

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ERNEST J. GLYNN,)
JEFFREY T. MACDONALD,)
DOUG JOHNSON and)
JOSHUA RICHARDSON, individually and)
on behalf of all others similarly situated,)
,

Plaintiffs,)

v.)

Case No. 2:19-cv-00176-NT

MAINE OXY-ACETYLENE SUPPLY CO.)
DANIEL GUERIN and BRYAN GENTRY)

Defendants)

MAINE OXY-ACETYLENE SUPPLY CO.)
EMPLOYEE STOCK OWNERSHIP PLAN)

Nominal Defendant)

SECOND AMENDED CLASS ACTION COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiffs Ernest J. Glynn, Jeffrey T. MacDonald, Doug Johnson and Joshua Richardson, on behalf of themselves and all others similarly situated, hereby file their Second Amended Complaint and complain against Defendants Maine Oxy-Acetylene Supply Co. (“Maine Oxy”), Daniel Guerin and Bryan Gentry, and Nominal Defendant Maine Oxy-Acetylene Supply Co. Employee Stock Ownership Plan, as follows:

INTRODUCTION

1. This is a class action arising from Defendant Maine Oxy's establishment of an Employee Stock Ownership Plan ("ESOP"), the subsequent acquisition of 49% of the company by its employees and its unlawful effort to purchase the shares back for a fraction of their value. At a minimum, Defendant Maine Oxy intentionally and/or negligently misrepresented the value of the employees' 49% share of the company in order to facilitate the purchase of the employee stock at a steep discount, to the direct financial benefit of both Defendants and to the wrongful detriment of the Plaintiffs and the Class.

PARTIES, JURISDICTION AND VENUE

2. Plaintiff Ernie Glynn is an individual who currently resides in Hampton, New Hampshire. At all relevant times, Mr. Glynn was an employee of Maine Oxy and a participant in Maine Oxy's ESOP.

3. Plaintiff Jeffrey MacDonald is an individual who currently resides in Glenburn, Maine. At all relevant times, Mr. MacDonald was an employee of Maine Oxy and a participant in Maine Oxy's ESOP.

4. Plaintiff Doug Johnson is an individual who currently resides in Addison, Maine. At all relevant times, Mr. Johnson was an employee of Maine Oxy and a participant in Maine Oxy's ESOP.

5. Plaintiff Joshua Richardson is an individual who currently resides in Alton, Maine. At all relevant times, Mr. Richardson was an employee of Maine Oxy and a participant in Maine Oxy's ESOP.

6. Defendant Maine Oxy is a Maine business corporation in good standing with a principal location in Auburn, Maine.

7. Defendant Daniel Guerin is an individual who currently resides in Minot, Maine.

8. Defendant Bryan Gentry is an individual who upon information and belief, currently resides in Naples, Florida.

9. Nominal Defendant Maine Oxy-Acetylene Company Employee Stock Ownership Plan (the "ESOP") was an employee pension benefit plan as defined by ERISA 3(2), 29 U.S.C. § 1002(2), is a defined contribution or individual account plan within the meaning of ERISA 3(34), 29 U.S.C. §1002(34) and is subject to ERISA pursuant to ERISA 49(a)(1), 29 U.S.C. § 1002(a)(1). The ESOP was administered in part in Lewiston, Maine.

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1), as this claim arises from the violation of federal law.

11. Venue is proper pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2), as the ESOP was administered in Maine, Maine Oxy's breach of the ESOP occurred in Maine, and Maine Oxy is a Maine corporation with a principal place of business in Maine.

FACTS COMMON TO ALL COUNTS

12. Maine Oxy is a supplier of welding equipment, industrial and specialty gases that was founded in 1929 and incorporated in the State of Maine in 1935. The company has employees at retail sites throughout Maine, New Hampshire, Vermont, Massachusetts, and Connecticut. The company also has a location in Canada.

13. Until 2004 Maine Oxy was a closely held corporation owned by the Albiston family.

14. In 2004, Bruce Albiston, the majority shareholder at that time, announced plans to establish an ESOP and sell a portion of his shares to Maine Oxy's employees' through the ESOP. The ESOP, which contained a profit sharing component, was intended as an additional employment incentive and retirement plan.

15. Through the company, Mr. Albiston facilitated a loan that would allow the ESOP to purchase some of his stock. Mr. Albiston proceeded to implement the ESOP and sold 30% of the total company shares to the ESOP.

16. In 2006, Mr. Albiston sold an additional 19% of the company to Maine Oxy's employees. Upon completion of the sale, the ESOP held 49% of the company. Mr. Albiston and his son Joseph Albiston retained 51% of the company.

17. When the ESOP was implemented in 2004, Maine Oxy provided a "Summary Plan Description" ("SPD") of the ESOP to Maine Oxy's employees, describing the nature of the employees' investment and linking the value of the employee-owned stock to the value of the company. Paragraph 3 of Maine Oxy's SPD states in relevant part as follows:

Investment in Company Stock

All amounts contributed to the Plan are invested in common stock of Maine Oxy-Acetylene Supply Company, except for amounts kept in case to permit efficient administration of the Plan. The value of your account will depend on the value of the stock of the Employer. The stock value will be determined annually by an independent appraiser.

18. Paragraph 11 of the SPD identifies Maine Oxy as the “Plan Administrator” and sets forth the responsibilities of the Plan Administrator, as follows:

As Plan Administrator, the Employer is responsible for various determinations, such as whether an employee has satisfied the requirements for becoming a participant; performing administrative duties, such as ensuring that employees receive notice of their eligibility to become participants; and distributing information and filing reports with the government, such as distributing this SPD to employees and filing the Plan’s annual report on Form 5500 with the U.S. Department of Labor. Day-to-day administrative matters relating to the Plan, such as answering employee’s questions and distributing and receiving employee election forms, are also the responsibility of the Plan Administrator.

19. The following paragraph on page 13 of the SPD confirms that at all relevant times, Maine Oxy was aware of its fiduciary duties as Plan Administrator under the federal Employee Retirement Income Security Act (“ERISA”):

Prudent Actions by Plan Fiduciaries

In addition to creating rights for Plan participants, ERISA imposes duties upon the people who are responsible for the operation of the Plan. The people who operate the Plan, called “fiduciaries” of the Plan, have a duty to do so prudently and in the interest of you and other Plan participants and beneficiaries. No one, including your employer or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA.

20. In 2012 Mr. Albiston decided that it was time to step away from the company and divest his ownership position. Confidential discussions and negotiations commenced

between Mr. Bruce Albiston, Mr. Joseph Albiston and Defendants Gentry and Guerin, who was the president of the Maine Oxy at this time.

21. The Albitsons' 25,500 shares, comprising 51% ownership of Maine Oxy, were valued at a minimum of \$654.62 dollars per share, amounting to a value just shy of \$17 million dollars.

22. The sale of Mr. Albiston's 51% share of the company was completed in September 2012.

23. Defendant Guerin represented to Maine Oxy employees and the public that he was the purchaser of the majority interest in the company. Upon information and belief, Defendant Gentry financed Mr. Guerin's purchase of the majority shares against the existing equity in the company.

24. Defendants have actively concealed the sale price for Mr. Albiston's 51% of the company from the ESOP participants. To this day, no ESOP participant other than Joseph Albiston and Defendant Guerin have seen a purchase and sale agreement or any other documents confirming the sale price.

25. When ESOP participants inquired of Mr. Guerin, they were told that the sale price was confidential and that they were not to ask about the sale price again.

26. Mr. Guerin, representing himself as the new owner, assured Maine Oxy's employees that "nothing would change" with the ESOP and profit-sharing plan. Despite this assurance, he immediately set about making substantial changes to the ESOP and profit-sharing plan.

27. Following his purchase of the majority shares and his installation as the new owner of Maine Oxy, Mr. Guerin paid an unexpected visit to the company's ESOP Committee.

28. Mr. Guerin informed the Committee that the company could not afford the ESOP and that the ESOP would have to be dissolved and shares sold back to the company.

29. Mr. Guerin made it clear to the Committee that a stock repurchase was the only way that the company could stay independent. Mr. Guerin also informed the Committee that the value of the employee owned stock was "frozen" and that the employee-owners had no alternative but to sell the stock back to the company.

30. In the Committee's final, brief meeting, Mr. Guerin depicted the imminent ESOP dissolution as a *fait accompli*, simply dependent upon reaching a majority number of participants availing themselves of the "opportunity" to sell their stock back to the company such that the ESOP could be discontinued.

31. At the direction of Defendants Guerin and Gentry, the valuation firm, third-party administrator, and law firms associated with management, accounting, and oversight of the ESOP were relieved of their duties with Maine Oxy and replaced. Maine Oxy also replaced employees in key financial positions and the Trustee of the ESOP.

32. Defendants Guerin and Gentry also orchestrated the demise of the ESOP Committee.

33. Defendant Guerin announced to all employee-owners that the ESOP would be replaced by a 401(k) and that employees who did not redeem their shares would be ineligible for a match under the new qualified plan.

34. Defendant Guerin also announced to all employee owners an “offer” and “opportunity” to sell their stock back to the company. The “opportunity” presented to employees came in the form of a “Special Diversification Eligibility Notice” dated August 9, 2013 (the “Notice”).

35. The Notice advised employees of the opportunity to “elect” to have their ESOP shares distributed to them so that they could “diversify” their investment into “alternatives other than investment in company stock for a portion of their ESOP balance.” Per the express terms of the Notice, this was a “one-time” offer that expired “no later than 30 days after receipt.” The Notice also states that if the “Special Diversification Election Form” accompanying the Notice was not returned within 30 days, “you will be considered as having made an election NOT to diversify any portion of your ESOP balance.”

36. A Special Diversification Election Form was sent to each ESOP employee. These forms set forth the cumulative value of each employee’s ESOP shares and required them to either “choose to make no diversification election” with the understanding that they “may or may not be given a similar opportunity in the future” or to “distribute my eligible balance according to my instructions below.”

37. If the employee chose to distribute their ESOP balance, they were given the following options: 1. to have some or all of cash value of their eligible shares distributed directly to the employee; 2. to roll over some or all of the eligible shares into Maine Oxy’s new 401k profit sharing plan; and/or 3. to roll some or all of the eligible shares into an eligible retirement account, such as an IRA.

38. The company hired by Maine Oxy to set up the new 401k plan referenced in the Special Diversification Election Form was queried by at least one employee as to what, if any other options were available.

39. The employee was informed that the only option was to sign over the stock and that the best thing thereafter would be to roll the proceeds from the company's purchase of his ESOP shares into the new 401(k) set up by the company.

40. Employees were concerned that their ability to participate in the new 401(k) would be foreclosed or that they would be ineligible for an employer match if they did not exercise one of the options presented by the company within the thirty day deadline.

41. Defendant Guerin appointed himself as the sole point of contact for any questions with respect to the Notice and emphasized the thirty-day time frame for this "opportunity."

42. All told, the employee-owners were collectively offered \$134.92 dollars a share for the 24,500 minority interest shares comprising 49% of the total number of shares — approximately \$3,305,540.00 in total.

43. The documentation provided to Plaintiffs and the Class with respect to the sale of ESOP stock back to Defendant Maine Oxy does not reveal the \$134.92 share price paid to the plan participants. In fact, the employees were not provided with any information about the share price they were paid.

44. In the meantime, the terms of the ESOP were unilaterally amended in order to eliminate the employees' right to receive common stock in the company upon dissolution of the plan.

45. Neither the ESOP Committee nor the ESOP Trustee was informed of the change. In fact, the Plan Trustee's signature was forged to the document implementing the change that divested employee-owners of their right to receive common shares upon dissolution of the ESOP.

46. Several Maine Oxy employees initially refused to avail themselves of the opportunity to sell the stock back to the company and resisted the forced buyback.

47. Deliberately using false and misleading measures, Defendant Guerin played an active and effective role in forcing owner-employees to sell their shares back to the company.

48. For example, Defendant Guerin informed several owner-employees that the company could not afford the ESOP plan and remain an independent company.

49. Defendant Guerin also stated that the value of the company was "frozen" and would "not go back up."

50. Despite Defendant Guerin's prior representations, the value of the shares was most certainly not "frozen" and continued to increase in value following the sale.

51. Holdouts to the "opportunity" were subject to threats, intimidation, and harassment.

52. In the final analysis, the understanding of the owner-employees was that that the "opportunity" presented to them, however worded, was most certainly neither an option they could refuse nor an "opportunity" by any reasonable measure.

53. On December 27, 2013 the Sun Journal newspaper reported that Defendant Guerin had assumed full ownership of Maine Oxy.

54. At the time of the sale, Maine Oxy was moving forward with substantial acquisitions and merger activity to fuel the future growth of the company.

55. Since Defendant Guerin's forced acquisition of the employees' stock, the value of the company has substantially increased. Among other things, subsequent acquisitions of and affiliations with other major gas and air entities in the industry have added to the company's value and increased its profits.

56. Defendant Gentry worked in concert with Defendant Guerin and Defendant Maine Oxy to deliberately acquire all of the ESOP stock from Maine Oxy's employees at a steep discount.

57. In May or June of 2016, an ESOP participant met with Mr. Bruce Albiston. During this meeting, Mr. Bruce Albiston revealed that had received 43 million dollars for his 51% share of the company. This was the first time that any of the ESOP participants learned that they may have unwittingly sold their shares back to the company at a steep discount.

58. During the summer of 2016, Bryan Gentry's son Jason, who was working for Maine Oxy at the time, told one or more employees that his father had paid 43 million dollars for Mr. Albiston's 51% share.

59. As a result of Defendants' termination of the ESOP and the forced buyback of the ESOP shares, Plaintiffs and the Class were divested of the right to continue to hold Maine Oxy shares and they received less than fair market value for their Maine Oxy stock. Additionally, Plaintiffs and the prospective class members have lost out on investment gains from the continued rise in Maine Oxy's value, the dividends and tax distributions paid, and

the opportunity for future investment gains, dividends and tax distributions of Maine Oxy stock.

CLASS ACTION ALLEGATIONS

60. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to ERISA and Rule 23 of the Federal Rules of Civil Procedure.

61. The questions arising in this action are of an interest common or general to all members of the class.

62. The members of the Class are so numerous that joinder of all members is impracticable. Specifically, Plaintiffs estimate that there are over 100 members of the Class.

63. Plaintiffs therefore sue for the benefit of all Class members.

64. The Class that Plaintiff seeks to represent is defined as follows:

All Maine Oxy employees who participated in the company ESOP and who sold their shares back to Maine Oxy after the Albistons sold their 51% interest in the company.

65. The identities of all Class Members are known to Defendant Maine Oxy, and records should exist with respect to all aspects of the Class's claims.

66. There are questions of law and fact common to the Class, including without limitation the following:

- a. Whether or not 51% of the company was sold in 2012-2013 for more than 3.4 million dollars, the value that was implicitly provided to Maine Oxy's employees via the valuation of the 49% of shares owned by the employees;

- b. Whether or not Defendants intentionally or negligently provided false and inaccurate valuations of its stock to ESOP participants at any time prior to coercing them to sell their shares back to the company;
- c. Whether or not Defendants deliberately and unlawfully misled, defrauded and/or otherwise coerced its ESOP participants into selling their shares back to the company at \$134 dollars a share for the 24,500 minority interest shares—approximately 3.3 million dollars in total;
- d. Whether or not the ESOP participants are entitled to an additional distribution based on the true value of their shares as determined by the price paid by Defendant Mr. Guerin for 51% of the company in 2012;
- e. Whether or not Defendants, by their actions set forth above or otherwise, violated the terms and provisions of the ERISA statute, specifically;
- f. Whether or not Defendants' misconduct caused Plaintiffs and the Class to incur a substantial loss of value with respect to their ESOP stock shares and the Plan as a whole;
- g. Whether or not and to what extent the Defendants have profited from the ESOP assets since the repurchase of employee shares was completed;
- h. Whether or not the ESOP participants are entitled to a share of Defendants' profits since the repurchase of employee shares was completed.
- i. Whether or not Defendants engaged in a prohibited transaction pursuant to ERISA;
- j. Whether or not the losses suffered by the ESOP and ESOP participants were a result of Defendants' ERISA violations; and
- k. The appropriate relief for Defendants' ERISA violations.

67. Plaintiffs are members of the Class. Plaintiffs' claims are typical of the claims of the Class Members and Plaintiffs will fairly and adequately protect the interests of the

Class. The interests of the Plaintiffs are coincident with, and not antagonistic to, those of the other members of the Class.

68. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among other things, prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members.

69. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among other things, prosecuting separate actions by or against individual class members would create a risk of adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

70. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among other things, the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members.

71. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Among other things, prosecution of these claims as a class action will eliminate the possibility of repetitious litigation.

72. To Plaintiffs' knowledge, there is no other pending litigation against the Class members or the Defendants arising from the allegations set forth in this complaint.

73. Concentrating the litigation of the claims set forth in this complaint in this forum is desirable, as both Defendants and most of the Class members reside in Maine.

74. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

COUNT I
Breach of Fiduciary Duty – 29 U.S.C. § 1132
(Maine Oxy)

75. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

76. The members of the Class are participants and/or beneficiaries of the ESOP as contemplated by the provisions of 29 U.S.C. § 1332(a).

77. Based on the foregoing, the members of the Class are entitled to enforce their rights under the terms of the ESOP, and to seek additional benefits that are due to them under the terms of the ESOP. Specifically, the members of the Class are entitled to receive the difference between the amounts paid by Maine Oxy to buy back their shares and the true value of these shares, as established by the sale of the company or otherwise.

COUNT II
Breach of Fiduciary Duty – 29 U.S.C. § 1132
(Daniel Guerin)

78. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

79. The members of the Class are participants and/or beneficiaries of the ESOP as contemplated by the provisions of 29 U.S.C. § 1332(a).

80. Based on the foregoing, the members of the Class are entitled to enforce their rights under the terms of the ESOP, and to seek additional benefits that are due to them under the terms of the ESOP. Specifically, the members of the Class are entitled to receive the difference between the amounts paid by Maine Oxy to buy back their shares and the true value of these shares, as established by the sale of the company or otherwise.

COUNT III
Breach of Fiduciary Duty – 29 U.S.C. § 1106
(Maine Oxy)

81. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

82. The members of the Class are participants and/or beneficiaries of the ESOP as contemplated by the provisions of 29 U.S.C. § 1332(a).

83. At all relevant times, Defendant Maine Oxy was a fiduciary for the ESOP as contemplated by the provisions of 29 U.S.C. § 1109.

84. At all relevant times, Defendant Maine Oxy was a party in interest as defined by 29 U.S.C. § 1002(A).

85. At a minimum, Defendant Maine Oxy intentionally and/or negligently misrepresented the value of the employees' 49% share of the company in order to facilitate the purchase of the employee stock at a steep discount, to the direct financial benefit of both Defendants and to the detriment of the ESOP participants.

86. By its actions, Defendant Maine Oxy has violated the provisions of 29 U.S.C. § 1106(a)(1)(A), which prohibits fiduciaries from engaging in any transaction if they knew or

should have known that such transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party in interest.

87. By its actions, Defendant Maine Oxy has violated the provisions of 29 U.S.C. § 1106(a)(1)(D), which prohibits fiduciaries from engaging in any transaction if they knew or should have known 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 ESOP.

88. By its actions, Defendant Maine Oxy has violated the provisions of 29 U.S.C. § 1106(b)(1), which prohibits fiduciaries from dealing with the assets of the ESOP for their own interests or for their own account.

89. By its actions, Defendant Maine Oxy has violated the provisions of 29 U.S.C. § 1106(b)(2), which prohibits fiduciaries in their individual or in any other capacities from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants.

90. By its actions, Defendant Maine Oxy has violated the provisions of 29 U.S.C. § 1106(b)(3), which prohibits fiduciaries from receiving any consideration for their own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

91. As a result of the Defendant Maine Oxy's breach of its fiduciary obligations to the Class, the members of the Class have incurred a substantial loss of value with respect to their ESOP stock shares and the Plan in general. .

92. As a result of the Defendant Maine Oxy's breach of its fiduciary obligations to the Class, it is liable to the members of the class to: 1. compensate them for all losses

resulting from the Defendants' breaches of their fiduciary duty; 2. restore any profits made by the Defendants through the use of ESOP assets; and 3. provide such other equitable or remedial relief as the court may deem appropriate.

COUNT IV
Breach of Fiduciary Duty – 29 U.S.C. § 1109
(Daniel Guerin)

93. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

94. The members of the Class are participants and/or beneficiaries of the ESOP as contemplated by the provisions of 29 U.S.C. § 1332(a).

95. At all relevant times, Defendant Mr. Guerin was a fiduciary for the Maine Oxy ESOP as contemplated by the provisions of 29 U.S.C. § 1109.

96. At all relevant times, Defendant Mr. Guerin was a party in interest as defined by 29 U.S.C. § 1002(A).

97. At a minimum, Defendant Mr. Guerin intentionally and/or negligently misrepresented the value of the employees' 49% share of the company in order to facilitate the purchase of the employee stock at a steep discount, to the direct financial benefit of both Maine Oxy and Mr. Guerin personally and to the detriment of the ESOP participants.

98. By his actions, Defendant Mr. Guerin has violated the provisions of 29 U.S.C. § 1106(a)(1)(A), which prohibits fiduciaries from engaging in any transaction if they knew or should have known that such transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party in interest.

99. By his actions, Defendant Mr. Guerin has violated the provisions of 29 U.S.C. § 1106(a)(1)(D), which prohibits fiduciaries from engaging in any transaction if they knew or should have known 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 ESOP.

100. By his actions, Defendant Mr. Guerin has violated the provisions of 29 U.S.C. § 1106(b)(1), which prohibits fiduciaries from dealing with the assets of the ESOP for their own interests or for their own account.

101. By his actions, Defendant Mr. Guerin has violated the provisions of 29 U.S.C. § 1106(b)(2), which prohibits fiduciaries in their individual or in any other capacities from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants.

102. By his actions, Defendant Mr. Guerin has violated the provisions of 29 U.S.C. § 1106(b)(3), which prohibits fiduciaries from receiving any consideration for their own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

103. As a result of the Defendant Mr. Guerin's breach of his fiduciary obligations to the Class, the members of the Class have suffered a substantial loss of value with respect to their ESOP stock shares and the Plan in general. .

104. As a result of Defendant Mr. Guerin's breach of their fiduciary obligations to the Class, he is personally liable to the members of the class to: 1. compensate them for all losses resulting from the Defendants' breaches of their fiduciary duty; 2. restore any profits

made by the Defendants through the use of ESOP assets; and 3. provide such other equitable or remedial relief as the court may deem appropriate.

COUNT V
Breach of Fiduciary Duty – 29 U.S.C. § 404(a)(1)
(Maine Oxy)

105. Plaintiffs repeat and reallege all preceding paragraphs as if fully 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 ESOP; (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.

107. 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 participant receives adequate consideration for the assets in his or her account in the Plan. 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 named fiduciary pursuant to the terms of the plan and in accordance with the Department of Labor regulations.

108. As set forth above, prior to the forced buyback in 2013 Defendant Maine Oxy was aware of other valuations of its stock that should have alerted them to the fact that the valuation used in connection with the forced sale did not reflect the fair market value of the stock.

109. Based on the foregoing, Defendant Maine Oxy breached its fiduciary duty under 29 U.S.C § 404(a)(1)(A),(B) and (D) insofar as the value of the Class members' accounts and the Plan were decreased.

COUNT VI
Breach of Fiduciary Duty – 29 U.S.C. § 404(a)(1)
(Dan Guerin)

110. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

111. 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 ESOP; (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.

112. 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 participant receives adequate consideration for the assets in his or her account in the Plan.

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 named fiduciary pursuant to the terms of the plan and in accordance with the Department of Labor regulations.

113. As set forth above, prior to the forced buyback in 2013 Defendant Guerin was aware of other valuations of its stock that should have alerted them to the fact that the valuation used in connection with the forced sale did not reflect the fair market value of the stock.

114. Based on the foregoing, Defendant Guerin breached his fiduciary duty under 29 U.S.C § 404(a)(1)(A),(B) and (D) insofar as the value of the Class members' accounts and the Plan were decreased.

COUNT VII
Breach of Fiduciary Duty – 29 U.S.C. § 404(a)(1)
(Bryan Gentry)

115. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

116. 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 ESOP; (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.

117. 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 participant receives adequate consideration for the assets in his or her account in the Plan. 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 named fiduciary pursuant to the terms of the plan and in accordance with the Department of Labor regulations.

118. As set forth above, prior to the forced buyback in 2013 Defendant Gentry was aware of other valuations of its stock that should have alerted them to the fact that the valuation used in connection with the forced sale did not reflect the fair market value of the stock.

119. Based on the foregoing, Defendant Gentry breached his fiduciary duty under 29 U.S.C § 404(a)(1)(A),(B) and (D) insofar as the value of the Class members' accounts and the Plan were decreased.

COUNT VIII
Breach of Fiduciary Duty – 29 U.S.C. § 1132
(Bryan Gentry)

120. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

121. The members of the Class are participants and/or beneficiaries of the ESOP as contemplated by the provisions of 29 U.S.C. § 1332(a).

122. Based on the foregoing, the members of the Class are entitled to enforce their rights under the terms of the ESOP, and to seek additional benefits that are due to them under the terms of the ESOP. Specifically, the members of the Class are entitled to receive the difference between the amounts paid by Maine Oxy to buy back their shares and the true value of these shares, as established by the sale of the company or otherwise.

COUNT IX
Breach of Fiduciary Duty – 29 U.S.C. § 1109
(Bryan Gentry)

123. Plaintiffs repeat and reallege all preceding paragraphs as if fully set forth herein.

124. The members of the Class are participants and/or beneficiaries of the ESOP as contemplated by the provisions of 29 U.S.C. § 1332(a).

125. At all relevant times, Defendant Gentry was a fiduciary for the Maine Oxy ESOP as contemplated by the provisions of 29 U.S.C. § 1109.

126. At all relevant times, Defendant Gentry was a party in interest as defined by 29 U.S.C. § 1002(A).

127. At a minimum, Defendant Gentry intentionally and/or negligently misrepresented the value of the employees' 49% share of the company in order to facilitate the purchase of the employee stock at a steep discount, to the direct financial benefit of both Maine Oxy and Mr. Guerin personally and to the detriment of the ESOP participants.

128. By his actions, Defendant Gentry has violated the provisions of 29 U.S.C. § 1106(a)(1)(A), which prohibits fiduciaries from engaging in any transaction if they knew or

should have known that such transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party in interest.

129. By his actions, Defendant Gentry has violated the provisions of 29 U.S.C. § 1106(a)(1)(D), which prohibits fiduciaries from engaging in any transaction if they knew or should have known 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 ESOP.

130. By his actions, Defendant Gentry has violated the provisions of 29 U.S.C. § 1106(b)(1), which prohibits fiduciaries from dealing with the assets of the ESOP for their own interests or for their own account.

131. By his actions, Defendant Gentry has violated the provisions of 29 U.S.C. § 1106(b)(2), which prohibits fiduciaries in their individual or in any other capacities from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants.

132. By his actions, Defendant Gentry has violated the provisions of 29 U.S.C. § 1106(b)(3), which prohibits fiduciaries from receiving any consideration for their own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

133. As a result of the Defendant Gentry's breach of his fiduciary obligations to the Class, the members of the Class have suffered losses to their accounts and to the Plan.

134. As a result of Defendant Gentry's breach of his fiduciary obligations to the Class, he is personally liable to the members of the class to: 1. compensate them for all losses resulting from the Defendants' breaches of their fiduciary duty; 2. restore any profits made

by the Defendants through the use of ESOP assets; and 3. provide such other equitable or remedial relief as the court may deem appropriate.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, pray for the following relief:

- A. That the Court certify the Class, appoint Plaintiffs as Class Representatives, and appoint undersigned counsel as Class Counsel;
- B. Declare that Defendants have breached their fiduciary duties to the Class and/or knowingly participated in breaches of fiduciary duty;
- C. Order Defendants to provide other appropriate equitable relief to the ESOP, Plaintiffs, and the Class, including but not limited to surcharge, rescission, reformation of the Plan, providing an accounting for profits, imposing a constructive trust and/or equitable lien on any funds wrongfully held by Defendants.
- D. Requiring Defendants to make good any losses suffered by Plaintiffs and the Class from the forced sale of the Maine Oxy stock held in their individual accounts in the ESOP in 2012 and disgorge to Plaintiffs and the Class any profits they have made from the forced sale.
- E. Order the proceeds of any recovery for the Plan to be allocated to the ESOP accounts of Class members, to render 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;

F. Ordering pursuant to ERISA 206(d)(4) that any amount to be paid to or necessary to restore Plaintiff's ESOP account can be satisfied by using or transferring any breaching fiduciary's interest in Maine Oxy in the Plan to the extent of their liability;

G. Award Plaintiffs reasonable attorneys' fees and costs of suit incurred herein pursuant to ERISA 502(g) and/or for the benefit obtained for the common fund;

H. Order Defendants to pay any prejudgment interest; and

I. Such other and further relief as the Court deems just.

Dated: June 2, 2020

Respectfully submitted,

/s/ Thomas L. Douglas, Esq.
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