UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RALPH T. MILLER,

Third-Party Plaintiff/Defendant,

v.

COMMITTEE OF NEW ENGLAND BIOLABS, INC. EMPLOYEES' STOCK OWNERSHIP PLAN; PERSONAL REPRESENTATIVE OF DONALD COMB; JAMES V. ELLARD; RICHARD IRELAND; and BRIAN TINGER,

Third-Party Defendants,

and

NEW ENGLAND BIOLABS, INC. EMPLOYEE STOCK OWNERSHIP PLAN & TRUST,

Nominal Defendant.

Civil Action No. 20-11234-RGS

THIRD-PARTY COMPLAINT

PARTIES

Third-Party Plaintiff/Defendant

1. Third-Party Plaintiff/Defendant Ralph T. Miller ("Miller") is a former employee of New England Biolabs, Inc. Miller was employed by New England Biolabs, Inc. from May 8, 2020 to September 2017. At the end of his employment, Miller was employed as receiving clerk for New England Biolabs. By at least May 8, 2002, he was a vested participant in the New England Biolabs, Inc. Employees' Stock Ownership Plan & Trust ("Plan" or "ESOP"). He is a participant of the ESOP within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7) including because he has a colorable claim for more benefits as a result of the fiduciary breaches and violations set forth below. Miller resides in Essex County, Massachusetts.

Counterclaim Defendant

2. Counterclaim Defendant (and Plaintiff) New England Biolabs, Inc. ("NEB") is a corporation organized under the laws of the Commonwealth of Massachusetts. NEB's principal place of business is in Ipswich, Massachusetts. NEB is and has been since the inception of the ESOP, the Sponsor of the ESOP within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B), the designated Plan Administrator of the ESOP within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102. According to the Plan Document, NEB established the Plan in 1985. Under the terms of the Plan, NEB was responsible for appointing, removing, and monitoring the Trustee and Committee and had the authority to remove its members and appoint a new Trustee and Committee. By virtue of these powers, Defendant NEB had the fiduciary responsibility to monitor the Trustee and Committee and remedy any fiduciary violations committed by the Trustee or Plan Committee. As a result, NEB was a fiduciary of the Plan under

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), because it exercised discretionary authority or discretionary control respecting management of the Plan, or had discretionary authority or discretionary responsibility in the administration of the Plan, or any combination of the foregoing.

Third-Party Fiduciary Defendants

3. Third-Party Defendant Plan Committee of the New England BioLabs, Inc. Employees' Stock Ownership Plan (the "Committee") is identified in Sections 2.3, 11.2 and Article 12 of the written instrument of the Plan as one of the named fiduciaries of the Plan within the meaning of ERISA § 402, 29 U.S.C. § 1102. Pursuant to Section 12.3 of the Plan Document, the Committee has all powers and authority necessary or appropriate to carry out its responsibilities for operating the Plan. The Committee meets the definition of a person within the meaning of ERISA § 3(9), 29 U.S.C. § 1002(9), because ERISA defines the term person broadly and because a committee meets the definition of an association or an unincorporated organization. As a result, the Committee and its members are and were fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C § 1002(21), because the Committee and its members have discretionary authority or discretionary responsibility for the administration of the Plan. Based on the 2003 SPD and the 2019 SPD, the members of the Committee at all times from at least 2003 have consisted of Donald Comb, Richard Ireland and James V. Ellard. The Committee and its members are referred to as the "Committee Defendants."

4. Third-Party Defendant the Personal Representative of Donald Comb ("Comb") is the representative for the former NEB Founder and CEO. Until his death in 2020, Comb was the Chairman of the Board of Directors since NEB's founding in 1974. As a member of the

Committee and one of the Trustees of the Plan, Comb was fiduciary of the ESOP within the meaning of ERISA § 3(21), 29 U.S.C § 1002(21) from at least 2003 through his death in 2020.

5. Third-Party Defendant James V. Ellard ("Ellard") is the Chief Executive Officer of NEB. As a member of the Committee and one of the Trustees of the Plan, Ellard has been a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C § 1002(21) from at least 2003 through the present.

6. Third-Party Defendant Richard "Rick" Ireland ("Ireland") is the Chief Financial Officer of NEB. As a member of the Committee and one of the Trustees of the Plan, Ireland has been a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C § 1002(21) from at least 2003 through the present.

7. Third-Party Defendants Comb, Ellard, and Ireland are referred to collectively here as the "Trustees" or "Trustee Defendants." The Trustees are identified in Sections 2.14 and 11.3 as well as Article 13 of the written instrument of the Plan as one of the named fiduciaries of the Plan within the meaning of ERISA § 402, 29 U.S.C. § 1102. As a result, the Trustees are and were fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C § 1002(21), because the Trustees have discretionary authority or discretionary responsibility for the administration of the Plan as set forth in Article 13. Based on the 2003 SPD and the 2019 SPD, the Trustees at all times from at least 2003 have consisted of Comb, Ellard, and Ireland.

8. Third-Party Defendant Brian Tinger ("Tinger") is the Controller of NEB. According to notes from the Department of Labor of a conversation with Tinger on August 30, 2019, Tinger identified himself as the plan administrator. Tinger also signs the Form 5500 on behalf of NEB as the Plan Administrator. Finally, Tinger is the person who communicates on behalf of the other fiduciaries of the ESOP and as the plan administrator concerning questions

about the ESOP. As a result of such functions and activities, Tinger has been a fiduciary of the ESOP within the meaning of ERISA § 3(21), 29 U.S.C § 1002(21) from at least 2017 through the present.

Nominal Defendant

9. Nominal Defendant New England Biolabs, Inc. Employee Stock Ownership Plan & Trust ("the Plan"), is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). The Plan purports to be a "defined contribution plan" within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). Before 2013, the Plan was an employee stock ownership plan ("ESOP") under ERISA § 407(d)(6) that was intended to meet the requirements of Section 4975(e)(7) of the Internal Revenue Code (the "Code") and IRS Regulations § 54.4975-11. According to the Schedule A of the Plan Document, the Plan was amended effective October 1, 2013 to become a profit-sharing plan. The written instrument, within the meaning of ERISA § 402, 29 U.S.C. § 1102, by which the Plan is maintained is the New England Biolabs, Inc. Employee Stock Ownership Plan & Trust (the "Plan Document"), effective as of October 1, 2013. The Plan is named as a nominal defendant pursuant to Rule 19 to ensure that complete relief can be granted as to claims brought on behalf of the Plan.

JURISDICTION & VENUE

10. This Court has subject matter jurisdiction over the claims in this Third-Party Complaint because the claims are all brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. As a result 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).

11. This Court has personal jurisdiction over the Third-Party Defendants because each Third-Party Defendant transacts business in, resides in, and has significant contacts with this District, and because ERISA provides for nationwide service of process pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

12. 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, and one or more, (and in fact all) Defendants may be found in this District, and the Plan is administered in this Judicial District.

CLASS ACTION ALLEGATIONS

13. Third-Party Plaintiff brings these Third-Party Claims (and the Counterclaims against NEB) as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following Class:

> All persons who are former employees of New England Biolabs and were vested participants in the New England Biolabs ESOP as of August 1, 2019 and the beneficiaries of any such participants.

14. Excluded from the Class are (a) the Third-Party Defendants, (b) officers and directors of NEB, (c) other persons who had decision-making or administrative authority relating to the administration, modification, funding or interpretation of the Plan, (d) the beneficiaries of such persons or the immediate family members of any of the foregoing excluded persons, and (e) the legal representatives, successors and assigns of any such excluded persons.

Impracticability of Joinder

15. The members of the Class are so numerous that joinder of all members is impracticable. According to a statement by Tinger reflected in the notes of the Department of Labor ("DOL") on August 30, 2019, there were 50 inactive (i.e. former employee) participants of

the ESOP at the time of the 2019 Amendment. Most, if not all, of the ESOP participants likely had at least one beneficiary, because every married participant had at least one beneficiary (a spouse) and some participants likely designated more than one beneficiary. As such, the Class probably consists of at least one hundred persons.

Commonality

16. The issues of liability are common to all members of the Class and are capable of common answers as those issues include whether the fiduciary defendants (i.e. the Trustees, the Committee Defendants and Tinger) breached various fiduciary duties to the Plan, whether the Trustees (and NEB) engaged in a prohibited transaction, whether the Plan suffered losses as a result of the fiduciary breaches and other violations and what is the appropriate relief for Defendants' violations of ERISA.

Typicality

17. Third-Party Plaintiff's claims are typical of those of the Class because the claims arise from the same events, practices, or course of conduct. These claims challenge Defendants' valuation of the Employer Stock Account and Dollar Account in connection with the liquidation of Plan Account using similar methodology, whether the Trustee Defendants and Committee Defendants breached their fiduciary duties in connection with the liquidation of those accounts, and the enforceability of the 2019 Amendment to the Plan under ERISA

18. Third-Party Plaintiff's claims are also typical of the claims of the other members of the Class, because the relief primarily sought consists of (a) a declaration establishing their rights under the Plan in effect at the time of their termination; (b) requiring the fiduciaries make the Plan whole for any losses caused by their fiduciary breaches and to disgorge their profits to

the Plan; and (c) payment for any such recovery from the Plan fiduciaries into the Plan. Any equitable relief will flow to all Class Members.

Adequacy

19. Third-Party Plaintiff will fairly and adequately represent and protect the interests of the Class.

20. Third-Party Plaintiff does not have any interests antagonistic to or in conflict with those of the Class.

21. The Third-Party Defendants have no unique defenses against Third-Party Plaintiff that would interfere with his representation of the Class.

22. Third-Party Plaintiff is represented by counsel with experience prosecuting class actions in general and ERISA class actions.

Rule 23(b)(1)

23. The requirements of Fed. R. Civ. P. 23(b)(1)(A) are satisfied. 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 the participants. This action challenges whether Third-Party Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the former employee-participants. As a result, prosecution of separate claims by individual members would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct relating to the Plan.

24. The requirements of Fed. R. Civ. P. 23(b)(1)(B) are also satisfied. Administration of an ERISA-covered plan requires that all similarly situated participants be treated the same. Resolving whether Third-Party Defendants (and NEB) fulfilled their fiduciary obligations to the Plan, engaged in prohibited transactions with respect to the Plan, or knowingly participated in

such breaches or violations as to Third-Party Plaintiffs' claims 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.

Rule 23(b)(2)

25. The requirements of Fed. R. Civ. P. 23(b)(2) are satisfied as to the Class because the Third-Party Defendants have acted and/or failed to act on grounds generally applicable to the Class, making declaratory and injunctive appropriate with respect to the Class as a whole. This action challenges whether the Third-Party Defendants acted consistently with their fiduciary duties or otherwise violated ERISA as to the Class as a whole. The relief sought primarily consists of declarations that the Third-Party Defendants breached their fiduciary duties or engaged in other violations of ERISA and injunctive relief. 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.

Rule 23(b)(3)

26. The requirements of Fed. R. Civ. P. 23(b)(3) are also satisfied. The common questions of law and fact concern whether Third-Party Defendants breached their fiduciary duties or violated ERISA to the Plan. As the members of the Class were participants in that Plan, their accounts were affected by those breaches and violations. Common questions related to liability will predominate over any individual questions precisely because the Third-Party Defendants' duties and obligations were uniform to all participants and therefore all members of the Class. As relief and any recovery will be on behalf of the Plan, common questions of remedies will likewise predominate over any individual issues.

27. A class action is a superior method to other available methods of the fair and efficient adjudication of this action. As the claims generally 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. Class certification is a superior method of proceeding because it will obviate the need for unduly duplicative litigation which might result in inconsistent judgments about the Third-Party Defendants' duties to the Plan.

28. The following factors set forth in Rule 23(b)(3) also support certification:

(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 the most desirable location for concentrating this litigation because (i) the Third-Party Defendants are located in this District, (ii) the Plan is administered in this District; (iii) the majority of the participant class members are likely located in this District; and (iv) a number of the witnesses, including a number of relevant non-party witnesses, are expected to be located in this District.

FACTUAL ALLEGATIONS

29. NEB claims on its website to have been founded in the mid-1970s as a collective of scientists committed to developing innovative products for the life sciences industry. NEB

also claims on its website to be a recognized world leader in the discovery and production of enzymes for molecular biology applications.

Background Regarding the Plan

30. According to the 2013 Plan Document, NEB adopted the Plan effective as of October 1, 1985. According to the 2013 Plan Document, the Plan was converted from an ESOP to a Profit Sharing Plan as of October 1, 2013.

31. Under the terms of the Plan, the employee-participants do not have any decision-making authority or control into which investments their accounts in the Plan are invested. As described in various Sections of the Plan, including Sections 6.6, 11.3, 13.2(a), 13.3 and 13.5, the Trustees of the Plan made and controlled all investment decisions, including decisions regarding into what investments the accounts of individual participants would be invested.

32. According to an email on December 3, 2019 from Tinger in response to a request by Miller for documents pursuant to ERISA § 104(b), there have only been two Summary Plan Descriptions (SPDs) issued to participants: one dated December 22, 2003 and one dated August 2019.

33. According to the 2003 SPD and the 2019 SPD, "[u]nder the Plan, Plan participants become stockholders – part owners – of Biolabs. As a stockholder, [employees] have a direct stake in Biolabs' future success because [employees] will benefit from any increase in the value of the Biolabs stock in [the employee's] Plan account."

34. Based on the Form 5500s filed by NEB with the United States Department of Labor, the Plan has held three different types of investments: (1) Mutual Funds that registered with the SEC and which are valued at the daily closing price; (2) Pooled Separate Accounts which are valued at the net asset value as provided by the contract issuer; (3) Employer (or

Company) Stock, which consists of NEB stock and the stock of Cell Signaling Technology ("CST") stock, neither of which are publicly traded and the price of which is determined, according to the Form 5500s, based on the appraisal of an outside valuation firm. Miller does not(??) know whether CST stock qualifies as employer securities.

Relevant Provisions of the 2013 Plan Document

35. According to Section 6.1 of the 2013 Plan Document, the Committee is required to establish two separate accounts for each Plan Participant as follows: a Dollar Account and an Employer Stock Account. Although the terms of the Plan are not clear, based on the 2019 Summary Plan Description and the Form 5500s, the Dollar Account invests in mutual funds and pooled separate accounts and the Employer Stock Account invests in NEB and CST stock.

36. Section 6.4 of the 2013 Plan Document provides that the fair market value of Employer Stock and other assets in the Plan will be determined by the Trustees at the applicable Valuation Date "and at any other time that the Committee may direct." According to the 2019 SPD, the usual Valuation Date for NEB stock is September 30 and the usual Valuation Date for CST stock is December 31; however, consistent with the Plan Document, the SPD represents that the Committee has the authority to request a valuation on other dates for Company stock. Section 6.6 of the 2013 Plan Document mandates that the value of mutual funds be determined based on the price at the end of each business day. Based on this provision in the Plan and the statements in the SPD, the Committee had authority to direct that the valuation of assets other than mutual funds should be at a date other than the default Valuation Date.

37. Section 6.4 of the 2013 Plan Document allows the Trustees to use the services of an outside appraisal firm engaged by the Employer or the Trustees to assess the fair market value of the Employer Stock; however, the ultimate determination of the fair market value of the NEB

and CST stock and assets other than mutual funds is made by the Trustees. Both the 2003 SPD and the 2019 SPD represent that "the valuation of the Company stock will be performed by an outside firm of valuation specialists" and "that valuation report will be used to determine the fair market value of [NEB and CST] stock in your stock account." The 2003 SPD states that valuation will be performed "as of each September 30. The 2019 SPD explains that the "valuation date for Biolabs stock is September 30 of each year" and the "valuation date for Cell Signaling Technology stock is December 31 of each year." Both SPDs also represent that "[t]he Committee may also request a valuation at any other time."

38. Section 6.4 of the 2013 Plan Document requires the Trustees to notify NEB of the Trustees' valuation determinations.

39. Section 7.1 of the 2013 Plan Document provides that "[a] Participant who retires or terminates employment with the Employer or Related Employer for any reason (other than death) will receive the amount in his accounts" and such amounts will be payable in accordance with Article 8. Section 7.1 of the 2013 Plan Document also provides that "[n]o distributions will be made to any Participant while he is still an Employee of the Employer."

40. Section 8.1(a)-(c) of the 2013 Plan Document provides that distributions from a Participant's Dollar Account will be in cash and distributions from a Participant's Employer Stock Account will be in cash unless the Participant elects to receive shares in stock.

41. Section 8.1(d) of the 2013 Plan Document provides in relevant part that if the distribution of a Participant's Employer Stock Account will be in cash, then "the Trustees *will convert the shares and fractional shares of Employer Stock.*"

Miller's Pre-Retirement Conversations with Brian Tinger

42. In January 2017 Mr. Miller had a face-to-face conversation in a hallway at NEB, with Tinger who was known to employees, including Mr. Miller as the person responsible for acting on behalf of NEB in its role as Administrator of the Plan.

43. In that January 2017 conversation, Mr. Miller asked Tinger, in his capacity as acting for the Administrator of the ESOP, if Mr. Miller could remain a shareholder after he retired and not cash-out his shares on retirement.

44. In response to that question, at a subsequent meeting, Tinger advised Mr. Miller he could retain his shares after he retired.

45. Tinger, the Administrator of the ESOP, knew at all material times that Mr. Miller would be more than 65 years old when retired and that he had not cashed-out his shares on retirement and Tinger, had granted permission to Mr. Miller to retain his shares.

NEB Amends the Plan as of August 1, 2019 & Liquates the Accounts of Former Employees

46. Effective August 1, 2019, NEB adopted the Third Amendment to the Plan which changed the Plan for former employees who remained as participants in the Plan ("2019 Amendment"). The 2019 Amendment added a new Section 6.9 and amended Sections 8.1, 8.2, 8.3, 8.4, 9.1 and 13.4.

47. According to notes by the DOL of a conversation with Tinger on August 30, 2019, the purpose of the 2019 Amendment was to allow NEB to divest the former employees of their shares so NEB could "recirculate" those shares and "make [those] shares are available to new employees." Based on these notes, the 2019 was intended to be applied to and was applied to Participants who terminated before the effective date of the Amendment.

48. Based on notes by the DOL of a conversation with Tinger on August 30, 2019, the 2019 Amendment was specifically adopted before the end of the Plan Year.

49. The effect of the 2019 Amendment was to eliminate the ability of former employees to remain invested in employer stock through the Plan.

50. According to Note E, entitled "PARTY -IN -INTEREST TRANSACTIONS" to the Financial Statements of the 2018 Form 5500 filed with the DOL, the following amounts of shares were "repurchased" from participants in 2019:

a. 26,747 of NEB voting stock

b. 61,936 shares of NEB non-voting stock

c. 96,913 shares of "affiliated company preferred stock" which is believed to be CST stock.

51. According to Note C of the Financial Statements of the 2018 Form 5500 filed with the DOL, the shares of stock distributed in 2019 at a value of $43,321,280, of which $38,783,330 was paid for NEB shares and $4,537,950 was paid for CST shares. Upon information and belief, most of these amounts were paid to former employees who shares were liquidated as a result of the 2019 Amendment.

52. Mr. Miller's shares and accounts in the Plan were liquidated and distributed on September 30, 2019.

Investments and Assets of the Plan

53. As of September 30, 2018, and as of September 30, 2019, the Plan reported the following investments and values on the Form 5500s:

Investments	2018	2019
Mutual Funds	$14,084,232	$5,295,437
NEB stock	$252,943,856	$293,748,583

CST stock	$18,193,499	$16,281,616
Pooled separate accounts	$5,932,628	$1,728,155

54. Based on the amount in liquid and semi-liquid investments and the amount of contributions from NEB during 2019, the Plan did not have sufficient cash or liquid investments from which to purchase more than $43 million of Employer Stock (i.e. NEB and CST stock).

55. As of September 30, 2019, the Plan held about $293 million in voting and non-voting stock of NEB, about $16 million in CST (a privately held entity) preferred stock, about $1.7 million in pooled separate accounts and about $5.2 million in mutual funds.

Value of Miller's Accounts in the Plan

56. In statements issued to Mr. Miller by NEB as the Plan Administrator as of September 30, 2017 and September 30, 2018, NEB represented to Mr. Miller that the Plan held the following for his benefit:

Investment	Shares	2017 Value	Appreciation	2018 Value
Side Fund (Dollar Account)	N/A	$82,148.48	$2,800.40	$84,948.88
NEB Voting Stock	710.253721	$267,694.63	$48,510.32	$316,204.95
NEB Non-Voting Stock	792.295324	$291,168.53	$52,766.87	$343,935.40
CST Stock	827.652847	$34,016.53	$4,717.62	$38,734.15
Totals		$675,028.17	$108,795.22	$783,823.39

57. According to the 2018 Form 5500 filed with the DOL on September 15, 2020, the NEB stock held in the Plan appreciated by $70,705,057 (or 27%) between September 30, 2018 and September 30, 2019. The Form 5500 does not provide further detail about any difference between the voting share and non-voting shares of NEB stock. According to the 2018 Form 5500

filed with the DOL on September 15, 2020, the CST stock held in the Plan appreciated by $2,626,067 (or 14.4%) between September 30, 2018 and September 30, 2019.

58. Applying the September 30, 2019 increased value of the Employer Stock (NEB and CST) – and even assuming an unrealistic zero appreciation on the mutual funds -- Miller's account results in the following amounts:

Investment	Shares	2018 Value	Appreciation	
Side Fund (Dollar Account)	N/A	$84,948.88	Assumed 0%	$84,948.88
NEB Stock	1,502.549045	$660,140.36	27%	$838,378.26
CST Stock	827.652847	$38,734.15	14.4%	$44,311.87
Totals		$783,823.39		$967,639.01

Had the shares in Miller's account been valued at the September 30, 2019 price when the fiduciaries of the Plan liquidated his shares on September 30, 2019, Miller would have received at least $ 183,815.62 more.

59. In August 2019, Tinger reaffirmed that as Administrator of the ESOP, he knew Mr. Miller had not cashed-out his shares. By letter dated August 6, 2019, Tinger, the Administrator of the ESOP wrote to Mr. Miller:

> As an inactive participant in the New England Biolabs, Inc. Employee Stock Ownership ("ESOP"), I would like to notify you of some upcoming changes.
>
> This September, you will once again be allowed to elect a distribution from the ESOP. However, **if you do not elect** a distribution in 2019, the ESOP will automatically convert the value of your NEB and CST stock into cash. This cash will then be deposited into your side fund account within the ESOP.
> We are making this change so that more stock will be available for new and active employees. (emphasis in original)
>
> By electing a distribution, especially in the form of a tax-free rollover to a qualified retirement account (such as a 401 (k) or an IRA), you will have control over how your money is invested.

Enclosed with this letter is your most recent ESOP account statement as of September 30, 2018. Within the next few days, you will receive a notice from Principal with instructions on how to elect your distribution and perform a tax-free rollover.

If you have any questions, please feel free to reach out to me directly.
Sincerely,
/s/ Brian T. Tinger

60. On August 9, 2019 Tinger sent an email to employees of NEB:

I would like to notify all full time employees of some changes to the Employee Stock Ownership Plan ("ESOP").

The primary reason for these changes is to ensure that NEB stock will be available for new and active employees. We decided to put these measures in place to restrict non-employees from retaining ownership of NEB stock, thereby promoting the recycling of shares to existing employees.

Effective August 1, 2019, when an individual leaves NEB they will have the option to take a distribution and "cash out" of the ESOP plan. If they defer their distribution election and decide to keep their money in the ESOP, the plan will automatically conv the value of their NEB & CST stock into cash. This cash will then be deposited into the individual's side fund account within the ESOP and their money will increase/decrease each year based on the performance of the side fund.

Participants will still be able to pursue NUA (Net Unrealized Appreciation) and elect a distribution in the form of shares, but NEB will only be obligated to repurchase the shares at 2 points in time:

1) the fiscal year in which the person separates from service
2) the fiscal year after the person separates from service.

NEB will no longer be obligated to repurchase the shares at age 60 or age 65.

Please let me know if you have any questions about these changes as I'd be happy to speak with you.

Brian T. Tinger

61. On August 8, 2019, Tinger sent an email to employees of NEB:

I'd like to convey answers to some common questions that I've been receiving about this announcement:

Q: What happens to individuals who left NEB and still have their money in the ESOP? Does this new policy apply to them as well?
A: Yes, this new policy applies to them as well. Former employees were sent a letter on Tuesday informing them of these changes. As such, they will be allowed to take a distribution in Sept 2019. If they defer their distribution election in Sept 2019 and decide to keep their money in the ESOP, the plan will automatically convert the value of their NEB & CST stock into cash. This cash will then be deposited into the individual's side fund account within the ESOP.

Q: Does this mean that more stock will be available to employees?
A: Yes, I expect that this change will result in more stock being available to employees this year. As for future years, I expect this change will promote the recycling of shares, thereby ensuring that stock will continue to be available to employees.

Brian T. Tinger

Miller Contacts the Department of Labor About the 2019 Amendments & Liquidation

62. According to notes provided the DOL, on August 12, 2019, Mr. Miller contacted the United States Department of Labor Employee Benefits Security Administration ("EBSA") by telephone in Boston and spoke with an attorney at EBSA. As reflected in the notes provided by the DOL, Miller reported and inquired about the 2019 Amendment, the upcoming liquidation of his account and proposed method and timing of valuation, including the Plan's intent to cash-out his account based on the September 30, 2018 valuation rather than the value at the time of cash-out which was expected to be in September 2019.

63. On August 22, 2019, Mr. Miller advised the DOL attorney that Principal Financial Group had contacted Mr. Miller on behalf of the ESOP and that Mr. Miller had to elect one of three options regarding his shares:

a. Cash-out the shares and pay taxes.

b. Cash-out the shares and roll the funds to an IRA.

c. Cash-out the shares and roll over to a side fund within the ESOP.

64. On August 28, 2019, the DOL attorney called Tinger, Administrator for the ESOP and left a message requesting a return call.

65. On August 30, 2019, Tinger, Administrator of the ESOP, returned the telephone called to the DOL attorney.

66. On August 30, 2019, Tinger, Administrator of the ESOP, represented to the DOL attorney "that participants are not required to take a distribution."

67. On August 30, 2019, Tinger, Administrator of the ESOP, represented to the DOL attorney that NEB determined, "that there are a lot of shares that are not recirculating" and NEB wants the shares to be "available to new employees."

68. After the DOL attorney interviewed Tinger, Administrator of the ESOP, James V. Ellard, Chief Executive Officer of NEB, and a fiduciary of the ESOP, telephoned Mr. Miller and threatened him for contacting DOL. As reflected in notes by the DOL of this conversation reported by Mr. Miller, Ellard threatened to take away two years of contribution out of his ESOP. Additionally, Ellard made statements in sum or substance as follows: "How can you do this to us after all we have done for you?"; "We paid for all of your operations."; "You wouldn't be in such a good financial situation if it wasn't for us." Also, in substance Mr. Ellard said NEB should have cashed-out Mr. Miller's stock when he turned 65.

69. On September 5, 2019 Mr. Miller reported the threats described in the prior paragraph to the DOL attorney.

70. Mr. Miller executed and delivered to NEB certain forms to cash-out his shares during September 2019.

71. NEB cashed out his shares on September 30, 2019 at the September 18, 2018 valuation rather than the September 30, 2019 valuation.

72. By letter dated January 20, 2020, Tinger, on behalf of the Committee, demanded that Mr. Miller pay the ESOP approximately $164,580 alleging that the ESOP had overpaid him. The letter did not explain how the overpayment had been calculated.

73. On February 14, 2020, Tinger, Administrator of the ESOP, sent a letter to Mr. Miller and wrote in part:

> The attached 1099-R has been issued as a result of your failure to repay the…ESOP. As we communicated to you in our letter dated January 20, 2020, you were overpaid $164,580.17…Once you repay the Plan, $164,580.17, we will issue an amended 1099-R to eliminate the taxable nature of this $164,580.17….

74. NEB, acting through Tinger, Administrator of the ESOP, sought self-help, including writing to Morgan Stanley demanding money from Mr. Miller's IRA at Morgan Stanley.

COUNT I
Engaging in Prohibited Transaction Forbidden by ERISA § 406(a), 29 U.S.C. §§ 1106(a), Against the Trustee Defendants

75. Third-Party Plaintiff incorporates the preceding paragraphs as though set forth herein.

76. 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."

77. ERISA § 3(14), 29 U.S.C. § 1002(14) defines a "party in interest" to include (A) any fiduciary of a plan and (C) an employer of whose employees are covered by such plan. Defendant NEB qualified as "party in interest" within the meaning of ERISA § 3(14).

78. 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.

79. 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 reflect the fair market value of the asset at the time of the transaction and that the fiduciary conducted a prudent investigation to determine the fair market value of the asset.

80. Pursuant to the 2013 Plan Document, the Trustee held legal title to the NEB and CST stock allocated to the individual ESOP accounts of the Class. Based on their authority in the Plan Document to manage the assets of the Plan, Trustees sold the NEB and CST stock allocated to the individual Plan accounts of Miller and the Class on or around September 30, 2019.

81. According to Article 9 of the 2013 Plan Document, the NEB and CST stock held in the individual Plan accounts could be purchased by either the employer, NEB or the Trustees. As explained in the Form 5500s, NEB is required to buy any shares in the participant's employer stock account for which there is no market. According to a Section of the 2018 Form 5500 (including a Section entitled "PARTY IN INTEREST TRANSACTIONS"), shares of NEB and CST stock were liquidated and distributed in 2019 for which $43,321,280 was paid for those shares. Based on the 2018 Form 5500, the Plan's combined liquid investments (i.e. mutual funds) and semi-liquid investments (i.e. pooled separate accounts) and employer contributions were far less than $43 million. As such, NEB would have been required to and, upon information and belief, did purchase the shares.

82. The Trustees caused the Plan 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 no less than fair market value was paid for NEB and CST stock purchased from Plaintiff and the Class Members in the ESOP.

83. As the purchaser of the NEB and CST stock held by the Class in the Plan, NEB was aware of sufficient facts that the purchase constituted a prohibited transaction with party in interest. As a party in interest and knowing participant, Counterclaim Defendant NEB is also liable for the violations of ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D).

COUNT II
Breach of Fiduciary Duty Under ERISA §§ 404(a)(1)(A), (B) & (D)
29 U.S.C. §§ 1104(a)(1)(A), (B) & (D) Against the Trustee Defendants
and the Committee Defendants

84. Third-Party Plaintiff incorporates the preceding paragraphs as though set forth herein.

85. 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) to act in accordance with the documents and instruments governing the plan insofar as those documents and instruments are consistent with ERISA.

86. In the context of transactions 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.

87. Pursuant to ERISA § 3(18), adequate consideration means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as 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.

88. To fulfill those fiduciary duties, the Trustees were required to undertake an appropriate and independent investigation of the fair market value of stock to fulfill their fiduciary duties. Among other things, the Trustees were required to conduct a thorough and independent review of any "independent appraisal," to make certain that reliance on any valuation experts' advice was reasonably justified under the circumstances of the purchase, 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.

89. An appropriate investigation would have revealed that the valuations used for and the price paid for the NEB and CST stock (and the price paid for the mutual funds) in the Plan did not reflect the fair market value of the stock (or the mutual funds) at the time that it was purchased and the purchases of the stock (and mutual funds) at those prices were not in the best interests of the Plan participants.

90. Based on the total amount distributed to Miller, the value of his Dollar Account also was paid at the September 30, 2018 values instead of the value as of September 30, 2019 when his account was liquidated and distributed. Upon information and belief, the accounts of other former employees whose Dollar Accounts were liquidated and distributed at the September 30, 2018 values. Pursuant to Section 6.6 of the Plan, the Valuation Date for investments in mutual funds is the last business day. Using a stale (i.e. year old) price for the mutual funds violated the terms of the Plan and did not reflect fair market value of the mutual funds.

91. Even if Section 9.2 of the Plan was construed to suggest that the amount paid for the assets in participants' accounts in the Plan did not have to be fair market value as of the date of the transaction, a prudent fiduciary would have disregarded that provision as the Supreme Court had expressly held in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) that ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) "makes clear that the duty of prudence trumps the instructions of a plan document." Moreover, the Committee had discretion under the terms of the Plan to select a different Valuation Date other than September 30.

92. Additionally, the Trustees were required to remedy any underpayment based on undervaluation of the accounts liquidated and distributed to Miller and the Class including as necessary correcting the prohibited transaction by seeking additional payment from NEB and/or requiring the breaching fiduciaries (i.e. these Trustees) to make up for the underpayment.

93. By causing the Plan to purchase assets in the Stock Account and the Dollar Account for less than fair market value and failing to correct the underpayments by the Plan and/or NEB, the Trustees breached their fiduciary duties under ERISA § 404(a)(1)(A), (B), and (D), 29 U.S.C. § 1104(a)(1)(A), (B), and (D) and caused losses to the Plan and the accounts of the Class Members.

COUNT III

Invalidation of the 2019 Amendment & Enforcement of the Terms of the Plan Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), Against All Defendants

94. Third-Party Plaintiff incorporates the preceding paragraphs as though set forth herein.

95. 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.

96. Relief is unavailable under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) or the remedy under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) is inadequate because the terms of the Plan, as reflected in the 2013 Plan Document, now include the terms of the August 2019 Amendment. Therefore, a claim challenging the validity of the amendment is properly brought under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

97. As a matter of both federal common law and the common law of contract, which apply to ERISA plans, the terms of the Plan are fixed at the time of acceptance by the employee-participant, which is completed by performance by the employee. At the latest, once an employee separates from employment, the terms of a pension plan in existence at the time of separation of employment are the terms that govern the benefits owed to and to be paid to the participant. Given that the employee-participant has fully performed his obligations under the contract, the Plan may not amend the terms of the Plan to change the conditions of benefits for a participant who has fully performed.

98. Effective August 1, 2019, NEB adopted the Third Amendment to the Plan which changed as to the Plan former employees who remained as participants in the Plan (the 2019 Amendment). The 2019 Amendment added a new Section 6.9 and amended Sections 8.1, 8.2, 8.3, 8.4, 9.1, and 13.4.

99. The 2019 Amendment purports to eliminate the ability of former employees to remain invested in employer stock through the Plan.

100. Based on notes from the Department of Labor of a conversation by Tinger on August 30, 2019 and the Notes to the 2018 Form 5500 (through the year ended September 30, 2019), NEB and the Plan fiduciaries applied the 2019 Amendment to then-existing former employee participants.

101. Based on NEB's reference to the 2019 Amendment in its Second Amended Complaint against Miller and the timing of Miller's liquidation, NEB and the Plan fiduciaries (i.e. the Trustees and the Committee) applied the 2019 Amendment to Miller.

102. As a matter of contract law, the 2019 Amendment is invalid to the extent that it applies to participants of the ESOP who terminated, retired, or otherwise completed performance before the effective date of the amendment.

103. As a result, Third-Party Plaintiff and the Class are entitled to have the 2019 Amendment declared invalid as to them, to a declaration that their rights and benefits are and will be determined under the Plan in effect when they terminated or retired, and, as necessary, Third-Party Plaintiff and the Class are entitled to have the Plan reformed accordingly and/or to an injunction requiring administration of the Plan in a manner consistent with the terms of the Plan in existence at the time of their retirement.

COUNT IV
Breach of Fiduciary Duty Under ERISA §§ 404(a)(1)(A), (B) & (D)
29 U.S.C. §§ 1104(a)(1)(A), (B) & (D) Against the Committee Defendants

104. Third-Party Plaintiff incorporates the preceding paragraphs as though set forth herein.

105. 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) to act in accordance with the documents and instruments governing the plan insofar as those documents and instruments are consistent with ERISA.

106. As reflected in the notes of the Department of Labor concerning a conversation with Tinger on August 30, 2019, even under the terms of the Plan after the 2019 Amendment, "participants are not required to take distribution." Instead, the Plan even after the 2019 Amendment merely allows the fiduciaries of the Plan to decide "which assets people hold in the ESOP account" and the 2019 Amendment provides that the Plan fiduciaries "will change the nature of the assets [the employee] hold[s] and convert it into the cash price.

107. In its Second Amended Complaint, NEB cites Section 8.3(a)(i) as requiring distribution of a Plan Participant's Stock Account and blames Miller for failing to complete forms. Yet, Section 8.3(a)(i) imposes a mandate on *the Committee to* distribute a Participant's Employer Stock Account by (A) not earlier than the later than the completion of the valuation of the Plan's assets as of the last day of the Plan Year preceding the date of the Participant's

termination of employment and (B) not later than 60 days after the end of the Plan Year in which the Participant retires or terminates employment (if the Participant retires on or after his 65th birthday).

108. Nothing in the Section 8.3(a) or anything else in the Plan requires action by a Participant, including one who is age 65 or older at the time of his retirement, to receive any distribution.

109. To the extent that the terms of the Plan prior to August 1, 2019 required the Committee (or other fiduciaries of the Plan) to liquidate and distribute the Accounts of any former employee participants, including Miller, the Committee Defendants breached their fiduciary duties by failing to act in accordance with the terms of the Plan as required by ERISA § 404(a)(1)(D).

110. Even if the Committee was somehow prevented from distributing assets to Miller or any other Participant within the time required by the terms of the Plan, a prudent and loyal fiduciary would have liquidated the Employer Stock Account and properly invested the assets in prudent and diversified assets.

111. Even if the Plan prior to August 1, 2019 required the Committee (or other fiduciaries of the Plan) to liquidate and distribute the Accounts of any former employee participants, including Miller, and the Committee Defendants failed to do so, any prudent and loyal fiduciary would have an obligation to take corrective action against the fiduciaries who breached their duties, including as necessary seeking a remedy or filing a lawsuit against the breaching fiduciaries, even if that required the Committee or the Trustees, or both to sue themselves.

112. To the extent that the Committee's failure to timely liquidate and distribute assets to any participants, including Miller, caused a loss to the Plan, including because the fair market value of the Stock Account increased and the Plan (or NEB) would need to pay more dollars to acquire the stock, such loss was caused by the Committee Defendants and not Miller.

COUNT V

Breach of Fiduciary Duty Pursuant to ERISA § 404(a)(A)(1)(A) & (B), 29 U.S.C. § 1104(a)(A) &(B) Against Tinger For Failure to Disclose Accurate Information to Miller

113. Third-Party Plaintiff incorporates and re-alleges by reference each of the foregoing paragraphs as if fully set forth herein.

114. 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 and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and …. (B) with "care, skill, prudence, and diligence."

115. An ERISA fiduciary's duty of loyalty and prudence under ERISA § 404(a)(1)(A) and (B) includes a duty to disclose and inform. Those duties not only require that a fiduciary comply the specific disclosure provisions in ERISA, but also require (a) a duty not to misinform, (b) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful, and (c) a duty to convey complete and accurate information material to the circumstances of the participants and beneficiaries.

116. As set forth in the Restatement of Trusts, once an ERISA beneficiary has requested information from a fiduciary who is aware of the beneficiary's status and situation, the fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance even if that information comprises elements about which the beneficiary has not specifically inquired.

117. To the extent that Tinger provided Miller with incomplete, inaccurate or misleading information, Tinger, acting on behalf of NEB, breached his fiduciary duties.

118. Miller relied on the information conveyed to him by Miller in deciding whether to keep his investments in the Plan.

119. Had Tinger told Miller that he could not keep his investments in the Plan or that if he did keep his investments in the Plan that they would not have appreciated or otherwise had any earnings, Miller would have taken steps to ensure the liquidation of his account and would have achieved market rate returns on his funds

120. As a result of breaching their fiduciary duties to Miller, Tinger must restore any losses to Miller's account in the Plan and/or a surcharge.

Count VI
Violation of ERISA § 501, 29 U.S.C. § 1140 by Miller Against NEB and Ellard on Behalf of Miller Individually

121. Third-Party Plaintiff reasserts all preceding paragraphs of the counterclaim as if set-forth herein again.

122. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for "any person" to discipline, discriminate or retaliate against a participant or beneficiary either for exercising rights under an ERISA plan, interfering with the attainment of a right to which a participant may become entitled under the plan or because he has given information or has testified or is about to testify in any inquiry or proceeding.

123. After Mr. Miller made an inquiry at the United States Department of Labor in or about August 12, 2019, James Ellard, the CEO of NEB engaged in retaliatory and discriminatory actions including by reprimanding Miller for contacting the DOL and threatening to take away two years of contributions.

124. Following these threats, Ellard caused NEB to take the following actions:

a. Demanding return of his shares which Brian Tinger, Administrator of the ESOP had represented to Mr. Miller that he did not need to cash-out on retirement.

b. Threatening to file a tax statement with the internal revenue service imputing income to Mr. Miller.

c. Filing suit against Mr. Miller for losses than never occurred to the ESOP and/or were not due to Mr Miller's actions or omissions.

125. Ellard retaliated against Mr. Miller as an ESOP participant by reason of the foregoing, because Mr. Miller exercised lawful rights under the ESOP,

126. Ellard interfered with a right to which Mr. Miller was entitled and because Mr. Miller had participated in an interview with the Department of Labor.

127. As a result of these actions, Ellard violated ERISA § 510, 29 U.S.C. § 1140 and Mr. Miller is entitled to appropriate equitable relief under ERISA § 502(a)(3) as a remedy for these violations.

ENTITLEMENT TO RELIEF

128. Due to the violations set forth in the foregoing paragraphs, Third-Party Plaintiff and the Class are entitled to sue each of the Defendants (each of whom are fiduciaries) pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), for relief on behalf of the Plan as provided in ERISA § 409, 29 U.S.C. § 1109, including for recovery of any losses to the Plan, the recovery of any profits resulting from the breaches of fiduciary duty, and such other equitable or remedial relief as the Court may deem appropriate.

129. Due to the violations set forth in the foregoing paragraphs, Third-Party Plaintiff and the Class are entitled pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), to sue any of the Defendants for any appropriate equitable relief to redress the wrongs described above.

PRAYER FOR RELIEF

WHEREFORE Third-Party Plaintiff prays on behalf of himself and the Class for judgment against the Third-Party Defendants (in addition to Counterclaim Defendant NEB) on each claim and be awarded the following relief:

A. Declare that Third-Party Plaintiff and the Class are entitled to have their benefits calculated and/or paid in conformity with the terms of the Plan document in effect at the time of their termination;

B. Declare that each of the Third-Party Defendants have breached their fiduciary duties to the Plan and the Class, are liable under ERISA § 405 and/or knowingly participated in other fiduciaries breaches of fiduciary duty;

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

D. Order that the Third-Party Defendants found to have breached his/her/its fiduciary duties to the Plan to jointly and severally make good to the Plan and/or to any successor trust(s) the losses resulting from their breaches and restore any profits they have made through use of assets of the Plan;

E. Order that the Third-Party Defendants provide other appropriate equitable relief to the Plan, Third-Party Plaintiff, and the Class, including but not limited to, surcharge, rescission of the forced sale(s), reinstatement in the Plan, reformation of the Plan, an accounting for profits, imposing a constructive trust and/or equitable lien on any funds wrongfully held by any of the

Third-Party Defendants (or Counterclaim Defendant NEB);

F. Declare any transaction that constitutes a prohibited transaction void and (1) requiring any fiduciary or party in interest to disgorge any profits made, (2) declaring a constructive trust over the proceeds of any such transaction or (3) any other appropriate equitable relief, whichever is in the best interest of the Plan;

G. Invalidate the 2019 Amendment as applied to the Class;

H. Remove the Trustees and Committee Defendants from their role as fiduciaries of this Plan, enjoining any of the breaching fiduciaries from acting as fiduciaries for any plan that covers the employees of New England Biolabs and appointing an Independent Fiduciary to manage the Plan at the expense of the breaching fiduciaries;

I. Order the proceeds of any recovery for the Plan to be allocated to the accounts of the Class to make them whole for any injury that they suffered as a result of the breaches of fiduciary duty in accordance with the Court's declaration with respect to the terms of the Plan;

J. Order pursuant to ERISA § 206(d)(4) that any amount to be paid to or necessary to restore losses to the ESOP Stock Account of Third-Party Plaintiff and the Class can be satisfied by using or transferring any breaching fiduciary's ESOP account in the Plan to the extent of his liability;

K. Find that James V. Ellard violated ERISA § 510 and require Ellard to regularly complete training on ERISA;

L. Dissolve the Injunction against Miller;

M. Declare that any indemnification agreement between the Defendants and the ESOP violates ERISA § 410, 29 U.S.C. § 1110, and is therefore null and void;

N. Require Third-Party Defendants to pay attorney's fees and the costs of this action

pursuant to ERISA §502(g)(1), 29 U.S.C. § 1132(g)(1) and/or ordering the payment of reasonable fees and expenses of this action to Third-Party Plaintiff's Counsel on the basis of the common benefit and/or common fund doctrine (and/or other applicable law) out of any money or benefit recovered for the Class in this action;

O. Order Third-Party Defendants to pay pre-judgment interest and post-judgment interest; and

P. Award any such other relief that the Court determines that Third-Party Plaintiff and the Class are entitled pursuant to ERISA §502(a), 29 U.S.C. § 1132(a) and pursuant to Rule 54(c) of the Federal Rules of Civil Procedure or otherwise.

Dated: March 25, 2021

Respectfully submitted,

/s/ R. Joseph Barton

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Certificate of Service

I hereby certify that this document was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on March 25, 2021.

/s/ Ming Siegel
Ming Siegel