-STRI cancelled several small contracts with Raydon so that Raydon could focus on the common driver systems contract.

30. In order to facilitate the sale of Raydon to the ESOP, Defendant Raydon and the Director Defendants hired Defendant Lubbock National Bank as Trustee of the ESOP sometime on or after August 17, 2015. At the time that Lubbock National Bank was hired, the closing date

of the Transaction was already proposed for September 30, 2015. In other words, Lubbock National Bank was retained as Trustee less than six weeks before the Transaction.

31. In September 2015, less than three weeks prior to the September 2015 ESOP Transaction, PEO-STRI terminated the common driver trainer systems contract because Raydon had failed to meet technical performance requirements. PEO-STRI's extreme displeasure with Raydon made it highly unlikely that the US Army would award Raydon any future contracts.

32. Prior to the September 2015 ESOP Transaction, there were discussions among Raydon management about potential layoffs due to the termination of the common driver systems contract.

Cubic Corporation Decides Not to Buy Raydon After Conducting Due Diligence

33. Prior to pursuing the ESOP transaction, the Selling Shareholders had attempted to sell Raydon to Cubic Corporation, another defense contractor, in April 2015. The proposed transaction price was far below the September 2015 ESOP Transaction price.

34. Cubic Corporation, however, decided not to pursue a transaction after conducting due diligence on Raydon Corporation.

Lubbock National Bank's Flawed Due Diligence and the Failure to Disclose Material Information By Raydon and the Director Defendants

35. Defendants Raydon and Director Defendants informed Lubbock National Bank that PEO-STRI had terminated the common driver systems contract prior to the September 2015 ESOP Transaction, but failed to disclose the implications of the contract termination for Raydon's business plans and financial projections.

36. The financial projections relied on by Defendant Lubbock National Bank for the September 2015 ESOP Transaction were prepared by Raydon management and assumed that Raydon would receive additional contracts from PEO-STRI. This was not a reasonable

assumption because, as alleged above, PEO-STRI was extremely dissatisfied with Raydon's performance on the common driver systems contract.

37. Defendant Lubbock National Bank failed to make an adequate investigation into the circumstances and consequences of PEO-STRI's termination of the common driver systems contract. Had Lubbock National Bank conducted an adequate investigation, it would have discovered that Raydon's financial projections were too rosy because Raydon was highly unlikely to receive future contracts from PEO-STRI.

38. The financial projections relied on by Defendant Lubbock National Bank for the September 2015 ESOP Transaction were not reliable for additional reasons. For at least several years prior to the September 2015 ESOP Transaction, Raydon managers participated in a weekly Revenue Meeting. The weekly Revenue Meeting included a review and discussion of revenue projections. Raydon's revenue projections were often based on wishful thinking rather contract awards. Raydon often fell short of the projected revenues.

39. If Lubbock National Bank had reviewed and properly analyzed Raydon's past revenue projections as part of its due diligence for the September 2015 EOSP Transaction, Lubbock National Bank would have realized that Raydon management's financial projections were not reliable and likely substantially overstated Raydon's future revenues.

40. The financial projections used for the September 2015 ESOP Transaction included projected revenue for business lines that Raydon hoped to develop but did not yet exist. Such revenues were highly speculative and should not have been included in the revenue projections. Lubbock National Bank should not have relied upon such highly speculative revenue projections.

41. In addition, the financial projections used for the September 2015 ESOP Transaction assumed that Raydon's future revenues would grow steadily without any downturns. Raydon's volatile history belied this assumption. Defendant Lubbock National Bank should not have relied on financial projections that showed uninterrupted revenue growth for Raydon.

42. The August 2014 National Guard contract, like many of Raydon's National Guard contracts, was front-loaded so that Raydon received much of the contract revenue up front or early in the contract period. Raydon received most of the revenue from the Army National Guard contract prior to the September 2015 ESOP Transaction. This had the effect of improving Raydon's balance sheet and recent financial performance as of the transaction date, but raised the question of where Raydon's future revenue would come from given that PEO-STRI had terminated the common driver contract.

43. Upon information and belief, Raydon and the Director Defendants did not disclose material information to Lubbock National Bank about the aborted Cubic Corporation transaction.

44. Upon information and belief, in conducting due diligence Defendant Lubbock National Bank only sought information from members of Raydon management who had a financial interest in the proposed ESOP transaction. Lubbock National Bank would have received more accurate information if it had sought information from a broader group of management employees, including information about the aborted Cubic Corporation transaction and the speculative nature of Raydon management's financial projections.

45. Upon information and belief, Defendant Lubbock National Bank did not consider the transaction price for the proposed Cubic Corporation transaction in evaluating whether the

transaction price for the September 2015 ESOP Transaction was no more than adequate consideration.

The September 2015 ESOP Transaction

46. In late August 2015, Raydon engaged Lubbock National Bank as Trustee of the ESOP.

47. On or about September 30, 2015, Lubbock National Bank, acting as Trustee of the ESOP, caused the ESOP to purchase 100% of Raydon stock from the Selling Shareholders for \$60,500,000.

48. Defendant Lubbock National Bank failed to conduct adequate due diligence prior to agreeing to the September 2015 ESOP Transaction, *inter alia*, because it rushed to complete the transaction by September 30, 2015.

Raydon's Poor Financial Performance Led to Layoffs Beginning in December 2015

49. Raydon began laying off employees soon after the September 2015 ESOP contract. For example, Joe Kohlbrand, who had been Director, Contracts & Compliance – and had played a key role in Raydon obtaining both the common driver trainer systems contract and the Army National Guard contract – was laid off in December 2015.

50. Raydon's financial performance missed the projections used for the September 2015 ESOP Transaction by a wide margin. Raydon's Q4 2015 performance fell far short of the September 30, 2015 projections and Raydon's 2016 financial performance missed the September 30, 2015 projections by an even wider margin. Raydon's financial performance in the months immediately following the September 2015 ESOP Transaction shows that the financial projections used for the Transaction were neither reliable nor made in good faith.

51. In August 2016, Raydon laid off over 30 employees, leaving approximately 150 employees. In October 2018, Raydon announced an additional layoff of 50 employees.

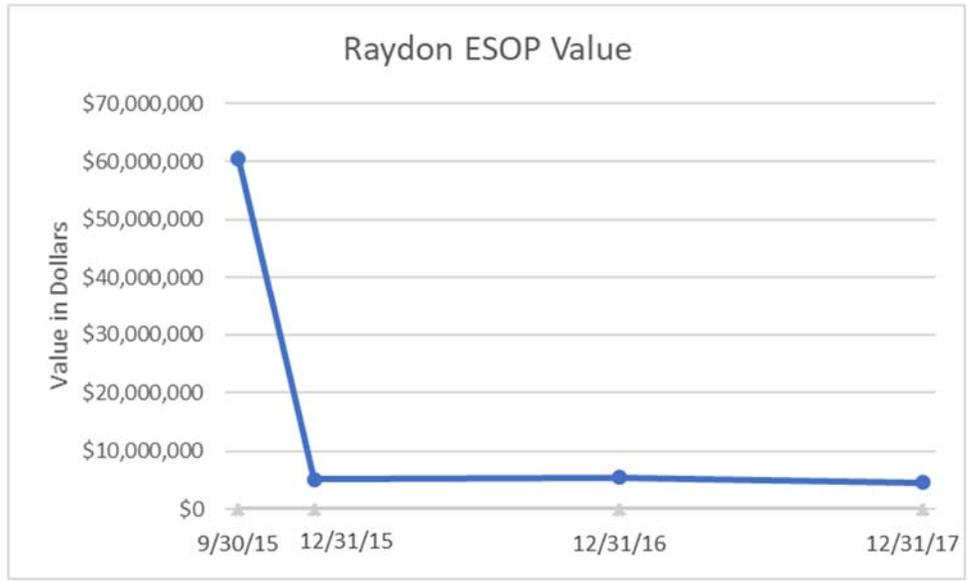
52. The Form 5500s filed by Raydon with the Department of Labor illustrate the declining number of employees between 2015 and 2017 (the last year for which information is available). From January 2015 to December 2017, the number of active participants declined from 233 to 122.

53. According to the 2015 Form 5500 filed with the Department of Labor on June 22, 2016, the fair market value for the stock held by the ESOP was only \$5,110,000 as of December 31, 2015.

54. According to the 2016 Form 5500 filed with the Department of Labor on August 29, 2017, the fair market value for the stock held by the ESOP was only \$5,530,000 as of December 31, 2016.

55. According to the 2017 Form 5500 filed with the Department of Labor on July 19, 2018, the fair market value for the stock held by the ESOP was only \$4,550,000 as of December 31, 2017.

56. As shown by the chart below, the value of the ESOP’s Raydon stock declined precipitously following the September 2015 ESOP Transaction and has remained far below the purchase price:



57. The ESOP paid more than fair market value in the September 2015 ESOP Transaction. The purchase price for the September 2015 ESOP Transaction was based in part on a valuation report that was unreliable and contained several methodological flaws.

58. The September 2015 ESOP Transaction price was based on unrealistic financial projections, did not adequately consider Raydon’s loss of the common driver trainer systems contract with PEO-STRI, Raydon’s inability to expand its business beyond the National Guard, or Raydon’s history of financial volatility and management turnover and was significantly greater than the amount that a third-party strategic buyer, Cubic, was willing to pay (before conducting due diligence and before the loss of the PEO-STRI contract).

59. A prudent fiduciary who had conducted a prudent investigation would have concluded that the ESOP was paying more than fair market value for the Raydon shares and/or the debt incurred in connection with the September 2015 ESOP Transaction was excessive.

60. The Director Defendants would have had access to the financial information upon which the valuation for the September 2015 ESOP Transaction was based. The valuation report was not provided to Plaintiff or other members of the proposed Class.

61. Plaintiff was not involved in negotiations with Cubic Corporation, the September 2015 ESOP Transaction, or providing financial information to Lubbock National Bank for ESOP valuations.

62. The decline in value of the Raydon stock owned by the ESOP following the September 2015 ESOP Transaction should have caused Defendant Lubbock National Bank as well as the Director Defendants, at a minimum, to investigate whether the ESOP had paid more than fair market value in the September 2015 ESOP Transaction. To the extent that any of the Defendants had conducted such an investigation, that investigation as well as any corrective measures would have been reported in one of the Form 5500s filed with the Department of Labor. As none of the Form 5500s report any such investigation or corrective actions, none of the Defendants investigated whether fiduciary violations had occurred in the September 2015 ESOP Transaction despite numerous red flags that should have raised concerns.

Lubbock Agreed for Ariel and Donovan to Receive Millions in Non-Compete Payments as Part of the September 2015 ESOP Transaction

63. As part of the September 2015 ESOP Transaction, Defendant Lubbock National Bank agreed that Defendants Ariel and Donovan would receive approximately \$5 million in “non-compete” payments from Raydon as part of their consideration for selling their Raydon shares to the ESOP.

64. As part of the September 2015 ESOP Transaction, Defendants Ariel and Donovan also received subordinated notes from Raydon whereby Raydon will pay them millions of dollars in principal and interest for at least 15 years after the transaction date.

65. As a result of the debt owed by Raydon on the notes for at least 15 years, Defendants Ariel and Donovan had and continue to have a strong economic incentive not to compete with Raydon independent of and without the need for any non-compete payments. If Defendants Ariel and Donovan compete with Raydon, they risk causing Raydon to default on the subordinated notes payments.

66. There was no rational economic basis for Defendants Lubbock National Bank, Ariel and Donovan to include the non-compete agreements as additional consideration for Ariel and Donovan in the September 2015 ESOP Transaction. The ESOP did not receive any valuable additional consideration in exchange for the non-compete agreements.

Lubbock National Bank's *Cactus Feeders* Settlement with the Department of Labor

67. On or about March 10, 2016, the U.S. Department of Labor filed a lawsuit alleging that Lubbock National Bank caused the Cactus Feeders, Inc. Employee Stock Ownership Plan to pay tens of millions of dollars more than it should have paid for company stock in a December 2012 ESOP transaction. *Acosta v. Cactus Feeders, Inc., et. al.*, N.D. Tex., Civil Action No. 2:16-cv-00049-J.

68. On May 4, 2018, Lubbock National Bank and other defendants agreed to settle the Department of Labor's claims, *inter alia*, in consideration for total payment of approximately \$6 million in settlement payments and penalties. As part of the May 4, 2018 Settlement Agreement with the U.S. Secretary of Labor arising out of ERISA claims in connection with a different ESOP transaction similar to the claims alleged by Plaintiff herein, Lubbock National

Bank agreed to adopt policies and procedures applicable to its services as Trustee of any ESOP in connection with transactions in which the ESOP is purchasing or selling employer securities that are not publicly traded. *See Acosta v. Cactus Feeders, Inc., et. al.*, N.D. Tex., Civil Action No. 2:16-cv-00049-J (ECF 92-1), settlement agreement entered May 4, 2018. The Secretary of Labor has required agreements of similar policy and procedures as part of settlements with only four other institutional Trustees. These policies and procedures are process requirements with which any Trustee seeking to fulfill its duty of prudence in an ESOP transaction should follow.

69. Defendants Raydon, ESOP Committee and Director Defendants either knew or should have known of the *Cactus Feeders* lawsuit and settlement. The settlement with the DOL, including the provisions requiring Lubbock National Bank to engage in certain policies was widely reported by ESOP industry groups, such as the National Center for Employee Ownership (a trade industry group for ESOP companies), publications aimed at employers such as *Plan Sponsor*, general financial publications such as *Inc.* magazine and a DOL Press Release.

70. Because the September 2015 ESOP Transaction occurred after the underlying ESOP transaction in the *Cactus Feeders* lawsuit but before Lubbock National Bank agreed to new policies and procedures as part of the 2018 settlement of the *Cactus Feeders* lawsuit, it would have been reasonable for the Director Defendants to infer that Defendant Lubbock National Bank did not follow certain policies and procedures set forth in the *Cactus Feeders* settlement in the September 2015 ESOP Transaction.

71. Learning about the *Cactus Feeders* lawsuit and settlement and knowing the short time frame in which Lubbock National Bank had to evaluate the Transaction would have caused a prudent and loyal fiduciary concern about whether the Defendant Lubbock National Bank had followed appropriate procedures in the September 2015 Raydon ESOP Transaction and whether

the price paid was for fair market value. Upon learning about the *Cactus Feeders* lawsuit and settlement, Defendants Raydon, ESOP Committee and Director Defendants should have conducted an investigation to determine whether Defendant Lubbock National Bank had followed appropriate procedures in the September 2015 Raydon ESOP Transaction and whether the price paid was for fair market value; however, based on the ESOP Committee's response to Plaintiff's administrative claim and the absence of any apparent changes and the lack of any other disclosed actions taken concerning the September 2015 Raydon ESOP Transaction, no fiduciary of the Raydon ESOP took any such action or conducted any such investigation.

Plaintiff Has Exhausted Her Administrative Remedies

72. By letter dated September 24, 2018, Plaintiff submitted an administrative claim to the ESOP Committee based on the ESOP purchasing Raydon stock for more than fair market value in the September 2015 ESOP transaction. By letter dated October 22, 2018, Michelle Warner, the ESOP Committee Chair, stated the Committee would not respond to Plaintiff's administrative claim. Ms. Warner's October 22 letter stated, "We will not respond to your assertions in your letter regarding the 2015 ESOP transaction."

73. By letter dated November 2, 2018, Plaintiff submitted an administrative appeal to the ESOP Committee. Plaintiff stated that she understood Ms. Warner's October 22 letter to be a denial of her administrative claim. Plaintiff reiterated her request that the selling shareholders should pay back to the ESOP the difference between the sale price in the September 2015 ESOP Transaction and the fair market value of the Raydon stock. By letter dated November 8, 2018, Ms. Warner, in her capacity as ESOP Committee Chair, again stated that the Committee would not respond to Plaintiff's claim. The November 8 letter stated, "We will not entertain your outlandish request."

74. Plaintiff has exhausted her administrative remedies under ERISA.

Indemnification Agreements

75. As part of the September 2015 ESOP Transaction, Raydon entered into indemnification agreements whereby Raydon agreed to indemnify Defendants Ariel and Donovan against any claims related to their services as a fiduciary of the ESOP.

76. As part of the September 2015 ESOP Transaction, Raydon adopted a Trust Agreement for the ESOP that provides an indemnification for Defendant Lubbock National Bank against claims related to the ESOP or Lubbock National Bank's performance of its duties as Trustee.

77. According to Counsel for Defendant Lubbock National Bank, Lubbock National Bank is being indemnified for the claims asserted in this lawsuit by Raydon Corporation.

V. CLASS ACTION ALLEGATIONS

78. Plaintiff brings these claims as a class action pursuant to Fed. R. Civ. P. 23(a) and (b), on behalf of all participants in the Raydon Corporation ESOP from September 30, 2015 or any time thereafter who vested under the terms of the Plan and those participants' beneficiaries. Excluded from the Plaintiff Class are Defendants and their immediate family (including any person defined as a relative under ERISA § 3(15)), any fiduciary of the Plan; the officers and directors of Raydon or of any entity in which a Defendant has a controlling interest; and legal representatives, successors, and assigns of any such excluded persons.

79. This action is properly maintainable as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b).

80. Impracticability of Joinder: The members of the Class are so numerous that joinder of all members is impracticable. According to the 2017 Form 5500 filed with the

Department of Labor, which is the most recent available Form 5500, as of January 1, 2017, there were 138 participants, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the ESOP.

81. Commonality: The issues of liability are common to all members of the Class and are capable of common answers as those issues primarily focus on Defendants' acts (or failure to act). Questions of law and fact common to the Plaintiff Class as a whole include, but are not limited to, the following:

a. Whether Defendants engaged in a prohibited transaction under ERISA by permitting the ESOP to purchase Raydon stock from the Selling Shareholders for more than adequate consideration in the September 2015 ESOP Transaction;

b. Whether Defendant Lubbock National Bank engaged in a prudent investigation of the proposed purchase of Raydon stock by the ESOP in the September 2015 ESOP Transaction;

c. Whether Defendant Lubbock National Bank breached a fiduciary duty to ESOP participants by causing the ESOP to purchase Raydon stock in September 2015 for more than fair market value;

d. Whether the Director Defendants breached their fiduciary duties by failing to adequately monitor the ESOP's Trustee;

e. The amount of losses suffered by the ESOP as a result of Defendants' fiduciary violations and/or other appropriate remedial and equitable relief.

82. Typicality: Plaintiff's claims are typical of those of the Class because her claims arise from the same event, practice and/or course of conduct. Specifically, Plaintiff, on behalf of the Class, alleges that Defendants breached their fiduciary duties or otherwise violated ERISA in connection with the sale of stock to the Raydon Corporation ESOP or in performing their

fiduciary duties to the Plan. Plaintiff challenges the legality and appropriateness of a plan-wide transaction, whereby, as explained in the Form 5500s, Raydon stock is allocated to all participants' accounts based on the per share price in the September 2015 ESOP Transaction as the Plan makes each payment of principal and interest. As a result, Plaintiff, like other ESOP participants in the Plaintiff Class, has received less in her ESOP account based on the same per share purchase price of Raydon stock, and continues to suffer such losses in the present because Defendants have failed to correct the overpayment by the ESOP.

83. Adequacy: Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff does not have any interests antagonistic to or in conflict with those of the Class. Defendants do not have any unique defenses that would interfere with Plaintiff's representation of the Class. Plaintiff has retained counsel competent and experienced in complex class actions, ERISA, and employee benefits litigation and with particular experience and expertise in ESOP litigation.

84. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(1)(A). Fiduciaries of ERISA-covered plans have a legal obligation to act consistently with respect to all similarly situated participants and to act in the best interests of the Plan and their participants. This action challenges whether Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the ESOP as a whole. As a result, prosecution of separate actions by individual members would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct relating to the Plan.

85. Class certification is also appropriate pursuant to Fed. R. Civ. P. 23(b)(1)(B). Administration of an ERISA-covered plan requires that all similarly situated participants be treated the same. Resolving whether Defendants fulfilled their fiduciary obligations to the Plan

or engaged in prohibited transactions with respect to the Plan would, as a practical matter, be dispositive of the interests of the other participants in the ESOP even if they are not parties to this litigation and would substantially impair or impede their ability to protect their interests if they are not made parties to this litigation by being included in the Class.

86. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the Class, making appropriate declaratory and injunctive relief with respect to Plaintiff and the Class as a whole. This action challenges whether Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the ESOP as a whole. The members of the Class are entitled to declaratory and injunctive relief to remedy Defendants' fiduciary violations. As ERISA is based on trust law, any monetary relief consists of equitable monetary relief and is either provided directly by the declaratory or injunctive relief or flows as a necessary consequence of that relief.

87. Additionally, and alternatively, class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to all Class members predominate over any questions affecting individual members of the Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this action. Common questions related to liability will necessarily predominate over any individual questions precisely because Defendants' duties and obligations were uniform to all participants and therefore all members of the Class. Plaintiff and all Class members have been harmed by the ESOP paying more than fair market value for Raydon stock in the September 2015 ESOP Transaction. As relief and any recovery will be on behalf of the Plan, common questions as to remedies will likewise predominate over any individual issues.

88. A class action is a superior method to other available methods for the fair and efficient adjudication of this action. As the claims are brought on behalf of the Plan, resolution of the issues in this litigation will be efficiently resolved in a single proceeding rather than multiple proceedings and each of those individual proceedings could seek recovery for the entire Plan. The losses suffered by individual Class members are small compared to the expense and burden of individual prosecution of this action. In addition, class certification is superior because it will obviate the need for unduly duplicative litigation which might result in inconsistent judgments about Defendants' duties with regard to the ESOP.

89. The following factors set forth in Rule 23(b)(3) also favor certification of this case as a class action:

- a) The members of the Class have an interest in a unitary adjudication of the issues presented in this action for the reasons that this case should be certified under Rule 23(b)(1).
- b) No other litigation concerning this controversy has been filed by any other members of the Class.
- c) This District is most desirable location for concentrating the litigation for reasons that include (but are not limited to) the following: (i) the ESOP is administered in part in this District, (ii) certain Defendants can be found in this District, and (iii) certain non-party witnesses are located in this District.

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

COUNT I

**[Engaging in Prohibited Transaction Forbidden by ERISA §§ 406(a),
29 U.S.C. §§ 1106(a), Against Defendant Selling Shareholders and Lubbock National Bank]**

91. Plaintiff incorporates Paragraphs 1-3, 6, 8-17, 19-74, 78-90 inclusive as though set forth herein.

92. ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), requires that a plan fiduciary “shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect (A) sale or exchange, or leasing of any property between the plan and a party in interest,” or a “(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.”

93. ERISA § 3(14), 29 U.S.C. § 1002(14) defines a “party in interest” to include (A) any fiduciary ... of such employee benefit plan”, (E) a relative -- which includes a spouse, ancestor, lineal descendant or the spouse of a lineal descendant -- of a fiduciary, (G) a trust of or in which 50 percent or more the beneficial interest of such trust is held by a fiduciary of such plan, and (H) an employee, officer or director or a 10 percent or more shareholder of an employer covered by the Plan. Defendants Ariel and Donovan (and their relatives or trusts for their benefit or the benefit of their relatives) qualified as “parties in interest” within the meaning of ERISA § 3(14).

94. ERISA § 408(e), 29 U.S.C. § 1108(e) provides a conditional exemption from the prohibited transaction rules for sale of employer securities to or from a plan if a sale is made for adequate consideration. The burden is on the fiduciary and the parties-in-interest to demonstrate that conditions for the exemption are met.

95. ERISA § 3(18)(B) defines adequate consideration as “the fair market of the asset as determined in good faith by the trustee or named fiduciary.” ERISA § 3(18)(B) requires that

the fiduciary or party-in-interest show that the price paid must reflect the fair market value of the asset at the time of the transaction, and the fiduciary conducted a prudent investigation to determine the fair market value of the asset.

96. As Trustee, Lubbock National Bank caused the ESOP to engage in a prohibited transaction in violation of ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D), by failing to ensure that the ESOP paid no more than fair market value for the Raydon stock purchased in the September 2015 ESOP Transaction. Specifically, Lubbock National Bank failed to conduct adequate due diligence and the ESOP paid more than fair market value for shares sold by the Defendant Selling Shareholders.

97. At all relevant times, Defendant Lubbock National Bank knew that the September 2015 ESOP Transaction was a prohibited transaction because Lubbock National Bank knew that the ESOP was purchasing company stock from parties in interest.

98. As officers and directors of Raydon, as fiduciaries of the ESOP and as the Selling Shareholders, Defendants Ariel and Donovan were aware of sufficient facts that the September 2015 ESOP Transaction constituted a prohibited transaction with parties-in-interest. As parties-in-interest, Defendant Selling Shareholders are liable for the violations of ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D).

COUNT II

[Engaging in Prohibited Transaction Forbidden by ERISA §§ 406(b), 29 U.S.C. §§ 1106(b), Against Defendant Selling Shareholders]

99. Plaintiff incorporates Paragraphs 1-3, 6, 8-17, 19-74, 78-90 inclusive as though set forth herein.

100. ERISA § 406(b), 29 U.S.C. § 1106(b), mandates that a plan fiduciary shall not (1) “act in any transaction involving the plan on behalf of a party (or represent a party) whose

interests are adverse to the interests of the plan or the interests of its participants,” or (2) “deal with the assets of the plan in his own interest or for his own account,” or (3) “receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”

101. By selling their shares of Raydon stock to the ESOP in the September 2015 ESOP Transaction, Defendant Selling Shareholders acted in a transaction involving a plan where their own interests were adverse to those of the ESOP within the meaning of ERISA § 406(b)(1), they dealt with the assets of the Plan, which purchased their Raydon stock, in their own interest within the meaning of ERISA § 406(b)(2) and as a result of the receipt of the proceeds from the sale of their Raydon stock received consideration for the their own personal account in connection with a transaction involving assets of a plan within the meaning of ERISA § 406(b)(3).

102. ERISA § 408(e), 29 U.S.C. § 1108(e) provides a conditional exemption from the prohibited transaction rules for sale of employer securities to or from a plan if a sale is made for adequate consideration. The burden is on the fiduciary to demonstrate that conditions for the exemption are met.

103. ERISA § 3(18)(B) defines adequate consideration as “the fair market of the asset as determined in good faith by the trustee or named fiduciary.” ERISA § 3(18)(B) requires that the price paid must reflect the fair market value of the asset, and the fiduciary must conduct a prudent investigation to determine the fair market value of the asset.

104. By selling their shares of Raydon stock to the ESOP in the September 2015 ESOP Transaction, Defendant Selling Shareholders engaged in a prohibited transaction in violation of ERISA §§ 406(b), 29 U.S.C. §§ 1106(b) for which they are liable to restore the losses caused by

these prohibited transactions, to disgorge profits or other appropriate remedial and equitable relief.

COUNT III
[Breach of Fiduciary Duty Under ERISA §§ 404(a)(1)(A) and (B),
29 U.S.C. §§ 1104(a)(1)(A) and (B) Against Defendant Lubbock National Bank]

105. Plaintiff incorporates Paragraphs 1-3, 6, 8-17, 19-74, 78-90 inclusive as though set forth herein.

106. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries, (A) for the exclusive purpose of providing benefits to participants and the beneficiaries of the plan, (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

107. In the context of a Transaction involving the assets of the Plan, the duties of loyalty under ERISA § 404(a)(1)(A) and prudence under ERISA § 404(a)(1)(B) require a fiduciary to undertake an appropriate investigation to determine that the plan and its participants receives adequate consideration for the plan's assets and the participants' account in the plan.

108. Pursuant to ERISA § 3(18), adequate consideration for an asset for which there is no generally recognized market means the fair market value of the asset determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with the Department of Labor regulations.

109. To fulfill its fiduciary duties, Lubbock National Bank was required to undertake an appropriate and independent investigation of the fair market value of Raydon stock in the September 2015 ESOP Transaction. Among other things, Lubbock National Bank was required

to conduct a thorough and independent review of any “independent appraisal,” to make certain that reliance on any and all valuation experts’ advice was reasonably justified under the circumstances of the September 2015 ESOP Transactions; to make an honest, objective effort to read and understand the valuation reports and opinions and question the methods and assumptions that did not make sense.

110. An appropriate investigation would have revealed that the valuations used for and the price paid by the ESOP in the September 2015 ESOP Transaction did not reflect the fair market value of the Raydon stock purchased by the Plan, the September 2015 ESOP Transaction was not in the best interests of the Plan participants and the September 2015 ESOP Transaction would cause the ESOP to take on excessive debt.

111. Additionally, Lubbock National Bank was required to remedy the ESOP’s overpayment for Raydon stock after the date of the September 2015 ESOP Transaction, including as necessary correcting the prohibited transaction by seeking the overpayment from the Selling Shareholders and/or the breaching Trustee (i.e. itself).

112. The duty of loyalty under ERISA § 404(a)(1)(A) requires a fiduciary to act with an eye single to the interests of the plan’s participants and beneficiaries.

113. Defendant Lubbock National Bank did not act solely in in the interests of the ESOP’s participants and beneficiaries in agreeing to non-compete payments for Ariel and Donovan as part of the September 2015 ESOP. Rather, the non-compete payments are for the benefit of Ariel and Donovan and the ESOP did not receive any additional valuable consideration in return.

114. By causing the ESOP to engage in the September 2015 ESOP Transaction and failing to correct the September 2015 ESOP Transaction, Lubbock National Bank breached his

fiduciary duties under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A), (B) and caused losses to the Plan and the accounts of the Class Members.

COUNT IV

[Engaging in Prohibited Transaction Forbidden by ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), Against Defendants Lubbock National Bank and Director Defendants]

115. Plaintiff incorporates Paragraphs 1-3, 6-9, 19, 46-47, 63-66, 72-74 inclusive as though set forth herein.

116. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), provides in part that a fiduciary shall not cause a plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan.

117. ERISA § 406(b), 29 U.S.C. § 1106(b), mandates that a plan fiduciary shall not (1) “act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants,” or (2) “deal with the assets of the plan in his own interest or for his own account,” or (3) “receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”

118. As members of the Board of Directors with the authority to appoint and remove the Trustee, Defendants Ariel and Donovan were fiduciaries of the ESOP.

119. ERISA § 3(14), 29 U.S.C. § 1002(14) defines a “party in interest” to include (A) “any fiduciary . . . of such employee benefit plan” and (H) “an employee, officer, director” of an employer whose employees are covered by the Plan. As fiduciaries of the ESOP and also employees, officers and directors of Raydon, Ariel and Donovan were parties in interest pursuant to ERISA § 3(14).

120. As part of September 2015 ESOP Transaction, Defendants Ariel and Donovan entered into agreements whereby they would receive non-compete bonus payments worth millions of dollars from Raydon as part of their consideration for selling Raydon stock to the ESOP. As the Trustee for the ESOP in the September 2015 ESOP Transaction, Defendant Lubbock National Bank caused the Plan to engage in the Transaction.

121. These non-compete bonus payments had no rational economic purpose because Raydon owes Ariel and Donovan tens of millions of dollars under the subordinated notes for the September 2015 ESOP Transaction and will only be able to pay these notes if it is a successful company. Therefore, no further economic incentive is required to prevent Ariel and Donovan from competing with Raydon. The ESOP received no meaningful additional consideration in exchange for agreeing that Ariel and Donovan would receive millions of dollars in non-compete bonus payments.

122. Defendants Lubbock National Bank, Ariel and Donovan knew or should have known that the non-compete bonus payments were not needed as an economic incentive to deter Ariel and Donovan from competing against Raydon.

123. Payment of these non-compete bonus payments reduced the value of Raydon and therefore the value of the ESOP's Raydon stock. To the extent that a prohibited transaction is required to cause harm or loss to the Plan and/or Plaintiff, the reduction of the value of Raydon harmed the ESOP and the participants by reducing the value of their shares and/or increasing the amount the Plan paid and thereby causing loss to the Plan and the accounts of the individual participants without any corresponding benefit.

124. By negotiating the terms of the sale and agreeing as a part of the September 2015 ESOP Transaction to these non-compete agreements and these payments, Defendants Lubbock

National Bank caused the Plan to engage in a prohibited transaction in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

125. As parties-in-interest, Defendants Ariel and Donovan can be held liable for knowing participation in these violations of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) because as parties to the transaction, officers of the Company and fiduciaries of the ESOP, Defendants Ariel and Donovan knew all of the facts sufficient to know that the non-compete payments as part of the September 2015 ESOP Transaction constituted a direct or indirect prohibited transaction..

126. By negotiating the terms of the September 2015 ESOP Transaction to include agreements that provided benefits, including continued employment and non-compete agreements for themselves, but without providing corresponding additional valuable consideration to the Company or the ESOP, Defendants Ariel and Donovan acted in the September 2015 ESOP Transaction, which involved the Plan, on behalf of a party (i.e. themselves) whose interests are adverse to the interests of the plan or the interests of its participants in violation of ERISA § 406(b)(1).

127. By negotiating the terms of the September 2015 ESOP Transaction to include agreements that provided benefits, including continued employment and non-compete payments for themselves, Defendants Ariel and Donovan dealt with the assets of the Plan in their own interest in violation of ERISA § 406(b)(2).

128. As a party to or beneficiary of agreements that provided consideration to themselves from Raydon, Defendants Ariel and Donovan received consideration for their own account from a party dealing with the Raydon in connection with a transaction involving the assets of the Plan in violation of ERISA § 406(b)(3).

COUNT V

**[Breach of Fiduciary Duty Under ERISA §§ 404(a)(1)(A), (B) and (D),
29 U.S.C. §§ 1104(a)(1)(A), (B) and (D) Against Defendant Raydon, ESOP Committee and
Director Defendants]**

129. Plaintiff incorporates Paragraphs 1-3, 6-74, 78-90 inclusive as though set forth herein.

130. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), requires that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries, (A) for the exclusive purpose of providing benefits to participants and the beneficiaries of the plan, (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with ERISA.

131. Under ERISA § 404(a)(1)(A) and (B), a fiduciary with the authority to appoint and/or remove other fiduciaries has an obligation to undertake an appropriate investigation that the fiduciary is qualified to serve in the position as fiduciary and at reasonable intervals to ensure that the fiduciary who has been appointed remains qualified to act as fiduciary and is acting in compliance with the terms of the Plan and in accordance with ERISA. In short, the appointing fiduciary has a duty to monitor the performance of the appointed fiduciary.

132. According to the ESOP Plan Document and Trust Agreement, the Raydon Board of Directors has the authority to appoint and remove both the Trustee and the members of the ESOP Committee.

133. According to the ESOP Plan Document, the ESOP Committee has the power to appoint investment managers to manage any assets of the Trust Fund.

134. Raydon, the Director Defendants and ESOP Committee either knew or should have known that Lubbock National Bank engaged in a prohibited transaction and/or breached fiduciary duties in the September 2015 ESOP Transaction.

135. Raydon, the Director Defendants and ESOP Committee either knew or should have known that Lubbock National Bank engaged in a prohibited transaction and/or breached fiduciary duties by agreeing to non-compete payments for Ariel and Donovan in the September 2015 ESOP Transaction.

136. Raydon, the Director Defendants and ESOP Committee either knew or should have known about the U.S. Department of Labor's 2016 lawsuit against Lubbock National Bank arising out of the *Cactus Feeders* ESOP transaction and the Department of Labor's 2018 settlement with Lubbock National Bank.

137. Upon information and belief, Defendant Lubbock National Bank did not follow certain policies and procedures set forth in the *Cactus Feeders* settlement in the September 2015 ESOP Transaction.

138. Upon discovering the *Cactus Feeders* lawsuit and/or settlement, Raydon, the Director Defendants and ESOP Committee should have done at least the following: (a) conducted an investigation into Lubbock National Bank's administration of the ESOP, including the September 2015 ESOP Transaction, and (b) taken actions necessary to remedy any fiduciary breaches including correcting the September 2015 ESOP Transaction, such as appointing an independent fiduciary or a new Trustee to evaluate the September 2015 ESOP Transaction.

139. Defendants Raydon, the Director Defendants and ESOP Committee breached their duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), because they failed to properly monitor the conduct of Lubbock National Bank before or after the September 2015 ESOP

Transaction and failing to take appropriate action upon learning of the *Cactus Feeders* lawsuit and/or settlement.

COUNT VI

[Violation of ERISA § 410 & ERISA § 502(a)(3) against Defendant Lubbock National Bank and Director Defendants]

140. Plaintiff incorporates Paragraphs 1-3, 6-9, 19, 46, 72-77 inclusive as though fully set forth herein.

141. ERISA § 410(a), 29 U.S.C. § 1110(a), provides in relevant part (with exceptions not applicable here) that “any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [ERISA Part IV] shall be void as against public policy.”

142. ERISA § 502(a)(3), 29 U.S.C. § 1102(a)(3), authorizes a plan participant to bring a civil action (A) to enjoin any act or practice which violates any provision of ERISA or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress violations of ERISA or the terms of the plan or (ii) to enforce any provisions of ERISA or the terms of the plan.

143. The provisions in the Trust Agreement for the ESOP that attempt to relieve Lubbock National Bank of its responsibility or liability to discharge its fiduciary duties or to have Raydon (an ESOP-owned company) and thereby the ESOP be responsible for its liability or breaches, are void as against public policy.

144. The provisions in the Indemnification Agreements that are part of the September 2015 ESOP Transaction that attempt to relieve the Director Defendants or any of them of their responsibility or liability to discharge their fiduciary duties or to have Raydon (an ESOP-owned

company) and thereby the ESOP be responsible for their liability or breaches are void as against public policy.

145. Because Defendants Lubbock National Bank and Director Defendants agreed to indemnification provisions that are void against public policy under ERISA § 410, these Defendants breached their fiduciary duties under ERISA by failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries (A) for the exclusive purpose of providing benefits to participants and beneficiaries and (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and aims, in violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

PRAYER FOR RELIEF

Wherefore, Plaintiff on behalf of herself and the Class, prays that judgment be entered against Defendants on each Claim and be awarded the following relief:

- A. Declare that Defendants have each breached their fiduciary duties under ERISA;
- B. Declare that Defendants Lubbock National Bank and Defendant Selling Shareholders have each engaged in prohibited transactions in violation of ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b), by engaging in the September 2015 ESOP Transaction;
- C. Enjoin each of the Defendants who are fiduciaries and breached their fiduciary duties from further violations of their fiduciary responsibilities, obligations and duties;
- D. Remove each of the Defendants who are fiduciaries and breached their fiduciary duties as fiduciaries and Trustee of the ESOP and/or bar each of them from serving as fiduciaries

of the ESOP in the future, and appoint a new independent fiduciary to manage the ESOP and order the costs of such independent fiduciary be paid for by Defendants;

E. Order that Defendants found to have breached his/her/its fiduciary duties to the ESOP to jointly and severally restore all the losses resulting from their breaches and disgorge all 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. Order pursuant to ERISA § 206(d)(4) that any amount to be paid to the ESOP accounts of the Class can be satisfied by using or transferring any breaching fiduciary's ESOP account in the Plan (or the proceeds of that account) to the extent of that fiduciary's liability;

H. Declare that any indemnification agreement between the Defendants, or any of them, and Raydon or the ESOP violates ERISA § 410, 29 U.S.C. § 1110, and is therefore null and void *ab initio* and reform the agreements to strike or modify such provisions;

I. Order Defendant Lubbock National Bank and Director Defendants to disgorge any money advanced by Raydon or the ESOP under any indemnification agreement or other instrument between Defendants and Raydon or the ESOP;

J. Issue a preliminary and permanent injunction barring Defendants and each of them from seeking to enforce any indemnification agreement between Defendants and the ESOP or Raydon;

K. Declare that a constructive trust be place on any non-compete payments that Defendants Ariel and Donovan have received, and/or order Defendants Ariel and Donovan to

disgorge any non-compete payments (and the proceeds of such payments) they have received from Raydon and enjoin payment of any further non-compete payments not already received;

L. Order Defendants and each of them to disgorge any fees they received in conjunction with the September 2015 ESOP Transaction;

M. Order that Defendants and each of them provide other appropriate equitable relief to the Plan, including but not limited to rescission, surcharge, providing an accounting for profits, and imposing a constructive trust and/or equitable lien on any funds wrongfully held by Defendants;

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

O. Award pre-judgment interest and post-judgment interest; and

P. Award such other and further relief that the Court determines that Plaintiffs and the Class are entitled to pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) or pursuant to Rule 54(c) of the Federal Rules of Civil Procedure or that is equitable and just.

Dated: April 23, 2019

Respectfully submitted,

/s/ Sam J. Smith
Sam J. Smith
Florida Bar No. 818593
Loren B. Donnell
Florida Bar No. 013429
BURR & SMITH, LLP
111 2nd Avenue N.E., Suite 1100
St. Petersburg, FL 33701
(813) 253-2010
ssmith@burrandsmithlaw.com
ldonnell@burrandsmith.com

Daniel Feinberg
CA 135983 (*pro hac vice*)
FEINBERG, JACKSON, WORTHMAN & WASOW LLP
2030 Addison Street, Suite 500
Berkeley, CA 94704
(510) 269-7998
dan@feinbergjackson.com

R. Joseph Barton
CA 212340 (*pro hac vice*)
Colin M. Downes (*pro hac vice*)
BLOCK & LEVITON LLP
1735 20th Street, N.W.
Washington, DC 20009
(202) 734-7046
joe@blockesq.com
colin@blockesq.com

Counsel for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify on April 23, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Sam J. Smith
Sam Smith