

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN**

CAROL CHESEMORE, DANIEL DONKLE,
THOMAS GIECK, MARTIN ROBBINS, and
NANNETTE STOFLET, on behalf of
themselves, Individually, and on behalf of all
others similarly situated,

Plaintiffs,

v.

ALLIANCE HOLDINGS, INC., A.H.I., INC.,
AH TRANSITION CORPORATION,
DAVID B. FENKELL, KAREN FENKELL,
PAMELA KLUTE, JAMES
MASTRANGELO, STEPHEN W.
PAGELOW, JEFFREY A. SEEFELDT,
ALPHA INVESTMENT CONSULTING
GROUP, LLC, and JOHN MICHAEL
MAIER,

Defendants,

and

TRACHTE BUILDING SYSTEMS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN
and ALLIANCE HOLDINGS, INC.
EMPLOYEE STOCK OWNERSHIP PLAN
AND TRUST,

Nominal Defendants.

Civil Action No. 09-CV-00413-wmc

Judge William M. Conley

THIRD AMENDED CLASS ACTION COMPLAINT

Plaintiffs Carol Chesemore, Daniel Donkle, Thomas Gieck, Martin Robbins, and
Nannette Stoflet, individually and on behalf of all those similarly situated, by and through their
attorneys, hereby allege as follows:

NATURE OF THE ACTION

1. This action arises under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, *et seq.*, and is brought on behalf of current and former employees of Trachte Building Systems, Inc. (“Trachte” or the “Company”) who are participants in the Trachte Building Systems, Inc. Employee Stock Ownership Plan (“Trachte ESOP,” or “the Plan”) to restore losses to the Plan and obtain equitable relief to remedy violations of ERISA and/or breaches of fiduciary duty by Defendants.

2. This action arises out of a Transaction involving the Trachte ESOP that occurred on or about August 29, 2007 (the “2007 Transaction”). As the first part of the 2007 Transaction, the assets of the accounts of Trachte employees who were participants in the Alliance Holdings Employee Stock Ownership Plan and Trust (“Alliance ESOP”), consisting of Alliance Holdings, Inc. (“Alliance”) stock and AH Transition Corporation (“AH Transition”) stock, were transferred into the Trachte ESOP (the “Spin-off”). Second, the Trachte ESOP exchanged the Alliance and AH Transition stock for Trachte stock and purchased additional shares of Trachte stock from Alliance, AH Transition, and Defendant Stephen W. Pagelow (the “Buyback”).

3. Immediately after the 2007 Transaction, the value of Trachte ESOP participants’ accounts was significantly less than the value was before the transaction, both because the Alliance and AH Transition stock had less value after the transfer than before the transfer, and also because the stock was exchanged for and conditioned on the purchase of overpriced Trachte stock. The value of the participants’ accounts, consisting almost exclusively of Trachte stock, was further jeopardized because Trachte acquired more debt than it could reasonably service in order to finance the 2007 Transaction. Moreover, the executive compensation of fiduciaries responsible for approving the transaction and valuing the Trachte stock for purposes of the 2007

Transaction was based on the price paid for the Trachte stock by the Trachte ESOP, putting those fiduciaries in such a position that their personal interests were in conflict with the interests of the Trachte ESOP participants and beneficiaries. As a result of the 2007 Transaction and the effect of the debt on Trachte, the accounts of the participants in the Trachte ESOP have significantly declined in value and Trachte itself is burdened with excessive debt that is threatening the viability of the Company.

4. This action seeks relief against Defendants for violations of ERISA's statutory and fiduciary provisions, including rescission of the Spin-off and restoration of the accounts of the Trachte ESOP participants and beneficiaries in the Alliance ESOP, recovery to the Trachte and Alliance ESOPs of any losses resulting from the breaches, disgorgement of any profits of any fiduciary which have been made through the use of assets of the Alliance or Trachte ESOP, and other appropriate equitable and remedial relief pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States and pursuant to 29 U.S.C. § 1132(e)(1), which provides for jurisdiction of actions brought under Title I of ERISA.

6. This Court has personal jurisdiction over each of the Defendants because (a) upon information and belief, Defendants have, or during the times relevant to this Complaint, had extensive contacts with the State of Wisconsin as a result of their positions or affiliations with Trachte, (b) a number of Defendants, including Stephen W. Pagelow, James Mastrangelo, Jeffrey A. Seefeldt, Pamela Klute, John Maier and Alpha Investment Consulting Group, LLC are or were at the time of the 2007 Transaction residents of the State of Wisconsin and (c) because ERISA provides for nationwide service of process.

7. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) because (a) the Trachte ESOP is administered in this District, (b) some or all of the breaches of fiduciary duty and violations of ERISA took place in this District and/or (c) at least one Defendant, and up to five Defendants, reside(s) or may be found in this District.

PARTIES

Plaintiffs

8. Plaintiff Carol Chesemore was an employee of Trachte from 1988 until May 2006. She was a participant in an ESOP sponsored by Trachte prior to September 18, 2002 (the “Old Trachte ESOP”) and a participant in the Alliance ESOP from September 18, 2002 until at least August 29, 2007 when her Alliance ESOP account was transferred to the new Trachte ESOP. From August 29, 2007 until the present she has been a vested participant in the Trachte ESOP with Trachte stock shares allocated to her individual account. She continues to have a colorable claim for benefits against the Alliance ESOP and therefore is a participant of the Alliance ESOP as defined in ERISA § 3(7), 29 U.S.C. § 1002(7). She has been a resident of the State of Wisconsin from at least 1988 until the present and currently resides in Sun Prairie, Wisconsin, which is located in this District.

9. Plaintiff Daniel Donkle was an employee of Trachte from 1988 until 1998. He was a participant in the Old Trachte ESOP prior to September 18, 2002, and a participant in the Alliance ESOP from September 18, 2002 until at least August 29, 2007 when his Alliance ESOP account was transferred to the new Trachte ESOP. From August 29, 2007 until the present he has been a vested participant in the Trachte ESOP with Trachte stock shares allocated to his individual account. He continues to have a colorable claim for benefits against the Alliance ESOP and therefore is a participant of the Alliance ESOP as defined in ERISA § 3(7), 29 U.S.C.

§ 1002(7). He has been a resident of the State of Wisconsin from at least 1988 until the present and currently resides in Cambridge, Wisconsin, which is located in this District.

10. Plaintiff Thomas Gieck was an employee of Trachte from 1969 until he was laid off on April 30, 2009. He was a participant in the Old Trachte ESOP prior to September 18, 2002, and a participant in the Alliance ESOP from September 18, 2002 until at least August 29, 2007 when his Alliance ESOP account was transferred to the new Trachte ESOP. From August 29, 2007 until the present he has been a vested participant in the Trachte ESOP with Trachte stock shares allocated to his individual account. He continues to have a colorable claim for benefits against the Alliance ESOP and therefore is a participant of the Alliance ESOP as defined in ERISA § 3(7), 29 U.S.C. § 1002(7). He has been a resident of the State of Wisconsin from at least 1969 until the present and currently resides in Sun Prairie, Wisconsin, which is located in this District.

11. Plaintiff Martin Robbins was an employee of Trachte from 1972 until he was laid-off on April 30, 2009. He was a participant in the Old Trachte ESOP prior to September 18, 2002, and a participant in the Alliance ESOP from April 18, 2002 until at least August 29, 2007 when his Alliance ESOP account was transferred to the new Trachte ESOP. From August 29, 2007 until the present, he has been a vested participant in the Trachte ESOP with Trachte stock shares allocated to his individual account. He continues to have a colorable claim for benefits against the Alliance ESOP and therefore is a participant of the Alliance ESOP as defined in ERISA § 3(7), 29 U.S.C. § 1002(7). He has been a resident of the State of Wisconsin from at least 1972 until the present and currently resides in Madison, Wisconsin, which is located in this District.

12. Plaintiff Nannette Stoflet has been an employee of Trachte from 1986 until the present (although as of April 2011 she is on a layoff). She was a participant in the Old Trachte ESOP prior to September 18, 2002, and a participant in the Alliance ESOP from April 18, 2002 until at least August 29, 2007 when her Alliance ESOP account was transferred to the new Trachte ESOP. From August 29, 2007 until the present, she has been a vested participant in the Trachte ESOP with Trachte stock shares allocated to her individual account. She continues to have a colorable claim for benefits against the Alliance ESOP and therefore is a participant of the Alliance ESOP as defined in ERISA § 3(7), 29 U.S.C. § 1002(7). She has been a resident of the State of Wisconsin from at least 1986 until the present and currently resides in Sun Prairie, Wisconsin, which is located in this District.

Trachte Defendants

13. Defendant Stephen W. Pagelow was the Chief Executive Officer and Chairman of the Trachte Board of Directors from the spring of 2007 until at least August 2007 and a member of the Trachte Board of Directors from September 2007 to the present. In his role as a member of the Trachte Board of Directors, Defendant Pagelow was and is a fiduciary with respect to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because he has exercised and is exercising discretionary authority and control respecting management of the Trachte ESOP and/or authority and control respecting management or disposition of its assets. Defendant Pagelow was at the time of the 2007 Transaction a party in interest with respect to the Trachte ESOP within the meaning of ERISA § 3(14)(I), 29 U.S.C. § 1002(14)(I) because he was a 10 percent or more shareholder of Trachte. On information and belief, Defendant Pagelow resides in Madison, Wisconsin, which is located in this District.

14. Defendant James Mastrangelo was the Executive Vice President/Chief Operating Officer of Trachte since July 23, 2007 and upon information and belief was recently terminated from Trachte. Between at least April 8, 2007 and August 1, 2007, Defendant Mastrangelo was appointed or purported to act as the “Representative” of the Trachte ESOP and exercised authority and control respecting management or disposition of the assets of the Trachte ESOP. Since at least August 1, 2007 to the present, Defendant Mastrangelo has been a Trustee of the Trachte ESOP. In both his role as “Representative” and Trustee of the Trachte ESOP, Defendant Mastrangelo was and is a fiduciary with respect to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21) because he has exercised or is exercising discretionary authority and control respecting management of the Trachte ESOP and/or authority and control respecting management or disposition of its assets. On information and belief, Defendant Mastrangelo resides in Sun Prairie, Wisconsin, which is located in this District.

15. Defendant Jeffrey A. Seefeldt was President of Trachte from at least 2006 through the August 29, 2007 Transaction and was the Chief Executive Officer/President of Trachte from November 2007 through September, 2009. Between at least April 8, 2007 and August 1, 2007, Defendant Seefeldt was appointed or purported to act as the “Representative” of the Trachte ESOP and exercised authority and control respecting management or disposition of the assets of the Trachte ESOP. Since at least August 1, 2007 until September, 2009, Defendant Seefeldt has been a Trustee of the Trachte ESOP. In both his role as “Representative” and Trustee of the Trachte ESOP, Defendant Seefeldt was and is a fiduciary with respect to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21) because he has exercised or is exercising discretionary authority and control respecting management of the Trachte ESOP and/or authority and control respecting management or disposition of its assets.

On information and belief, Defendant Seefeldt resides in Middleton, Wisconsin, which is located in this District.

16. Defendant Pamela J. Klute has been Vice-President of Human Resources for Trachte since 1995. From August 1, 2007 to the present, Defendant Klute has been a Trustee of the Trachte ESOP. At the time of the 2007 Transaction, Defendant Klute was President of the Wisconsin Chapter of the ESOP Association. As Trustee of the Trachte ESOP and as a result of her exercise of authority and control respecting management or disposition of the assets of the Trachte ESOP, Defendant Klute is and at the time of the 2007 Transaction was a fiduciary with respect to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21). On information and belief, Defendant Klute resides in Sun Prairie, Wisconsin, which is located in this District.

17. Defendants Mastrangelo, Seefeldt and Klute are collectively referred to in this Complaint as “the Trachte Trustee Defendants.”

Alliance Defendants

18. Defendant Alliance Holdings, Inc. (“Alliance”) has been the sponsor and the Named Fiduciary of the Alliance ESOP since 1995. As the Alliance ESOP Named Fiduciary, Alliance has the authority to appoint the Plan Administrator and Trustee and the responsibility to monitor their performance. Defendant Alliance is, and was at the time of the 2007 Transaction, a fiduciary with respect to the Alliance ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because of its position as the Named Fiduciary and because of its discretionary authority or discretionary responsibility in the administration of the Alliance ESOP. Defendant Alliance was a party in interest to the Trachte ESOP from the formation of the Trachte ESOP in the spring of 2007 until August 29, 2007 within the meaning of ERISA § 3(14)(E), 29 U.S.C. § 1002(14)(E), because it owned, through its ownership of A.H.I., Inc., directly or indirectly 50

percent or more of the combined voting power of all classes of stock entitled to vote of Trachte, which is an employer of employees covered by the Trachte ESOP.

19. Defendant A.H.I., Inc. (“AHI”) is a wholly-owned subsidiary of Alliance. Prior to the sale of Trachte stock to the Trachte ESOP, Alliance transferred all of its Trachte stock to A.H.I., Inc. Defendant A.H.I., Inc. was a party in interest to the Trachte ESOP from the time of the transfer until August 29, 2007 within the meaning of ERISA § 3(14)(E), 29 U.S.C. § 1002(14)(E), because it owned 50 percent or more of the combined voting power of all classes of stock entitled to vote of Trachte, which is an employer of employees covered by the Trachte ESOP.

20. Defendant David B. Fenkell (“Defendant Fenkell or Defendant David Fenkell”) has been, from 1995 to the present, the sole Trustee of the Alliance ESOP and the President, Chief Executive Officer and sole member of the Board of Directors of Alliance. As the sole member of the Alliance Board of Directors, he had the responsibility for appointing the Alliance ESOP Plan Administrator and Trustee. Defendant Fenkell is and was at the time of the 2007 ESOP transaction a fiduciary of the Alliance ESOP within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), because of his position as Trustee and because of his exercise of authority and control respecting management or disposition of the Alliance ESOP’s assets. As the sole member of the Alliance Board of Directors, he is and was at the time of the 2007 Transaction also a fiduciary with respect to the Alliance ESOP within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), because of his discretionary authority or discretionary responsibility in the administration of the Alliance ESOP. Upon information and belief, Defendant Fenkell is a resident of Pennsylvania.

21. AH Transition Corporation (“AH Transition”) is a corporation wholly owned by the Alliance ESOP. At the time of the 2007 Transaction, AH Transition owned fifty percent of the outstanding stock of Alliance. As a part of the 2007 Transaction, Defendant AHI assigned to AH Transition 92.87% of a promissory note from the Trachte ESOP. As such, Defendant AH Transition received proceeds from the 2007 Transaction.

22. Defendants Alliance, AHI, AH Transition and Fenkell are collectively referred to in this Complaint as the “Alliance Defendants.”

Defendant Karen Fenkell

23. Defendant Karen Fenkell (“Defendant Karen Fenkell”) is, and at least since August 2007, has been the spouse of Defendant David Fenkell. On information and belief, Defendant Karen Fenkell is the gratuitous recipient of the proceeds disbursed to Defendant Fenkell from the Trachte Building Systems, Inc. Phantom Stock Plan for Alliance Employees (“Phantom Stock Plan”) in connection with the 2007 Transaction. Upon information and belief, Defendant Karen Fenkell is a resident of Pennsylvania.

Alpha Defendants

24. Defendant Alpha Investment Consulting Group, LLC (“Alpha”) is an investment consulting group located in Milwaukee, Wisconsin. On August 13, 2007, Alpha was appointed as an independent fiduciary to the Trachte ESOP with purported authority to review the 2007 Transaction and to direct the Trachte Trustees to execute the transaction. Defendant Alpha purportedly directed the Trachte Trustee Defendants to engage in the 2007 Transaction and was a fiduciary with respect to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because it exercised discretionary authority and control respecting management of the Trachte ESOP and/or exercised authority and control respecting management or disposition of its assets.

25. Defendant John Michael Maier is a Senior Consultant for Alpha and was the individual who reviewed the 2007 Transaction for Alpha, and directed the Trachte Trustees to proceed with the transaction. Defendant Maier purportedly directed the Trachte Trustee Defendants to engage in the 2007 Transaction and was a fiduciary with respect to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because he exercised discretionary authority and control respecting management of the Trachte ESOP and/or exercised authority and control respecting management or disposition of its assets.

26. Defendants Alpha and Maier are collectively referred to as the “Alpha Defendants.”

27. Defendants A.H.I. and Pagelow are collectively referred to as the “Selling Defendants.”

Nominal Defendants

The Trachte ESOP

28. Nominal Defendant Trachte Building Systems, Inc. Employee Stock Ownership Plan (“Trachte ESOP”) is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), a pension plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and a defined contribution plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(34) which is administered in Sun Prairie, Wisconsin. The Trachte ESOP is designed to be an employee stock ownership plan (“ESOP”) that meets the requirements of Section 4975(e)(7) of the Internal Revenue Code and Section 54.4975-11 of the Regulations promulgated by the Secretary of the Treasury. The Trachte ESOP is named as a defendant in this action pursuant to Federal Rules of Civil Procedure Rule 19, solely to assure that complete relief can be granted.

The Alliance ESOP

29. Nominal Defendant Alliance Holdings, Inc. Employee Stock Ownership Plan and

Trust (“Alliance ESOP”) is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), a pension plan within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2), and a defined contribution pension plan within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34). From April 18, 2002 until at least August 29, 2007, the participants of the Alliance ESOP included Trachte employees. The Alliance ESOP is designed to be an employee stock ownership plan (“ESOP”) that meets the requirements of Section 4975(e)(7) of the Internal Revenue Code and Section 54.4975-11 of the Regulations promulgated by the Secretary of the Treasury. The Alliance ESOP is named as a defendant in this action pursuant to Federal Rules of Civil Procedure Rule 19, solely to assure that complete relief can be granted.

RELEVANT NON-PARTY

30. Trachte Building Systems, Inc. (“Trachte” or “TBS”) is a Wisconsin corporation with its headquarters and principal place of business in Sun Prairie, Wisconsin. According to its website, www.trachte.com, Trachte is one of the largest manufacturers of steel storage systems in the industry. Trachte is currently 100% owned by the Trachte ESOP and shares of Trachte stock constitute almost all of the assets of the Trachte ESOP

CLASS ACTION ALLEGATIONS

31. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the following Classes:

The Class: All persons who were participants or beneficiaries of the Trachte ESOP at any time from August 29, 2007 to the present; and

The Subclass: All persons who were participants or beneficiaries of the Alliance ESOP at the time of the 2007 Transaction and whose accounts were transferred to the Trachte ESOP on or about August 29, 2007 as part of the 2007 Transaction.

Excluded from the Class and the Subclass are the Defendants named herein, any fiduciary of the Trachte ESOP, any fiduciary of the Alliance ESOP, members of their immediate families, and the legal representatives, heirs, successors or assigns of any such excluded party.

32. **Numerosity.** The members of the Class and Subclass are so numerous that joinder of all members is impracticable. According to the most recent Form 5500 filed with the Department of Labor, there were 247 participants of the Trachte ESOP as of December 31, 2008 all of whom are members of the Class. Upon information and belief, most, if not all of the members of the Class were also participants in the Alliance ESOP at the time of the 2007 Transaction and are members of the Subclass.

33. **Commonality.** This case presents numerous common questions of law and fact. The following common questions of law and fact are among those applicable to members of the Subclass:

- a. Whether Alliance violated Section 208 of ERISA, 29 U.S.C. § 1108, by spinning off Trachte participants from the Alliance ESOP when the Trachte participants did not receive benefits immediately after the transfer which were equal to or greater than the benefit they would have been entitled to receive immediately before the transfer (if the plan had then been terminated).
- b. Whether Defendant Fenkell breached his fiduciary duties of prudence and loyalty to the Trachte participants by failing to insure that, after the Spin-off of Trachte participants from the Alliance ESOP, the Trachte participants received benefits immediately after the transfer which were equal to or greater than the benefits they would have been entitled to

receive immediately before the transfer (if the plan had then been terminated).

- c. Whether the Trachte Trustee Defendants breached their fiduciary duties by failing to bring suit against Alliance and the Alliance ESOP fiduciaries for spinning off assets from the Alliance ESOP to the Trachte ESOP when the value of Trachte participant accounts in the Trachte ESOP was not equal to or greater than the value of Trachte participant accounts in the Alliance ESOP.

The following common questions of law and fact are among those applicable to members of the entire Class:

- a. Whether the Alpha Defendants and/or the Trachte Trustee Defendants breached their fiduciary duties of prudence and loyalty by causing the Trachte ESOP to exchange shares of Alliance and AH Transition stock for over-priced Trachte stock.
- b. Whether the Alpha Defendants and/or the Trachte Trustee Defendants breached their fiduciary duties by causing or permitting the Trachte ESOP to purchase Trachte stock for more than “adequate consideration.”
- c. Whether Defendant Pagelow is liable for the breach of fiduciary responsibility of another fiduciary.
- d. Whether the Plan has sustained losses and if so, what is the proper measure of such losses.
- e. Whether the Selling Defendants are liable to disgorge any benefit that they received by knowingly participating in the foregoing breaches of fiduciary

duty by the Alpha Defendants, Trachte Trustee Defendants, the Trachte Director Defendants, Defendant Fenkell and/or Alliance.

- f. Whether members of the Class are entitled to injunctive and declaratory relief.
- g. Whether members of the Class are entitled to attorneys fees.

34. **Typicality.** Plaintiffs' claims are typical of the claims of the Class and Subclass, as plaintiffs are participants or beneficiaries of the Trachte ESOP and were participants of the Alliance ESOP at the time of the 2007 Transaction and bring these claims for relief on behalf of the Plan and/or seeking identical equitable relief.

35. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of the Class and Subclass because of the following reasons:

- a. Named Plaintiffs have no interests antagonistic to or in conflict with the interests of the Class or the Subclass they seek to represent;
- b. Named Plaintiffs are willing to participate in and vigorously represent the interests of the Class and Subclass they seek to represent;
- c. Named Plaintiffs have retained counsel to represent themselves and the Class and Subclass and their counsel have significant experience prosecuting class actions in general and ERISA litigation specifically, including litigation involving ESOPs.

36. **Rule 23(b)(1)(B).** The requirements of Rule 23(b)(1)(B) are met in this action because prosecution of separate actions by the members of the Class and Subclass would create a risk of adjudications with respect to individual members of the Class and Subclass which

would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

37. **Rule 23(b)(1)(A).** The requirements of Rule 23(b)(1)(A) are met in this action because the prosecution of separate actions by the members of the Class and Subclass would create a risk of establishing incompatible standards of conduct for Defendants.

38. **Rule 23(b)(2).** The requirements of Rule 23(b)(2) are met in this action because Defendants have acted or refused to act on grounds generally applicable to the Class and Subclass, and final injunctive, declaratory, and other appropriate equitable relief with respect to the Class as a whole is appropriate. As to the claims asserted pursuant to ERISA § 502(a)(3), the only available relief is equitable relief.

39. **Rule 23(b)(3).** Additionally and alternatively, the requirements of Rule 23(b)(3) are met because the questions of law and/or fact set forth above are not only common, but will predominate over any individual questions in this action. A class action is superior to the other available methods for the fair and efficient adjudication of this litigation.

SUMMARY OF RELEVANT PLAN TERMS

The Trachte ESOP

40. At the time of the 2007 Transaction, the terms of the Trachte ESOP were governed by the Trachte Building Systems Employee Stock Ownership Plan effective August 1, 2007, or upon information and belief, substantially similar terms (the “Trachte ESOP Plan Document”).

41. Section 2.2 of the Trachte ESOP Plan Document defines “Administrator” to mean “the person or entity designated by the Plan Sponsor to administer the Plan as set forth in Section 7.2.”

42. Section 2.3 of the Trachte ESOP Plan Document defines “Affiliated Employer” as any corporation which is a member of a controlled group of corporations (as defined in Code § 414(b)) which includes the Plan Sponsor, any trade or business (whether or not incorporated) which is under common control (as defined in Code § 414(c)) with the Plan Sponsor, any organization (whether or not incorporated) which is a member of an affiliated service group (as defined in Code § 414(m)) which includes the Plan Sponsor, and any other entity required to be aggregated with the Plan Sponsor pursuant to the Regulations under Code § 414(o). The following entities were, under the Plan terms, Affiliated Employers of the Plan Sponsor at the time of the 2007 Transaction: Fire Facilities, Inc.; Trac-Rite Door, Inc.; and Store-N-Save Self Storage, Ltd.”

43. The Trachte ESOP Plan Document did not identify Alliance as an “Affiliated Employer” at the time of the 2007 Transaction.

44. Section 2.11 of the Trachte ESOP Plan Document defines “Employer” to mean “the Plan Sponsor and its Affiliated Employers.”

45. The Trachte ESOP Plan document did not identify Alliance as an “Employer” at the time of the 2007 Transaction.

46. Section 2.12 of the Trachte ESOP Plan Document defines “Employer Stock” to mean “stock that constitutes ‘employer security’ under Code § 409(l) with respect to the Employer.”

47. According to the designated representative of the Trachte ESOP, Brian Anderson, who was also the person who drafted the Trachte ESOP Plan Document, only Trachte stock was contemplated to be encompassed with the definition of employer security under Code § 409(1).

48. Section 2.24 of the Trachte ESOP Plan Document defines the “Plan Sponsor” to mean “Trachte Building Systems, Inc.”

49. Section 2.34 of the Trachte ESOP Plan Document defines the “Trustee” to mean “the person or entity serving as Trustee of the Trust. Initially, the Trustee is the following group: James M. Mastrangelo, Jeffrey A. Seefeldt, and Pamela Klute.”

50. Section 5.9 of the Trachte ESOP Plan Document gives a distributee (if a Participant, a donee of a Participant, or a person, such as an estate or its distributee, to whom the Employer Stock passes by reason of a Participant’s death) the nonterminable right to require that the Employer repurchase the Employer Stock under a fair valuation formula (“put option”). It does not give a distributee a nonterminable right to require the Employer to repurchase Alliance or AH Transition stock.

51. With respect to the put option on accounts transferred as a result of the 2007 Transaction, Section 5.9 of the Trachte ESOP sets the fair market value to be paid on those accounts by reference to the “Floor Price Provisions” of Section 5.18 or Section 5.19 of the Trachte ESOP.

52. Section 5.18, entitled “Put-Option Floor Price for Pre-Merger Guaranteed Accounts” applies to Pre-Merger Guaranteed Accounts, which are defined in Section 2.27 as “the Pre-Merger Account of a Participant in [the Trachte ESOP] who was a participant in the [Old] Trachte ESOP upon its inception in 1992 who was active in the [Trachte ESOP] on the Spin-Off Date – the date on which Transferred Accounts were acquired by the Trachte ESOP from the Alliance ESOP (i.e. August 29, 2007). Pursuant to Section 5.18, fair market value for put option rights is defined as the greater of (a) fair market value or (b) 80% of the balance of the Participant’s Pre-Merger Guaranteed Account not to exceed fair market value. In the event that

the payment of the put option is based on (b), the source of the payment is Trachte, rather than the Plan; however, Section 5.18 provides that payment under that circumstance is limited by the loan agreements that Trachte has with JP Morgan Chase, which prevents repurchase unless the bank agrees.

53. Section 5.19, entitled “Put-Option Floor Price for Other Transferred Accounts” applies to any other Transferred Account – defined as any account spun-off from the Alliance ESOP – other than Pre-Merger Guaranteed Account. Pursuant to Section 5.19, fair market value for put option rights is defined as the greater of (a) fair market value or (b) the applicable percentage of the value of the Participant’s Transferred Account as of the Spin-off Date (i.e. August 29, 2007), but only in the case of retirement, death or disability. The applicable percentages – only for retirement, death and disability – are then defined as 100% for 2007 and 2008, 80% in 2009, 60% in 2010, 40% in 2011 and after 2011, no floor at all. In the event that the payment of the put option is based on (b), the source of the payment is Trachte, rather than the Plan, but Section 5.19 provides that payment under that circumstance is limited by the loan agreements that Trachte has with JP Morgan Chase, which prevents repurchase unless the bank agrees. There is no floor price protection for distributions other than retirement, death or disability; in particular, there is no floor price protection in the event of termination.

54. Section 6.2 of the Trachte ESOP Plan Document provides as follows: “Solely at the direction of the Administrator, the Trustee shall invest the Trust Fund primarily in Employer Stock. The Administrator may direct the Trustee to incur debt from time to time to finance the acquisition of Employer Stock by the Trust Fund. The Trustee may also invest the Trust Fund in cash, cash equivalents, certificates of deposit, money market funds, guaranteed investment

contracts, short term securities, bonds, and other investments desirable for the Trust at the direction of the Administrator.”

55. Section 6.4 of the Trachte ESOP Plan Document provides in part: “Solely at the direction of the Administrator, the Trust may borrow money for any lawful purpose, provided the proceeds of an Exempt Loan are used within a reasonable time after receipt only to acquire Employer Stock or repay that (or a prior) Exempt Loan.”

56. Section 7.1(a) of the Trachte ESOP Plan Document provides that “[t]he Employer shall have the sole fiduciary authority to appoint and remove the Trustee.”

57. Section 7.1(b) of the Trachte ESOP Plan Document provides that “[t]he Administrator shall be the named fiduciary and plan administrator, as those terms are defined by ERISA . . .”

58. Section 7.1(c) of the Trachte ESOP Plan Document provides that “[t]he Trustee shall have the sole responsibility for administration of the Trust and the administration of assets held under the Trust, all as specifically provided in the Trust, unless an investment manager has been appointed.”

59. Section 7.2 of the Trachte ESOP Plan Document provides that “[t]he Administrator shall be the Employer or any other person or entity designated by the Employer from time to time.”

60. At the time of the 2007 Transaction, the Administrator of the Trachte ESOP was Trachte.

61. At the time of the 2007 Transaction, Alpha was not the Administrator of the Trachte ESOP.

62. Section 7.6(d) of the Trachte ESOP Plan Document provides that [t]he Administrator shall have such duties and powers as may be necessary to discharge its duties hereunder, including . . . “to appoint and employ individuals to assist in the administration of the Plan and any other agents it deems advisable, including legal and actuarial counsel.”

63. Section 8.1(a) of the Trachte ESOP Plan Document provides that the Trustee is authorized and empowered in its sole discretion “to invest and reinvest the principal and income of the Trust Fund without distinction between principal and income, in such stocks, bonds, notes, mortgages, or other obligations, trust and participation certificates, leaseholds, collective investment trust funds qualified under Code § 501(a) or any common trust funds qualified under Code § 584 now or hereafter established and maintained by the Trustee or any affiliate thereof, or any agent of either, or in such other property or interest therein, whether real or personal as the Trustee deems proper, provided that the indicia of ownership of all such investments are maintained within the jurisdiction of the United States.”

64. Section 8.1(g) of the Trachte ESOP Plan Document provides that the Trustee is authorized and empowered in its sole discretion “to do all acts, whether or not expressly authorized, which they may deem necessary and proper for the protection of the property held hereunder.”

65. Section 2 of the Trachte Building Systems Employee Stock Ownership Plan Summary Plan Description dated September 2007 (“Trachte SPD”) identifies Trachte as the Administrator of the Trachte ESOP.

66. According to representations made by Trachte management at a July 13, 2007 Town Hall Meeting with Trachte employees regarding the employee purchase of Trachte (“2007 Town Hall Meeting”), the Board of Directors of Trachte appoints the ESOP Trustee(s).

67. Section 3 of the Trachte SPD provides that “[t]he Trustee currently consists of the following three individuals: Jeffrey A. Seefeldt, James N. Mastrangelo, and Pamela J. Klute.”

The Alliance ESOP

68. At the time of the 2007 Transaction, the terms of the Alliance ESOP were governed by the Alliance Holdings, Inc. Employee Stock Ownership Plan and Trust effective January 1, 2007, or upon information and belief, substantially similar terms (the “Alliance ESOP Plan Document”).

69. Section 13.1 of the Alliance ESOP Plan Document provides that “[t]he Company [i.e. Alliance], as Plan Sponsor, shall serve as a Named Fiduciary having the following (and only the following) authority and responsibility: (a) to establish and communicate to the Trustee a funding policy for the Plan; (b) to appoint the Trustee and Plan Administrator and to monitor each of their performances; (c) to communicate such information to the Plan Administrator and to the Trustee as each needs for the proper performance of its duties; and (d) to provide channels and mechanisms through which the Plan Administrator and/or Trustee can communicate with Participants and their Beneficiaries.”

70. Section 14.3 of the Alliance ESOP Plan Document provides as follows: “The Trustee shall be the Named Fiduciary with respect to investment of the Fund assets and shall have the powers and duties set forth in the Trust Agreement.”

71. According to the Alliance ESOP Form 5500, Defendant Fenkell is and was at the time of the 2007 Transaction the Alliance ESOP Trustee.

72. Section 2.3(b) of the Trust Agreement authorizes the Alliance ESOP Trustee “to sell for cash or on credit, convert, redeem, exchange for another authorized investment, or otherwise dispose of, any authorized investment at any time held by him.”

73. Section 2.3(e) of the Trust Agreement gives the Trustee the power “to join in, consent to, dissent from or oppose the reorganization, recapitalization, consolidation, sale, merger, foreclosure, or readjustment of the finances of any corporations, entities or properties in which the Fund may be invested, or the sale, mortgage, pledge or lease of any such property or the property of any such corporation or entity on such terms and conditions as the Trustee may deem wise; to do any act (including the exercise of options, making of agreements or subscriptions, and payment of expenses, assessments or subscriptions) which may be deemed necessary or advisable in connection therewith; and to accept any authorized investment which may be issued in or as a result of any such proceeding, and thereafter to hold the same.”

74. Section 11.4(b) of the Alliance ESOP Plan Document provides: “If, at the time of distribution from the Fund, Employer Securities are not treated as ‘readily tradeable on an established market’ within the meaning of Code Section 409(h), then such Employer Securities shall be subject to a put option in the hands of a Qualified Holder. The put option shall enable the Qualified Holder to sell any or all of the Employer Securities received in the distribution to the Employer that employs or employed the Participant or, if either the Plan or Funds so elects, to the Plan or Fund at the fair market value of the Employer Securities.”

75. Section 16.5 of the Alliance ESOP Plan Document provides as follows: “In the event of any merger or consolidation with, or transfer of assets or liabilities to, any other plan, each Participant shall have a benefit in the surviving or transferee plan (determined as if such plan were then terminated immediately after such merger, consolidation or transfer) that is equal in value to or greater in value than the benefit he would have been entitled to receive immediately before such merger, consolidation or transfer in the plan in which he was then a

Participant (had such plan been terminated at that time). For the purposes hereof, former Participants and Beneficiaries shall be considered Participants.”

FACTUAL ALLEGATIONS

Background of Trachte Building Systems

76. Trachte was originally founded in Madison, Wisconsin as Trachte Brothers Sheet-Metal Workers (“Trachte Brothers”) in 1901. Beginning in the 1920s, Trachte Brothers began to market steel buildings as the concept of self-storage began to emerge. Throughout the 1930s and 1940s, Trachte Brothers continued to market and sell commercial and industrial metal buildings. In 1952, Trachte Brothers changed its name to Trachte Metal Buildings Company.

77. Trachte entered the self-storage industry in 1974 by pioneering one of the first all-steel mini-warehouses in the United States. In 1975, Trachte Metal Buildings Company changed its name to Trachte Building Systems, Inc.

78. As described on Trachte’s website, Robert Trachte, the son of founder Arthur Trachte, retired in 1978 and was the last Trachte family member to be actively involved in the operation of Trachte.

79. Defendant Pagelow purchased the majority control of Trachte Building Systems, Inc. in 1984.

80. In 1985, Trachte purchased land in the Sun Prairie Business Park and established Sun Prairie as its corporate headquarters and its principal manufacturing facility.

81. Upon information and belief, the majority of Trachte employees are employed in and around Sun Prairie, Wisconsin.

Background of Alliance Holdings

82. Alliance was incorporated in 1994 as a holding company for the acquisition of equity interests in small and medium sized operating companies.

83. Alliance has a strategy of making acquisitions of ESOP companies to build value quickly.

84. According to the Alliance ESOP Form 5500s, Alliance sponsors the Alliance ESOP which directly, or indirectly through AH Transition, Inc., owns substantially all of Alliance's outstanding common stock.

85. Upon information and belief, since 1995 Alliance has purchased at least 13 privately-owned operating companies and has sold at least 9 of those companies. Employees of those operating companies become members of the Alliance ESOP at the time of purchase by Alliance and their Alliance ESOP accounts are spun off when the operating company is sold.

86. Alliance markets itself to potential companies by stating that it provides a market for shareholders of privately held companies who want to sell their shares and defer taxation on the sale of the stock. Additionally, Alliance informs potential buyers that it will create a phantom stock plan for the acquired company which, according to its website, "provides substantial reward for each of our management team."

Alliance's Purchase of Trachte

87. In September 2002, Alliance purchased Trachte for \$24 million (the "2002 Transaction").

88. Prior to the purchase by Alliance in 2002, Trachte sponsored an employee stock ownership plan ("the Old Trachte ESOP") which owned approximately 30 percent of Trachte's common stock.

89. According to a June 4, 2002 memorandum to Trachte shareholders from Trachte management (“the June 4, 2002 Management Memorandum”), under the terms of the purchase agreement by Alliance of Trachte, the Old Trachte ESOP was required to purchase sufficient stock to obtain an 80 percent ownership interest in Trachte. Trachte borrowed and, in turn, lent money to the Old Trachte ESOP which the Old Trachte ESOP used to purchase common shares of Trachte stock to reach the 80 percent ownership interest.

90. At the time of the 2002 Trachte Transaction, the overwhelming majority of the remaining Trachte shares were owned by Defendant Stephen Pagelow, Trachte’s then-President and CEO.

91. From 2002 until sometime in 2006 and/or 2007 prior to August 29, 2007, several other persons continued to hold small numbers of Trachte stock. Upon information and belief, sometime prior to the 2007 Transaction, the shares owned by those shareholders were purchased by Trachte and/or one of the Alliance Defendants.

92. As outlined in the June 4, 2002 Management Memorandum, Alliance transferred Alliance shares equivalent in value to 80 percent of the Old Trachte shares to a newly-created, wholly-owned subsidiary corporation, the “Alliance Sub,” and the Alliance Sub then exchanged the Alliance shares for the Trachte shares owned by the Old Trachte ESOP. The Alliance Sub was then merged into Trachte, with Trachte being the surviving corporation. At the same time, the Trachte ESOP was merged into the Alliance ESOP; the Old Trachte ESOP participants became Alliance ESOP participants and the Old Trachte ESOP assets and liabilities were transferred to the Alliance ESOP.

93. According to the Trachte Consolidated Financial Report, effective October 1, 2002, Trachte established two phantom stock plans in order to reward key employees of Trachte

and/or Alliance. On information and belief, the Phantom Stock Plans entitled eligible employees to receive cash based, in part, on the value of Trachte stock.

94. At the time of the merger of the Old Trachte ESOP with the Alliance ESOP, the Alliance ESOP owned most of the common stock of Alliance. According to the Alliance ESOP Form 5500, in 2005 AH Transition was formed. After the formation of AH Transition, the Alliance ESOP owned approximately half of Alliance's common stock and substantially all of the remaining Alliance common stock was owned by AH Transition. The Alliance ESOP, in turn, owned all of the common stock of AH Transition.

Alliance's Attempts To Sell Trachte

95. Sometime in the first half of 2006, Alliance began looking for a buyer for Trachte. Prior to Alliance beginning to look for a buyer of Trachte, Defendant Fenkell had discussed a potential sale of Trachte with Defendant Pagelow.

96. In the spring of 2006, Kenneth Wanko, Director of Acquisitions for Alliance, contacted William Blair to explore a potential sale of Trachte. In discussions with William Blair, Mr. Wanko explained that the reason for exploring a sale was because Trachte had grown to become a disproportionately large portion of Alliance.

97. At a meeting of the Trachte Board of Directors in May 2006, which Defendant Pagelow attended, Defendant Fenkell announced plans to sell Trachte and a price for which Alliance hoped to sell Trachte (not including Store-N-Save). One of the potential options expressed by Fenkell in that meeting was possibly selling Trachte to a to-be-formed Trachte ESOP.

98. In the first half of 2006, Alliance approached several strategic buyers about potentially purchasing Trachte.

99. In June 2006, Alliance met with multiple investment banks in an attempt to arrange or explore a sale of Trachte to potential buyers. Upon information and belief, the meeting with the investment banks occurred after Alliance had unsuccessfully approached several strategic buyers about purchasing Trachte.

100. After attempts to sell Trachte to a strategic buyer failed, in July 2006, Alliance, as majority shareholder of Trachte, requested that Trachte management, specifically Defendant Seefeldt, the then-President of Trachte, enter into an agreement with William Blair & Co., an investment banking firm, in an attempt to market Trachte to a wider group of potential purchasers, including financial buyers.

101. As of August 2006, the anticipated timeline set by William Blair established a goal of closing a sale of Trachte by February 2007.

102. In order to reach that deadline, William Blair began an aggressive campaign to market Trachte to hundreds of potential purchasers, both financial and strategic.

103. In November and December 2006, William Blair began to receive indications of interest from potential purchasers. Eventually, William Blair received only four indications of interests to purchase Trachte from HIG Capital, Tricor Pacific Capital, Watermill Group and Lincolnshire. All of the potential purchasers who expressed indications of interest – other than management – were financial buyers.

104. In an attempt to compare the offers, William Blair summarized the four indications of interest in a spreadsheet which was provided to Kenneth Wanko of Alliance, who then forwarded the information to Defendant Fenkell and Trachte Director Eric Lynn as well as Defendant Pagelow.

105. All of the indications of interest received by William Blair in late 2006 and early

2007 were below the sales price anticipated by Defendant Fenkell at the May 2006 Board meeting and the range of expected transaction prices set forth by William Blair in its July 31, 2006 engagement letter.

Trachte's Financial Results Begin To Decline

106. By the second half of 2006, the members of the Board of Directors of Trachte had been made aware – through presentations by the then-President of Trachte (Defendant Seefeldt), the then-CFO of Trachte (Defendant Mastrangelo) and the Vice-President of Business Development (Paul Schneider) – that the projected sales margins of Trachte would likely come in below budget for 2006.

107. At the November 2006 meeting of the Board of Directors of Trachte, members of the Board of Directors expressed concern that that the forecasted 2006 results were dipping below the projected results set forth in the Confidential Memorandum circulated by William Blair to potential buyers. As a result, Director Eric Lynn indicated that he would request a list from then-president Jeffrey Seefeldt and then-CFO James Mastrangelo of corrective actions needed to improve EBITDA.

108. At a meeting of the Compensation Committee of Alliance Holdings on December 4, 2006, Defendant Fenkell provided a detailed summary of the business of Alliance's operating companies, including Trachte. With respect to Trachte, Defendant Fenkell advised at that meeting that until recently, Trachte has had significant growth, but business levels had dropped.

109. Upon information and belief, Trachte's projected results coming in below the original projections in the William Blair Confidential Memorandum and the drop in business levels were not communicated to potential purchasers prior to the time that such potential purchasers submitted their indications of interests in November or December 2006.

Trachte Management Makes An Offer For Trachte

110. In February 2007, Defendants Seefeldt & Mastrangelo, purportedly representing a “team” of management at Trachte, made a proposal to purchase Trachte in which they proposed having a to-be-formed Trachte ESOP purchase Trachte.

111. Upon information and belief, the offer from Trachte management constituted a higher purchase price than any of the initial offers received by Alliance by arms-length potential purchasers.

112. In fact, the “management offer” in 2007 was based on a EBITDA multiple that was higher than *any* of the offers from the arms-length third party purchasers who had submitted indications of interest to William Blair.

113. Upon information and belief, Alliance pursued the HIG offer over management’s offer because, among other reasons, Kenneth Wanko at Alliance had doubts whether management could obtain the financing necessary to accomplish a sale and because Alliance believed that a sale to management and/or a to-be-formed ESOP was riskier and would take longer than a sale a third-party buyer.

The Attempted Sale of Trachte To HIG

114. In early 2007 (approximately February 2007), Alliance entered into negotiations with HIG Capital, which is a leading global private investment firm with over \$7.5 billion of capital under management. Upon information and belief, HIG Capital made an offer to purchase Trachte from Alliance and Pagelow subject to certain conditions.

115. Prior to consummating the purchase of Trachte, among the conditions was that HIG would be permitted to conduct due diligence on Trachte and the self-storage industry. Upon information and belief, HIG engaged in an extensive due diligence process.

116. Upon information and belief, as part of its due diligence process, HIG (and/or its consultants) contacted a significant number of Trachte's customers in an attempt to assess the market generally and Trachte specifically – particularly regarding the likelihood of future growth.

117. During the course of conducting due diligence on Trachte, HIG learned that the sales and EBITDA at Trachte had fallen off significantly in late 2006 and early 2007. HIG had based its offer in early January 2007 on 2006 results and continuing growth in 2007.

118. In addition, HIG's due diligence revealed that there was a significant reduction in the amount of self-storage facilities being built generally in the market. In other words, HIG's due diligence revealed signs of a slow down in Trachte's principal market, which was the likely cause of the slowdown and decline in Trachte's sales.

119. After learning of the declining sales at Trachte, HIG had conversations with a number of senior management at Trachte, including Defendants Seefeldt and/or Mastrangelo as well as Director of Sales, Jamie Lindau, in the course of its due diligence.

120. As a result of its due diligence, HIG expressed to Alliance that it no longer believed that Trachte would meet its budget of \$8 million EBITDA for 2007.

121. In the "2007 Town Hall Meeting," Defendants Seefeldt, Mastrangelo and/or Klute stated that HIG Capital and Alliance did not reach an agreement on the terms, including the price, on which to sell Trachte.

122. According to the Trustee Defendants, among the reasons that HIG Capital refused to purchase Trachte at the price that Alliance wanted was that "[m]arket data indicated [that] the self storage [industry] ha[d] matured" and that orders at Trachte had "softened in 2007."

123. After HIG had substantially completed its due diligence of Trachte by the end of March or early April 2007, HIG presented Alliance with a substantially revised and lowered offer that included an “earn out” whereby a portion of the payment would be contingent on Trachte achieving certain financial results for 2007.

The Proposed Sale of Trachte to a Newly Created Trachte ESOP

124. Unable to obtain the price that Alliance wanted from a third-party in an arms-length transaction, Defendants Alliance, A.H.I, Inc. and Pagelow decided to sell Trachte to a new Trachte ESOP.

125. Less than two days after receiving the significantly reduced offer from HIG, Alliance, specifically Defendant Fenkell, re-engaged in discussions with Defendant Mastrangelo about the February 6, 2007 previous bid by Trachte management.

126. On April 12, 2007, Donald Hughes, counsel for Alliance and the Alliance ESOP, transmitted a draft Letter of Intent (“April 12th Draft LOI”) to Defendants Seefeldt & Mastrangelo as well as Defendant Pagelow. Among the terms contemplated in the April 12th draft was Alliance causing Trachte to establish a new Trachte ESOP, the spin-off of the accounts of the Trachte employees from the Alliance ESOP into the new Trachte ESOP and the buyback of the outstanding shares of Trachte stock. Upon information and belief, the terms of April 12th Draft LOI were drafted by Alliance and/or its counsel, Squire Sanders & Dempsey.

127. Ultimately, the terms of a proposed Buyback of Trachte by the new Trachte ESOP were finalized in an April 19, 2007 Letter of Intent (“April 19th LOI”) addressed to Defendant Fenkell from Defendants Seefeldt and Mastrangelo, acting as the new Trachte ESOP’s Representatives.

128. The April 12th Draft LOI established the enterprise value and equity value of Trachte as well as Store-N-Save. While certain terms changed between the April 12th Draft LOI and the final April 19, 2007 LOI, neither the Enterprise Value nor the Equity Value of Trachte set forth in the April 12th Draft LOI changed in any way in the April 19th LOI. Likewise, the overall consideration to be paid in the transaction did not materially change between the April 12th Draft LOI and the April 19th LOI

129. The Enterprise Value of Trachte set forth in the April 19th LOI exceeded the Enterprise Value in the bids from the potential arms-length purchasers of Trachte. Likewise, the Enterprise Value set forth in the April 19th LOI of Trachte's 60% interest in Store-N-Save also exceeded the amount estimated internally at Trachte and Alliance.

130. At the time that Alliance (through its counsel) transmitted the April 12th Draft LOI and executed the April 19th LOI, Alliance, including Defendant Fenkell, Alliance Director of Acquisitions Kenneth Wanko, and Defendant Pagelow were aware that several arms-length purchasers had made offers, or at least indications of interest, that were below the offer made by Defendants Mastrangelo and Seefeldt as the "representatives of the Trachte ESOP."

131. Defendants Mastrangelo and Seefeldt were aware of at least one offer – namely the HIG offer – and were aware that the deal with HIG was not reached, in part, because of price and concerns about future growth in the self-storage industry.

132. Additionally, Defendants Mastrangelo and Seefeldt should have known that there had been significant "softening" of sales, that the likely forecast of sales was not likely to improve in the near-term and that there would be significant flattening, if not decline, of sales in the future. Even if they did not have actual knowledge of such information, such information

was available to them by talking to their various salespeople and the Director of Sales, Jamie Lindau, who had learned as much from their customers.

The Terms of the Proposed Deal

133. The proposed Buyback outlined in the April 19, 2007 Letter of Intent included the following terms:

- (a) Defendants Seefeldt and Mastrangelo, as the ESOP Representatives, would cause Trachte to establish the Trachte ESOP;
- (b) Defendant Alliance would sell \$7,514,000 of Trachte stock to the Trachte ESOP and would receive a promissory note or notes as payment for the shares;
- (c) The Alliance ESOP accounts of current and former Trachte employees consisting of Alliance stock (approximately 8%) and AH Transition stock (approximately 92%) would be spun off from the Alliance ESOP into the Trachte ESOP;
- (d) The Trachte ESOP would pay the promissory note(s) to Alliance and AH Transition by using, as a form of payment, the Alliance and AH Transition stock allocated to current and former Trachte employees' accounts in the Trachte ESOP, leaving the accounts of Trachte ESOP participants with only Trachte stock instead of Alliance stock;
- (e) Trachte would borrow \$27,500,000 from third-party lenders on terms and conditions to be negotiated by Defendants Seefeldt and Mastrangelo, acting as the ESOP's Representatives, together with assistance and guidance from Kenneth Wanko of Alliance;
- (f) Store-N-Save, a subsidiary of Trachte, would repay \$2,924,000 of its note payable to Trachte with the proceeds of a loan from third-party lenders on terms

and conditions to be negotiated by Defendants Seefeldt and Mastrangelo, acting as the ESOP's Representatives, together with assistance and guidance from Kenneth Wanko of Alliance;

(g) Trachte would make a loan to the Trachte ESOP to be used by the Trachte ESOP to purchase the remaining Trachte shares held by the Selling Shareholders (Defendants Alliance and Pagelow);

(h) Trachte would terminate the Trachte Building Systems, Inc. Phantom Stock Plan for Alliance Employees and make approximately \$4,905,000 in cash payments to its participants;

(i) The Trachte Phantom Stock Plan (under which only Trachte employees were participants) would remain in place and unchanged by the closing and would be amended if necessary to clarify that the acquisition of Trachte stock by the Trachte ESOP would not be a change of control event;

(j) Trachte would redeem \$2 million in preferred stock held by Defendant Alliance in exchange for cash payment of \$2 million;

(k) Trachte would redeem \$4.5 million in common shares held by Defendants Alliance and Pagelow in exchange for \$3,791,317.50 to Defendant Alliance and \$708,682.50 to Defendant Pagelow;

(l) Trachte would redeem \$9,123,000 in common shares held by Defendants Alliance and Pagelow in exchange for Subordinate Sellers Notes of \$7,073,000 to Defendant Alliance and \$2,050,000 to Defendant Pagelow;

(m) The Trachte ESOP would purchase all remaining Trachte common shares held by Defendant Alliance for cash payment of \$15,020,682.50 using the proceeds of the Trachte loan; and

(n) The Trachte ESOP would purchase all remaining Trachte common shares held by Defendant Pagelow for a cash payment of \$4,959,317.50 using the remaining proceeds of the Trachte loan.

The closing was to be a “simultaneous sign and close” and, at the end of the Buyback, the Trachte ESOP would be the sole shareholder of Trachte.

134. The April 19th LOI contained certain “material conditions or contingencies” including the requirements that the capital stock of Trachte, Alliance Holdings and AH Transition would be appraised at the closing date, that all valuation appraisals would be conducted by Stout Risius Ross, Inc. (“SRR”) and all fairness opinions required by the Trachte ESOP or the ESOP Representatives would be issued by any one of GBQ Capital Partners, LLC, Moore Stephens Apple, or Barnes Wendling Valuation Services, Inc.

135. The April 19th LOI expressly provided that the parties to the LOI had agreed that Defendants Seefeldt and Mastrangelo would be the Trustees of the Trachte ESOP.

136. The April 19th LOI provided that the ESOP Representatives, Defendants Seefeldt and Mastrangelo (with assistance and guidance by Kenneth Wanko) would begin pursuing the necessary debt financing, and Squire, Sanders & Dempsey (counsel for Alliance, A.H.I, Inc., the Alliance ESOP and Defendant Fenkell) would prepare and submit the draft Definitive Agreements. The parties agreed to work to consummate the transaction according to the following timetable: (a) a financing Commitment Letter would be delivered by May 4, 2007; (b)

the parties would reach agreement on all Definitive Agreements by May 4, 2007; and (c) the transaction would close on May 31, 2007.

137. At the time of the April 19th LOI, a reasonable person could ascertain that: (a) the Trachte ESOP would offer pension benefits to Trachte employees in the form of Trachte stock; (b) the class of beneficiaries covered by the Trachte ESOP would be current and former employees of Trachte (and their beneficiaries); (c) the source of financing for the Trachte ESOP would be the Trachte employee participant accounts transferred from the Alliance ESOP to the Trachte ESOP and a loan to the Trachte ESOP from Trachte; and (d) participants would receive benefits through the establishment of accounts in the Trachte ESOP.

138. Sometime between April 19, 2007 (when all parties agreed to the terms of the 2007 Transaction as set forth in the April 19th LOI) and August 1, 2007, the Trachte ESOP was established.

139. At the time of the April 19th LOI, Defendants Mastrangelo and Seefeldt, as the ESOP's Representatives, were exercising discretionary authority and control over management of the Trachte ESOP and/or were exercising authority or control over the management and disposition of the Trachte ESOP's assets.

Alliance's Transfer of Its Shares of Trachte Stock to A.H.I., Inc.

140. On April 12, 2007, Defendant Fenkell, as Sole Director of Defendant Alliance, transferred all of the shares of common and preferred stock that Alliance held in Trachte to A.H.I., Inc., an affiliate of Alliance. Defendant Pagelow was advised of this transfer.

141. Upon information and belief, this transfer was accomplished to facilitate or in contemplation of a sale of Trachte stock to a to-be-formed Trachte ESOP.

The Fiduciaries Obtain Advice

Stout Risius & Ross (“SRR”)

142. Defendant Fenkell, as the Alliance ESOP Trustee, obtained valuations of Alliance, AH Transition and Trachte from SRR. In a letter addressed to Defendant Fenkell, as the Alliance ESOP Trustee, SRR valued Alliance at approximately \$72 million with a per share value of approximately \$17.15, on a controlling interest basis and applying a five percent discount for lack of marketability based on the “put” option contained in the Alliance ESOP and Alliance’s overall financial condition. SRR valued AH Transition at approximately \$34 million with a per share value of approximately \$23.65 on a controlling interest basis and applying a discount for lack of marketability. SRR valued Trachte at approximately \$44 million with a per share value of approximately \$13,725.50 on a controlling interest basis and without applying a discount for lack of marketability.

Barnes Wendling Valuation Services (“BWVS”)

143. In May 2007, the Trachte Trustee Defendants engaged BWVS to provide a fairness opinion of the proposed 2007 Transaction. Initially, BWVS proposed providing both a valuation *and* a fairness opinion to the Trachte Trustee Defendants in connection with the 2007 Transaction. In a draft engagement letter, BWVS proposed a separate amount to be billed in order provide a valuation opinion in addition to a fairness opinion. Ultimately, BWVS was retained only to provide a fairness opinion.

144. The Trachte Trustee Defendants ultimately only obtained a fairness opinion of the proposed Buyback from BWVS. In its fairness opinion, BWVS concluded that Trachte’s common equity value ranged from \$26.2 million to \$40.1 million. BWVS compared this range of value to the SRR valuation of Trachte obtained by Defendant Fenkell. In order to make the valuations comparable, BWVS added a \$1.9 million “tax shield” and subtracted “phantom

equity” payments of \$4.9 and \$3 million from the SRR valuation and concluded that the SRR valuation of Trachte’s common equity would have been \$37,665.00 with these adjustments. BWVS compared its own valuation of Trachte’s common stock at \$40.1 million with SRR’s adjusted valuation at \$37.6 million and the Buyback proposal for Trachte common stock of \$40.5 million and opined that the Buyback was “within the range of reasonableness, albeit near the upper end of the range.” BWVS concluded that the terms of the proposed Buyback were “fair and reasonable for the purpose of the transaction” and that the Trachte ESOP would be paying “adequate consideration” for the Trachte stock.

145. To the extent that BWVS performed a valuation analysis in the context of providing its fairness opinion, the underlying analysis of its valuation was never provided to the Trachte Trustee Defendants, the Alliance Defendants, Defendant Pagelow or the Alpha Defendants prior to the close of the 2007 Transaction. As such, none of the Defendants were in a position to assess or analyze the reasonableness of the assumptions, methodologies or the conclusions of value of Trachte stock reached by BWVS.

RSM McGladrey

146. The Trachte Trustee Defendants obtained an opinion from RSM McGladrey which reviewed the BWVS fairness opinion and valuations performed by SRR. In a July 6, 2007 letter to the Trachte Trustee Defendants, RSM McGladrey informed them that “you are paying at the high end of the value ranges” and pointed out concerns about the methodology used in the valuations, including increasing the value by \$1.9 million for the ESOP tax shelter which did not have consensus in the valuation community and issues relating to valuation of the seller notes.

Walter Smith

147. On August 1, 2007, the Trachte Trustee Defendants requested former member of the Board of Directors Walter Smith, who was and is also an accountant, to provide them with advice regarding the 2007 Transaction. Smith agreed to do so and was paid for this advice.

148. After reviewing certain documents related to the transaction, Walter Smith met with Defendants Mastrangelo and Seefeldt on August 14, 2007. Walter Smith's notes dated August 14 indicate the following "conclusions" conveyed at that meeting:

1. Price, interest, etc, too high.
2. Attainment of projections questionable given uncertainty of assumptions with current economic climate
3. No "real" negotiations. Alliance dictating. Steve staying out of it.

149. At that meeting, Smith expressed the opinion that the price being paid by the Trachte ESOP was too high, the economic assumptions too rosy, the terms too onerous and the underlying appraisals too imprecise to be meaningful.

Alpha Is Hired As The "Independent" Fiduciary

150. At or near the beginning of August 2007, upon the recommendation of the Trustees' counsel, Brian Anderson, Defendants Mastrangelo and Seefeldt began to consider the hiring of an independent fiduciary.

151. The primary purpose of hiring an independent fiduciary in connection with the 2007 Transaction was to protect the Trachte Trustees from liability in the 2007 Transaction.

152. On August 13, 2007, Trachte engaged Defendant Alpha Investment Consulting Group, LLC ("Alpha") to act as an "independent fiduciary" for the Trachte ESOP. Defendant Alpha, through Defendant Maier, agreed that Alpha would be a fiduciary of the Trachte ESOP and would be subject to ERISA's fiduciary duty provisions. At the time that Defendant Alpha

was retained as “independent fiduciary,” the target date for closing the transaction was August 20, 2007.

153. The Trachte ESOP Plan Document does not provide for appointment of an independent fiduciary and does not give an independent fiduciary the power or authority to direct the Trachte ESOP Trustees.

154. Defendant Alpha was engaged to determine whether the purchase of Trachte by the Trachte ESOP was appropriate under the circumstances and in the best interest of the Trachte ESOP and, if so, to direct the Trachte ESOP Trustees to execute the transaction and to take such other steps as reasonably required by Trachte to facilitate the proposed transaction.

155. Trachte agreed to furnish all information reasonably requested by Defendant Alpha and agreed that Defendant Alpha had no obligation to independently verify the information, assumed no responsibility for the accuracy or completeness of the information, and was not required to make an appraisal of any of the tangible assets or liabilities of Trachte.

156. Just three days after being retained as “independent fiduciary,” on August 16, 2007, Defendant Alpha had already preliminarily concluded that the 2007 Transaction would be in the best interest of the Trachte ESOP participants and that it would direct the Trachte Trustees to proceed with the transaction.

157. Despite concluding that the 2007 Transaction would be in the best interest of Trachte ESOP participants, Defendant Alpha had not been asked to or made any determination whether the purchase price was for fair market value.

158. In its direction letter to the Trustees, Defendants Alpha and Maier eventually provided an opinion that the price being paid for Trachte by the Trachte ESOP represented fair market value.

159. At the time of the direction, the only valuation that Defendants Alpha or Maier had to rely upon was an appraisal by SRR procured by Defendant Fenkell as Trustee for the Alliance ESOP.

160. The Alliance Defendants, the Alpha Defendants and Defendant Mastrangelo knew or should have known that the SRR valuation was intended for the Alliance ESOP and could not be relied upon by the Trachte ESOP or its fiduciaries.

161. In August 2007, Defendant Mastrangelo requested a copy of the “full valuation package” prepared by SRR in order for Alpha to rely on that valuation.

162. After receiving that request, Defendant Alliance contacted SRR about potentially allowing one or more of the Trachte ESOP fiduciaries, including the Trachte Trustee Defendants and/or the Alpha Defendants, to use and rely on the SRR valuation opinion.

163. In response, SRR advised that SRR would permit the Trachte Trustees, in particular, Alpha, to rely on SRR’s value of Trachte only if there was a letter explicitly advising the fiduciaries of the Trachte ESOP, among other things, that SRR had been retained by Defendant Fenkell for the Alliance ESOP, that SRR reported solely to the Alliance ESOP Trustee and that there was no presumption of SRR’s independence from the Trachte fiduciary or the Trachte ESOP. Such a letter was drafted, but never finalized.

164. In order to allow the fiduciaries of the Trachte ESOP to rely on the SRR appraisal, even with these qualifications, SRR requested an *additional* fee. Upon information and belief, that additional fee was never paid to SRR in order to allow the Alpha Defendants or the Trachte Trustee Defendants to rely on the SRR valuation of Trachte in connection with the 2007 Transaction.

165. The Alpha Defendants and the Trustee Defendant knew or should have known that the BWVS “fairness opinion” was not designed to be an opinion of fair market value and should not be used for that purpose. Even if they lacked such knowledge, the Trachte Trustee Defendants and the Alpha Defendants should have been aware that there was no underlying data provided to them by which to analyze how BWVS had reached its conclusions about the value of Trachte.

166. The Alpha Defendants and Defendant Mastrangelo also knew or should have known that BWVS was under the impression that SRR was going to perform the valuation opinion for Trachte and that by August 20, 2007, there was insufficient time for BWVS to perform its own valuation for the August 29, 2007 Transaction.

167. The Alpha Defendants nonetheless relied upon the SRR valuation updated to the date of the 2007 Transaction and the BWVS “fairness opinion” updated to the date of the 2007 Transaction, which relied for valuation purposes solely on the SRR valuation opinion.

168. The Alpha Defendants were never provided with (a) a copy of the RSM McGladrey letter criticizing the BWVS “fairness opinion” or any information about RSM McGladrey’s advice; (b) any information about the advice provided by Walter Smith to Defendants Seeefeldt and Mastrangelo less than two weeks before the 2007 Transaction; (c) any underlying information supporting any valuation performed by BWVS; (d) any information about the value of Alliance or AH Transition; (e) written permission to use the SRR valuation of Trachte; or (f) a copy of the Phantom Stock Plan documents.

169. The Alpha Defendants were not provided with a copy of the following documents until the day of the 2007 Transaction: (1) the executed plan document for the Trachte ESOP; (2) the three signed opinion of fair market value letters from SRR; (3) the updated and signed

BWVS fairness letter; (4) an up to date and signed “Master Closing Memorandum” with exhibits; and (5) an executed spin-off resolution.

170. From the face of the direction letter listing what the Alpha Defendants had reviewed in connection with issuing its direction to the Trachte Trustee Defendants, the Trustee Defendants and the Alliance Defendants knew or should have known that the Alpha Defendants had received insufficient information upon which to determine that the 2007 Transaction was either in the best interests of the Trachte ESOP and its participants or that the price at which the Trachte ESOP intended to purchase Trachte stock in the 2007 Transaction was for no more than adequate consideration.

The Resignation & Removal of the Trachte Board of Directors

171. Throughout 2005 and 2006, the Trachte Board of Directors held regular, quarterly meetings. During that period of time (and before) the members of the Trachte Board of Directors consisted of at least two representatives of Alliance (Defendant Fenkell and Eric Lynn), Defendant Pagelow (who served as Chairman) and two independent members of the Board of Directors, Rolf Killingstad and Walter Smith. Both Messrs. Smith and Killingstad had served on the Board of Trachte since before Alliance had purchased Trachte.

172. Shortly after Alliance announced plans to sell Trachte in 2006, Walter Smith resigned as Director of Trachte. Smith resigned in protest of a proposed sale of Trachte because he believed that the proposed sale was contrary to the interests of the Trachte employees. At the time of his resignation, Smith submitted a letter to Defendant Pagelow, as Chairman explaining the reasons for his resignation.

173. At the next meeting of the Board of Directors of Trachte, the minutes incorrectly recorded that Mr. Smith had “retired.” No member of the Trachte Board made any motion to

correct that description. After Mr. Smith resigned as Director, he was replaced as Director on the Trachte Board by Kenneth Wanko, Director of Acquisitions for Alliance.

174. The only meeting of the Board of Directors of Trachte that occurred in 2007 prior to August 29, 2007 was held in February 2007. At or around the time of that meeting Rolf Killingstad expressed concern that a proposed sale of Trachte to a new Trachte ESOP would not be in the employees' best interests. Shortly after expressing that opinion, Mr. Killingstad was removed from the Board of Directors.

175. After February 2007, there were no other formal meetings of the Trachte Board of Directors until after the August 29, 2007 Transaction.

176. On August 22, 2007, through "Action by Unanimous Consent," the shareholders of Trachte – then Defendants A.H.I., Inc. and Pagelow – removed the remaining existing directors and appointed Defendants Seefeldt and Mastrangelo as the members of Trachte's Board of Directors. The shareholders further resolved that they would permit Defendant Fenkell and Kenneth J. Wanko to act as board observers, without voting rights. Defendant Fenkell and Wanko were entitled to attend and participate in meetings of the Board of Directors and any committees for as long as Alliance was a shareholder of Trachte, were entitled to notice of all meetings of the Board and any committee, and were entitled to receive all copies of all materials distributed to members of the Board of Directors. Any action of the Board, including, without limitation, the execution of written consents, would be invalid without notice to Defendant Fenkell and Wanko or a waiver of notice by them.

177. On August 24, 2007, through "Written Consent in Lieu of a Special Meeting," Defendants Mastrangelo and Seefeldt, acting as Trachte Directors, adopted the Trachte ESOP effective as of August 1, 2007, named themselves and Defendant Klute as the initial trustees, and

ratified and approved the engagement of Defendant Alpha which had occurred on August 13, 2007.

The August 29, 2007 Purchase of Trachte by the Trachte ESOP

178. The Spin-off of Trachte employees from the Alliance ESOP into the Trachte ESOP and the purchase of all outstanding shares of Trachte stock by the Trachte ESOP occurred on August 29, 2007.

179. BWVS issued a final Fairness Opinion to the Trachte Trustee Defendants, dated August 29, 2007, which outlined the transaction as follows: (1) the Alliance ESOP accounts of Trachte employees would be spun off from the Alliance ESOP into the new Trachte ESOP; (2) the Alliance and AH Transition stock held in the Trachte ESOP would be exchanged for Trachte stock; (3) the remaining common shares of Trachte would be purchased by the Trachte ESOP or redeemed by Trachte for \$38,329,447.53; (4) the Trachte preferred shares would be redeemed by Trachte for \$2 million; and (5) Trachte would pay \$4,905,000 owing to non-Trachte employees under the Trachte Systems, Inc. Phantom Stock Plan. The total consideration for the transaction would be \$45,234,747.53. At the end of the transaction, the new Trachte ESOP would be the sole shareholder of Trachte.

180. The August 29, 2007 BWVS Fairness Opinion again evaluated the SRR valuation of Trachte. Despite the concerns raised by RSM McGladrey, BWVS continued to add a \$1.9 million “tax shield” and subtracted “phantom equity” payments of \$4.9 and \$3 million from the \$43.7 million valuation by SRR and concluded that the SRR valuation of Trachte’s common equity would have been \$37,665.00 with these adjustments. BWVS continued to compare its own valuation of Trachte’s common stock at \$40.1 million with SRR’s adjusted valuation at \$37.6 million and the Buyback proposal for Trachte common stock of \$40.5 million and opined

that the Buyback was “within the range of reasonableness, albeit near the upper end of the range.” BWVS concluded that the terms of the proposed Buyback were “fair and reasonable for the purpose of the transaction” and that the Trachte ESOP would be paying “adequate consideration” for the Trachte stock.

181. Defendant Alliance, through its sole Director Defendant Fenkell, executed an “Instrument Providing for Amendment and Spin-off from the Alliance Holdings, Inc. Employee Stock Ownership and Trust to the Trachte Building Systems Employee Stock Ownership Plan” (“Instrument of Spin-off”) on August 29, 2007. The Instrument of Spin-off provided that all of the assets allocated to Alliance ESOP accounts of employees and former employees of Trachte and its Subsidiaries, and their beneficiaries would be spun-off and transferred from the Alliance ESOP to the Trachte ESOP. The Instrument of Spin-off did not state the amount to be spun-off, but provided that “[i]mmediately after the Spin-off Date, (i) the sum of the balances for each participant, former participant and beneficiary account under the Alliance ESOP and the Trachte ESOP shall be equal to the balance of such participant, former participant and beneficiary account under the Alliance ESOP immediately prior to the Spin-off Date; (ii) the assets in the Alliance ESOP shall be equal to the sum of the balances for all participant, former participant and beneficiary accounts in the Alliance ESOP; and (iii) the assets in the Trachte ESOP shall be equal to the sum of the balances for all participant, former participant and beneficiary accounts in the Trachte ESOP.”

182. On August 29, 2007, Defendant Alpha issued a letter signed by Defendant Maier, to the Trachte Trustees, stating that it had reviewed the following information:

- (a) the Trachte ESOP document (Plan #004) established effective August 1, 2007;

- (b) the TBS Inc. Master Closing Memorandum and schedules;
- (c) the ESOP Loan and Pledge Agreement;
- (d) the opinion of fair market value of Trachte as of the date of the transaction prepared by SRR as well as the full appraisal report of the value of the employer stock held by the Alliance Holdings ESOP inclusive of the value of Trachte prepared as of December 31, 2006 and supplemented with opinion letters as of the transaction date;
- (e) the opinion of the fairness of the transaction from a financial point of view and that the price represents no more than adequate consideration prepared by BWVS as of the date of the transaction;
- (f) the Forms 5500 available on the internet for Trachte and Alliance retirement plans and discussions with Trachte executives as to the benefits provided to Trachte employees under the plans;
- (g) a spreadsheet of the account balances of the participants whose accounts would be spun off into the Trachte ESOP;
- (h) the ESOP Repurchase Obligation Projections for Trachte prepared by ESOP Economics, Repurchase Obligation Specialists in August 2007;
- (i) the financial statements of Trachte as a subsidiary of Alliance for fiscal year 2005 and 2006 audited by McGladrey & Pullen;
- (j) conversations with Mastrangelo, Seefeldt, Steve Kindstrom of JP Morgan Chase and Trachte ESOP Counsel Brian Anderson; and

- (k) general searches on the internet for information regarding all of the parties to the transaction including the websites of Trachte, Alliance, BWVS, SRR and ESOP Economics.

183. Among the items that the Alpha Defendants did not list as the items or matters considered in connection with the 2007 Transaction were the following:

- a. The RSM McGladrey letter that had expressed concerns about the 2007 Transaction as one of the documents it had reviewed;
- b. Any communications or conversations with anyone at BWVS;
- c. Any information about the advice provided to Defendants Mastrangelo and Seefeldt by Walter Smith;
- d. Any of the prior offers or proposals to purchase Trachte by arms-length third parties.

184. The August 29, 2007 letter from Defendant Alpha to the Trachte Trustee Defendants concluded that the 2007 Transaction was in the best interest of the ESOP plan participants and that the price at which the ESOP intended to purchase Trachte stock represented no more than adequate consideration. Accordingly, Defendant Alpha directed the Trachte Trustee Defendants to complete the transaction.

185. The Trachte Trustee Defendants should not have followed the direction from Defendant Alpha to complete the transaction because they knew or should have known that:

- (a) The Trachte ESOP Plan Document only authorized the Trachte Trustee Defendants to take direction from the Administrator to purchase Trachte stock and Defendant Alpha was not the Administrator;

- (b) Defendant Alpha was retained only one week before the scheduled closing and two weeks before the actual closing, which was not a sufficient amount of time to review the 2007 Transaction;
- (c) The Alpha Defendants had no or virtually no prior experience acting as a discretionary fiduciary or discretionary trustee in a leveraged ESOP Transaction and no one had performed an independent analysis of the qualifications of the Alpha Defendants to act as an independent discretionary trustee in a leveraged ESOP transaction;
- (d) The Alpha Defendants were not aware that they were required to determine whether the purchase of Trachte stock was for adequate consideration until August 21, 2007, six days before the 2007 Transaction;
- (e) The Alpha Defendants had not obtained their own valuation of the Alliance, AH Transition, and Trachte stock but had instead relied on valuations obtained by Defendants Alliance and Fenkell, whose interests were adverse to the Trachte ESOP;
- (f) The Alpha Defendants had not obtained their own fairness opinion but had instead relied on the Fairness Opinion issued by BWVS to the Trachte Trustee Defendants;
- (g) The Alpha Defendants did not act independently, but instead relied on directions from Defendant Mastrangelo, the lending banks, and Alliance representatives in determining what information to review and what direction should be given;

- (h) The Alpha Defendants did not have a copy of the final valuation and Fairness Opinion until August 29, 2007, the date of the transaction and the date it issued the direction; and
- (i) The Alpha Defendants did no analysis of the valuations and Fairness Opinion to determine whether the information and assumptions upon which they were based were accurate and complete, and based on the information that they had been provided, were unable to assess whether the assumptions and conclusions of BWVS were reasonable.

186. Pursuant to the “direction” given by Defendant Alpha, the Trachte Trustee Defendants caused the Trachte ESOP to engage in the August 29, 2007 Transaction which involved the following components:

- Step 1: A.H.I. sold and transferred to the Trachte ESOP common shares of Trachte stock held by A.H.I., Inc. and received promissory notes in exchange, which were assigned to Defendants Alliance and AH Transition;
- Step 2: The Alliance ESOP transferred to the Trachte ESOP the accounts of current and former Trachte employees in the Alliance ESOP which consisted of shares of Alliance and AH Transition common stock and some cash;
- Step 3: The Trachte ESOP repaid the promissory notes assigned to Alliance and AH Transition;
- Step 4: J.P. Morgan Chase loaned Trachte money for the purpose of repaying Trachte’s then existing indebtedness and funding the transaction;

- Step 5: Trachte repaid certain employee notes and specified expenses;
- Step 6: Store-N-Save, a subsidiary of Trachte, repaid money it owed to Trachte;
- Step 7: Trachte loaned money to the Trachte ESOP;
- Step 8: Trachte terminated the Trachte Building Systems, Inc. Phantom Stock Plan for Alliance Employees and paid its participants;
- Step 9: Trachte redeemed common and preferred shares held by Defendants Alliance and Pagelow and, in consideration, paid them subordinated promissory notes;
- Step 10: Defendant Alliance redeemed shares of Alliance stock held by Trachte and caused Defendant A.H.I., Inc. to transfer shares of Trachte stock to Trachte; and
- Step 11: The Trachte ESOP purchased shares of Trachte stock from Defendants Alliance and Pagelow.

187. Section 2 of the General Provisions of the Master Closing Memorandum expressly provided that “[t]he obligation of the parties to consummate each transaction is conditioned upon the consummation of all of the transactions.” As a result of this provision, the terms of the 2007 Transaction expressly required that once part of the Transaction was performed the remaining parts of the Transactions must also be performed. As such, once the accounts of the Trachte employees in the Alliance ESOP had been transferred to the Trachte ESOP in Step 2, the parties to the Transaction, including the Trachte Trustee Defendants on behalf of the Trachte ESOP, were obligated to complete the purchase of Trachte by the Trachte ESOP in Step 11 (as well as all steps in between).

188. As a result of the 2007 Transaction, as of the end of the day of August 29, 2007, the Trachte ESOP owned all outstanding shares of Trachte stock. The Trachte ESOP used the account balances of its participants and beneficiaries spun off from the Alliance ESOP (reported by the Alliance ESOP Form 5500 to be \$9,249,470 and by the Trachte ESOP Form 5500 to be \$7,803,534) and obtained a loan of \$26,677,523 from Trachte in order to finance the purchase. Trachte, itself, had borrowed the money to loan to the Trachte ESOP, borrowed an additional \$5,630,000 to redeem preferred and common Trachte stock held by Defendants Alliance and Pagelow, and paid out \$4,905,000 in phantom stock payments. Thus, Trachte and the Trachte ESOP together paid \$45,056,057 for the Buyback.

189. Trachte management, including upon information and belief, the Trachte Trustee Defendants, told its employees that “We are buying the company with no cash up front, just the ESOP account values.”

190. In a March 18, 2008 Q&A Session, Trachte management told Trachte employees that it had the following loans outstanding as a result of the Buyback: (1) a \$12.5 million loan from Chase with an open line of credit to \$4 million; (2) a mezzanine loan of \$15 million; (3) an SNS loan with G.E. for \$12.5 million with an additional \$2 million available as the cash flow of SNS increased; and (4) a loan from the sellers of \$5.7 million. This amounted to \$45.7 million which, together with the \$7.9 million from Trachte employee account balances, equals \$53.5 million – about \$8 million more than the consideration for the Buyback listed in the Fairness Opinion.

Effect of the 2007 Transaction on Trachte

191. The amount of debt incurred by Trachte in order to engage in the 2007 Transaction was more debt than the Company could reasonably be expected to service.

192. In order to meet the loan covenants and service the debt, Trachte had to maintain a \$6.3 million in annual earnings before interest, taxes, depreciation and amortization (“EBITDA”).

193. As set forth in the 2007 Town Hall Meeting, Trachte’s historical annual EBITDA was as follows:

2003	\$5.7 million
2004	\$4.5 million
2005	\$6.8 million
2006	\$6.3 million

194. Trachte’s average EBITDA over the four years prior to the 2007 Transaction was only \$5.8 million. Indeed, in the four years prior to 2007 Transaction, Trachte had achieved EBITDA at or greater than \$6.3 million in just two of those years. In addition, Trachte’s EBITDA *declined* in 2006 from the high in 2005 and by July 2007, it was known that sales in 2007 would be “softer,” thus suggesting that the EBITDA for 2007 would fall below \$6.3 million. Moreover, the interest rates charged on Trachte’s loans are contingent on reaching \$7.5 minimum EBITDA annually, which Trachte had not once achieved in the four years preceding the 2007 Transaction.

195. In response to the question “Will we be leveraged to the max?” in the “Employee Questions and Answers from Town Hall Meeting” on July 13, 2007, Trachte management responded: “[Trachte] will be **highly leveraged.**” As a result of incurring so much debt, Trachte management stated that Trachte “need[ed] to do some belt tightening.” In order to

increase its EBITDA to meet the loan terms, Trachte took the following “belt tightening” measures:

- a. The Company contribution to the 401k plan was reduced from 6% to 3% for office employees and reduced from 8% to 3% for plant (i.e. non-office) employees.
- b. The Company reduced the amount of paid sick leave from 80 hours to 56 hours effective January 2008.
- c. The Company cut the amount of medical benefits provided to employees and shifted the amount of medical premiums to employees.

196. In an effort to reduce expenses to service the debt from the 2007 Transaction, Trachte, which had approximately 220 employees at the time of the 2007 Transaction, has terminated approximately 48 employees and furloughed approximately 43 union employees, leaving Trachte with a little more than 100 employees as of April 2009. Trachte also cut the hours and/or workdays for its remaining employees as a further effort to reduce its expenses. In addition, Trachte employees have been forced to take two pay cuts in 2009; one was a percentage based on salary and the other was a ten percent pay cut across the board.

Effect of the 2007 Transaction on the Trachte ESOP and the Trachte ESOP Participants

197. As soon as the accounts of the Trachte employees were transferred to the Trachte ESOP, they were worth less than they were before the transfer because: (1) The Alliance and AH Transition stock held by the Trachte ESOP immediately went down in value because the Trachte ESOP did not have a controlling interest in either company and the Trachte ESOP participants no longer had a right to put the stock back to Alliance; and (2) as a condition of the Spin-off transaction, the Alliance and AH Transition stock was immediately exchanged for

Trachte stock that was over-valued for purposes of the exchange and which would immediately lose value after the transfer due to the heavy debt load Trachte took on in the 2007 Transaction in order to finance the purchase of Trachte shares.

198. The impact of this debt on the value of the Trachte ESOP is illustrated by the Trachte ESOP's 2007 5500 Report. As of December 31, 2007, three months after the 2007 Transaction, the 5500 Report listed the value of the Trachte stock held by the ESOP at \$16,989,988, the cost of the Trachte stock at \$34,481,057 and the acquisition debt at \$26,484,144. As a result, the overall net assets available for the payment of benefits are listed as *negative* \$9,311,074.

199. The 2007 Transaction had a direct impact on the ESOP participants' accounts. For example, the ESOP account balances for each of the named Plaintiffs declined by approximately 50% within four months of the 2007 Transaction. As of December 31, 2008, the Trachte stock held by the ESOP was worthless. Upon information and belief, this loss was attributable, primarily or solely, to the immediate effect of the 2007 Transaction.

200. On information and belief, the precipitous and immediate drop in the Trachte ESOP's assets was the result of overpaying for the new shares and the effect of the debt used in that Buyback on the value of existing shares.

Effect of the Spin-off of Trachte on Alliance

201. In an August 2007 News Release, Alliance announced that it was "pleased to announce the Spin-off of Trachte" to the Trachte ESOP and that "Alliance was able to realize a significant return on its initial investment." Alliance further announced that "[w]ith this move, Alliance significantly adds to its available capital to prudently and aggressively pursue its acquisition and diversification plan."

202. In this August 2007 News Release, Defendant Fenkell, stated that its “five-year association” with Trachte “created a substantial return for” Alliance.

Inappropriateness of the 2007 Transaction

203. Contrary to the valuations obtained by Alliance and/or the Trachte Trustee Defendants, and relied upon by Defendant Alpha, the valuation of \$13,725.50 per share of Trachte stock for purposes of the 2007 Transaction constituted a price in excess of the fair market value of the stock as of August 29, 2007 due to the following reasons, as well as other factors:

- a. the valuation did not take into account the ability of Trachte, which was obligated on the debt, to service the ESOP debt as well as other debt used to finance the Buyback;
- b. the valuation did not address the likelihood of default on the loan covenant to maintain EBITDA of \$6.3 million;
- c. the valuation included a “tax shield” which is not generally accepted in the valuation community;
- d. the valuation did not take into account the offer from HIG Capital and discussions with other potential buyers;
- e. the valuation treated a \$6.2 million cash balance as if it were a non-operating asset rather than as working capital;
- f. the Trachte common stock was valued as a controlling interest, however the amount and basis for any control premium was not disclosed or discussed;
- g. the valuation did not include a discount for lack of marketability; and

- h. the valuation did not take into account the \$26 million in debt burden imposed on the company which was used to purchase the shares.

204. No prudent and loyal fiduciary would have caused the Trachte ESOP to engage in the exchange of Alliance and AH Transition stock for Trachte stock and the purchase of additional Trachte stock at least because of the following:

- a. a prudent investigation would have revealed that the price of \$13,725.50 per share represented a price in excess of the fair market value of the stock;
- b. the amount of debt incurred by Trachte and the Trachte ESOP as a result of the Buyback was more debt than Trachte could service thereby jeopardizing the value of the shares purchased in the Buyback;
- c. even apart from Trachte's ability to service the ESOP acquisition debt, the debt that Trachte took on to redeem common and preferred shares and to make payments under the Phantom Stock Plan reduced the value of the shares purchased by the Trachte ESOP, such that much of the value already allocated to participants' accounts in the Alliance ESOP was destroyed by the purchase of the Trachte stock and the associated debt load;
- d. the Buyback was not for the primary or best interest of the participants and beneficiaries of the Trachte ESOP, but benefitted the sellers, the recipients of the payments on the Trachte Phantom Stock Plan, and the management of Trachte at the expense of the Trachte ESOP and its participants;

- e. the valuation opinions provided by SRR and the Fairness Opinions provided by BWVS were not reasonably justified under the circumstances; and
- f. it was not reasonable to rely on the valuations performed by SRR and the Fairness Opinions provided by BWVS in light of the RSM McGladrey critique of those valuations and Fairness Opinions;
- g. the price and interest was too high, the attainment of the projections questionable given the economic climate and the outlook of the industry, and there had been no real negotiations;
- h. a number of senior-level management had expressed concerns about the outlook of the primary business, self-storage, and whether current likely market conditions and sales forecasts could support the amount of debt required for the 2007 Transaction.

COUNT I

**(VIOLATION OF ERISA § 208 AND THE TERMS OF THE PLAN AGAINST
DEFENDANT ALLIANCE ON BEHALF OF THE SUBCLASS)**

205. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

206. ERISA § 208, 29 U.S.C. § 1108, prohibited Alliance from spinning off the Trachte employees' accounts in the Alliance ESOP to the Trachte ESOP unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the transfer which was equal to or greater than the benefit he would have been entitled to receive immediately before the transfer (if the plan had then terminated).

207. Section 16.5 of the Alliance ESOP Plan Document similarly prohibited Alliance from engaging in any merger or consolidation with, or transfer of assets or liabilities to, any other plan, unless each Participant would have a benefit in the surviving or transferee plan (determined as if such plan were then terminated immediately after such merger, consolidation or transfer) that would be equal in value to or greater in value than the benefit he would have been entitled to receive immediately before such merger, consolidation or transfer in the plan in which he was then a Participant (had such plan been terminated at that time).

208. As part of the 2007 Transaction, Alliance caused the Alliance ESOP to transfer assets to the Trachte ESOP by having the accounts of the Trachte employees transferred from the Alliance ESOP into the Trachte ESOP.

209. As soon as the accounts of the Trachte employees were transferred to the Trachte ESOP, they were worth less than they were before the transfer because: (1) The Alliance and AH Transition stock held by the Trachte ESOP (a) immediately declined in value because the Trachte ESOP did not have a controlling interest in either company, (b) the Trachte ESOP would have had a minority interest in Alliance and AH Transition stock, (c) the Trachte ESOP participants no longer had a right to put the stock back to Alliance, (d) even if the Trachte ESOP participants still had a put right, it only guaranteed 80% of the balance of their Pre-Merger Guaranteed Account and provided no floor price protection at all for any other transferred accounts in the event of termination, and (e) that put right would have to be honored by Trachte (the sponsor of the Trachte ESOP), not Alliance, and due to the financial condition of Trachte, the put right was not as valuable;¹ and (2) as a condition of the Spin-off transaction, the Alliance

¹ Plaintiffs recognize that the Court rejected some of these theories on the Motions to Dismiss and/or summary judgment but include them in the Complaint for purpose of preserving the issue including on appeal.

and AH Transition stock was immediately exchanged for Trachte stock that was over-valued for purposes of the exchange and which would immediately lose value after the transfer due to the heavy debt load Trachte took on in the 2007 Transaction in order to finance the purchase of Trachte shares.

210. As a result of causing the accounts of Trachte employees to be spun off into the Trachte ESOP under the circumstances described above, Alliance violated Section 208 of ERISA, 29 U.S.C. § 1108, and Section 16.5 of the Alliance ESOP Plan Document.

COUNT II

(VIOLATION OF ERISA § 404 AGAINST DEFENDANT FENKELL, OR IN THE ALTERNATIVE AGAINST DEFENDANT ALLIANCE, ON BEHALF OF THE SUBCLASS)

211. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

212. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell was required to act prudently and solely in the interest of all of the participants and beneficiaries in the Alliance ESOP, including those participants and beneficiaries whose accounts were to be spun off from the Alliance ESOP.

213. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell had a duty to follow the terms of the Alliance Plan Document, including Section 16.5.

214. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell was obligated to follow the direction of Alliance with respect to the spin-off of Trachte employee accounts from the Alliance ESOP to the Trachte ESOP. The August 29, 2007 Instrument of Spin-off directed that immediately after the Spin-off Date, the sum of the

balances of Trachte employee accounts in the Trachte ESOP and would be equal to the sum of the Trachte employee accounts in the Alliance ESOP immediately prior to the Spin-off date.

215. Defendant Fenkell had a personal interest in the 2007 Transaction because it allowed him to collect benefits under the Phantom Stock Plan sponsored by Trachte and because he was a participant in the Alliance ESOP and upon information and belief had a sizeable account balance invested in Alliance stock through the Alliance ESOP.

216. Upon information and belief, Defendant Fenkell either knew or was aware of facts by which he should have known that the Trachte employee accounts would immediately decrease in value after and as a result of the Spin-off because (a) a control premium no longer applied to the Alliance and AH Transition stock, (b) the Trachte ESOP would have had a minority interest in Alliance and AH Transition stock, (c) the Trachte ESOP participants no longer had a right to put the stock back to Alliance, (d) even if the Trachte ESOP participants still had a put right, it only guaranteed 80% of the balance of their Pre-Merger Guaranteed Account and provided no floor price protection at all for any other transferred accounts in the event of termination, and (f) that put right would have to be honored by Trachte (the sponsor of the Trachte ESOP), not Alliance, and due to the financial condition of Trachte, the put right was not as valuable, and (2) the transfer was conditioned on the exchange of the Alliance and AH Transition stock for over-valued Trachte stock and the additional purchase of over-valued Trachte stock by the Trachte ESOP which immediately depleted the account balances of Trachte ESOP participants and beneficiaries.

217. In the event that Defendant Fenkell did not know or was not aware of facts that the Trachte employee accounts would immediately decrease in value after and as a result of the Spin-off, Defendant Fenkell was required to undertake an appropriate investigation to determine

whether the Trachte Employee accounts would decrease in value after the Spin-off in order to fulfill his fiduciary duties as a Trustee of the Alliance ESOP and to comply with Section 16.5 of the Alliance ESOP Plan Document. Defendant Fenkell had this obligation even if he was directed by Alliance to engage in the Spin-off because the Instrument of Spin-off did not identify the amount of assets to be transferred nor did it require the transfer of stock. Instead, it only required that, immediately after the Spin-off date, the sum of the balances of each Trachte participant, former participant and beneficiary would be equal to the balance of such participant, former participant and beneficiary immediately prior to the Spin-off date.

218. Under the circumstances described above, transferring the Alliance ESOP accounts to the Trachte ESOP in the Spin-off was not in the interests of the Alliance ESOP participants who were transferred to the Trachte ESOP and violated Section 16.5 of the Alliance ESOP Plan Document.

219. No prudent and loyal fiduciary would have transferred the Trachte accounts to the Trachte ESOP when he knew or should have known that the value of those accounts would be substantially less immediately after the transfer due to the incorrect valuations of the Alliance, AH Transition and Trachte stock and the heavy debt load Trachte took on in order to finance the purchase.

220. By transferring the Trachte employees accounts in the Alliance ESOP to the Trachte ESOP when those accounts had less value after the Spin-off than before the Spin-off, Defendant Fenkell breached his fiduciary duties under ERISA by failing to discharge his duties with respect to the Alliance ESOP solely in the interest of the participants and beneficiaries (1) for the exclusive purpose of providing benefits to participants and their beneficiaries; (2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent

person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and like aims, and (3) in accordance with the documents and instruments governing the Alliance ESOP, all in violation of ERISA § 404(a)(1)(A), (B) and (D), 29 U.S.C. § 1104(a)(1)(A),(B), and (D).

221. In the alternative, to the extent Defendant Fenkell alleges that he transferred the Trachte employee accounts in the Alliance ESOP to the Trachte ESOP at the direction of Defendant Alliance, Defendant Alliance, acting through Defendant Fenkell as its President, Chief Executive Officer and sole member of the Board of Directors, breached its fiduciary duties under ERISA by failing to discharge its duties with respect to the Alliance ESOP solely in the interest of the participants and beneficiaries (1) for the exclusive purpose of providing benefits to participants and their beneficiaries; (2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and like aims, and (3) in accordance with the documents and instruments governing the Alliance ESOP, all in violation of ERISA § 404(a)(1)(A), (B) and (D), 29 U.S.C. § 1104(a)(1)(A),(B), and (D).

COUNT III

(VIOLATION OF ERISA § 406(a)(1)(D) AGAINST DEFENDANT FENKELL, OR IN THE ALTERNATIVE AGAINST DEFENDANT ALLIANCE, ON BEHALF OF THE SUBCLASS)

222. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

223. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell was a fiduciary and a party in interest to the Alliance ESOP and was prohibited from causing the Alliance ESOP to engage in a transaction, when he knew or should

have known that the transaction constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the Alliance ESOP.

224. At the time of the 2007 Transaction, Defendant Fenkell was a participant in the Trachte Phantom Stock Plan and was a participant in the Alliance ESOP and through his participation had a substantial amount invested in Alliance stock.

225. Under the terms of the Trachte Phantom Stock Plan, Defendant Fenkell was entitled to a benefit when there was a change of control of Trachte, and the amount of that benefit was based on the value of Trachte stock at the time of the change of control.

226. As a participant in the Alliance ESOP, Defendant Fenkell would personally and directly benefit by selling Trachte for more than adequate consideration and as the President and sole Director of Alliance, and as a member of the Board of Directors of Trachte, had the power to cause Trachte to establish the Trachte ESOP and purchase the shares of Trachte from Alliance and/or AHI for the price and on the terms set by Alliance and/or AHI.

227. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell was responsible for determining the conditions under which the Trachte participants' accounts would be transferred from the Alliance ESOP to the Trachte ESOP. Defendant Fenkell pre-arranged that transfer as part of an integrated 2007 Transaction, in which the purchase or redemption of all Trachte stock was based on the price set forth in the April 19th LOI and/or the August 29, 2007 Fairness Opinion and which resulted in a change of control of Trachte and which he knew or should have known that without the transfer of the Alliance accounts to the Trachte ESOP, the 2007 Transaction could not be accomplished because those shares essentially served as the equity in the 2007 Transaction.

228. By conditioning the transfer of Trachte participant accounts to the Trachte ESOP on a change of control of Trachte and an integrated transaction requiring a purchase by the Trachte ESOP at a price set by the Alliance Defendants, Defendant Fenkell caused the Alliance ESOP to engage in a transaction, when he knew or should have known that such transaction constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the Alliance ESOP in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

229. In the alternative, to the extent Defendant Fenkell alleges that he conditioned the transfer of Trachte participants accounts to the Trachte ESOP at the direction of Defendant Alliance, Defendant Alliance, acting through Defendant Fenkell as its President, Chief Executive Officer and sole member of the Board of Directors, caused the Alliance ESOP to engage in a transaction, when it knew or should have known that such transaction constituted a direct or indirect transfer to, or use by or for the benefit of, a party in interest (Defendant Fenkell) of any assets of the Alliance ESOP in violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D)..

COUNT IV

(VIOLATION OF ERISA § 406(b) AGAINST DEFENDANT FENKELL ON BEHALF OF THE SUBCLASS)

230. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

231. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell was prohibited from engaging in transactions involving assets of the Alliance ESOP in his own interest or for his own account, from acting on behalf of someone whose interests were adverse to the plan or its participants and beneficiaries, and from receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the Alliance ESOP.

232. As the Trustee of the Alliance ESOP at the time of the 2007 Transaction, Defendant Fenkell was responsible for determining the conditions under which the Trachte participants' accounts would be transferred from the Alliance ESOP to the Trachte ESOP. Defendant Fenkell pre-arranged that transfer as part of an integrated 2007 Transaction, in which the purchase or redemption of all Trachte stock was based on the price set forth in the April 19th LOI and/or the August 29, 2007 Fairness Opinion and which resulted in a change of control of Trachte and which he knew or should have known that without the transfer of the Alliance accounts to the Trachte ESOP no transaction could be accomplished without the transfer of those shares to essentially serve as the equity in the 2007 Transaction.

233. At the time of the 2007 Transaction, Defendant Fenkell was a participant in the Trachte Phantom Stock Plan and was a participant in the Alliance ESOP and upon information and belief had a substantial account balance in Alliance stock through his participation in the Alliance ESOP.

234. Under the terms of the Trachte Phantom Stock Plan, participants were entitled to payments based on the value of Trachte stock when there was a change of control of Trachte.

235. As such, Defendant Fenkell's payment from the Trachte Phantom Stock Plan was based on the same value of Trachte as placed on Trachte for the Spin-off and Buyback.

236. As a participant in the Alliance ESOP, Defendant Fenkell would also personally and directly benefit by selling Trachte for more than adequate consideration and as the President and sole Director of Alliance, and as a member of the Board of Directors of Trachte, he had the power to cause Trachte to establish the Trachte ESOP and purchase the shares of Trachte from Alliance and/or AHI for the price and on the terms set by Alliance and/or AHI.

237. By conditioning the Spin-off on the price established in the August 29, 2007 Fairness Opinion for the redemption and purchase of Trachte stock, Defendant Fenkell violated his fiduciary duties under ERISA by dealing with the assets of the Alliance ESOP in his own interest or for his own account and by receiving consideration for his own personal account from a party dealing with the Alliance ESOP in connection with a transaction involving the assets of the Alliance ESOP in violation of ERISA § 406(b)(1) and (3), 29 U.S.C. § 1106(b)(1) and (3).

238. By engaging in a transaction which he knew or should have known was for more than adequate consideration, Defendant Fenkell violated his fiduciary duties under ERISA by dealing with the assets of the Alliance ESOP in his own interest or for his own account and by receiving consideration for his own personal account from a party dealing with the Alliance ESOP in connection with a transaction involving the assets of the Alliance ESOP in violation of ERISA § 406(b)(1) and (3), 29 U.S.C. § 1106(b)(1) and (3).

COUNT V

(VIOLATIONS OF ERISA § 404 AGAINST DEFENDANT ALLIANCE ON BEHALF OF THE SUBCLASS)

239. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

240. Pursuant to the terms of the Alliance ESOP Plan Document, Defendant Alliance had the authority to appoint, monitor and remove the Alliance ESOP Trustee and to direct the Alliance ESOP Trustee to spinoff assets of the Alliance ESOP to the Trachte ESOP.

241. Pursuant to this authority, Alliance had an obligation to monitor Defendant Fenkell's conduct and to take appropriate action if Defendant Fenkell did not follow its direction and was not adequately protecting the interests of the Alliance ESOP participants and

beneficiaries, including the employees of Trachte who were then participants and beneficiaries in the Alliance ESOP and whose accounts were transferred to the Trachte ESOP.

242. Upon information and belief, Alliance knew that after the Spin-off each participant in the Trachte ESOP would not (if the Trachte plan then terminated) receive a benefit equal to or greater than the benefit the participant would have been entitled to receive immediately before the transfer (if the Alliance plan had then terminated) as required by ERISA, the Alliance ESOP plan document and the Instrument of Spin-off and that Defendant Fenkell would benefit from the Spin-off.

243. Upon information and belief, Alliance never attempted to insure that Defendant Fenkell complied with the Instrument of Spin-off, to undo the Spin-off, to remove Fenkell as Trustee, or otherwise to correct the violations described herein.

244. By failing to properly monitor and remove Defendant Fenkell as the Alliance ESOP Trustee, Alliance breached its fiduciary duties under ERISA by failing to discharge its duties with respect to the Alliance ESOP solely in the interest of the participants and beneficiaries (1) for the exclusive purpose of providing benefits to the participants and beneficiaries, and (2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and like aims, all in violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

COUNT VI

(VIOLATION OF ERISA § 404 AGAINST TRACHTE TRUSTEE DEFENDANTS ON BEHALF OF THE CLASS)

245. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

246. The Trachte Trustee Defendants caused and/or permitted the Trachte ESOP to engage in the 2007 Transaction.

247. The Trachte Trustee Defendants failed to undertake an appropriate investigation of the 2007 Transaction as proposed. An appropriate investigation of the 2007 Transaction would have revealed at least (a) that the Alliance and AH Transition stock was not as valuable after the transfer and, therefore, the Trachte ESOP did not receive the assets to which it was entitled, (b) that the price paid for the Trachte shares exceeded the fair market value of the stock, (c) that the debt assumed by Trachte in connection with the Buyback diminished the value of the Trachte shares, (d) that much of the value already allocated to participants' accounts in the Alliance ESOP was destroyed by the purchase of the Trachte stock and the associated debt load, and (e) that the Company would likely have difficulty servicing the debt assumed in connection with the investment.

248. Even if the Trachte Trustee Defendants were directed to engage in the 2007 Transaction by Alpha, the Trachte Trustee Defendants had a duty not to engage in a transaction that violated ERISA. The Trachte Trustee Defendants knew or should have known that Alpha had no authority to direct them to engage in the 2007 Transaction under the terms of the Trachte ESOP plan document and that Alpha had not engaged in a prudent investigation of the 2007 Transaction.

249. Additionally and alternatively, the Trachte Trustee Defendants were aware of facts, described above, by which they either knew or should have known that the 2007 Transaction was imprudent and not in the interest of the ESOP's participants and beneficiaries.

250. Upon information and belief, the Trachte Trustee Defendants engaged in the 2007 Transaction in order to save their jobs.

251. By causing and/or permitting the Trachte ESOP to engage in the 2007 Transaction, which was not in the interests of the Trachte ESOP's participants and beneficiaries, the Trachte Trustee Defendants breached their fiduciary duties under ERISA by failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries (1) for the exclusive purpose of providing benefits to participants and their beneficiaries; (2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and like aims, and (3) in accordance with the documents and instruments governing the Trachte ESOP, all in violation of ERISA § 404(a)(1)(A), (B) and (D), 29 U.S.C. § 1104(a)(1)(A),(B), and (D).

COUNT VII

(VIOLATION OF ERISA § 406(a)(1)(A) AND (D) AGAINST THE TRACHTE TRUSTEE DEFENDANTS ON BEHALF OF THE CLASS)

252. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

253. As part of the 2007 Transaction, the Trachte Trustee Defendants caused or permitted the Trachte ESOP to engage in a \$26 million stock purchase from Defendants Pagelow and A.H.I., Inc.

254. By causing or permitting the Trachte ESOP to engage in the \$26 million stock purchase from Defendants Pagelow and A.H.I., Inc. described above, in which the Trachte ESOP paid more than “adequate consideration,” the Trachte Trustee Defendants violated their fiduciary duties under ERISA by causing the Trachte ESOP to engage in a transaction which they knew or should have known constituted a direct or indirect (1) sale or exchange of property between the Plan and parties in interest, or (2) transfer to, or use by or for the benefit of, a party

in interest, of any assets of the Plan, all in violation of ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D).

COUNT VIII

**(VIOLATION OF ERISA § 404 AGAINST THE ALPHA
DEFENDANTS ON BEHALF OF THE CLASS)**

255. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

256. The Alpha Defendants caused the Trachte ESOP to engage in the 2007 Transaction.

257. Once Defendant Alpha agreed to be the independent fiduciary of the Trachte ESOP, the Alpha Defendants had a duty to determine whether they were authorized under the terms of the Trachte ESOP Plan Document to direct the Trachte Trustee Defendants to engage in the 2007 Transaction. Had they done so, the Alpha Defendants would have determined that Alpha had no authority to direct the Trachte Trustee Defendants to engage in the 2007 Transaction.

258. Because the Alpha Defendants directed the Trachte Trustee Defendants, then the Alpha Defendants had a fiduciary duty to undertake an appropriate investigation of the 2007 Transaction, including a valuation of the Alliance, AH Transition and Trachte stock.

259. The Alpha Defendants failed to undertake an appropriate investigation of the 2007 Transaction as proposed for the following reasons, among others: (a) they were retained only one week before the scheduled closing and two weeks before the actual closing, which was not a sufficient amount of time to review the 2007 Transaction; (b) they were not aware that they were required to determine whether the purchase of Trachte stock was for adequate consideration until August 21, 2007, six days before the 2007 Transaction; (c) they did not

obtain their own valuation of the Alliance, AH Transition, and Trachte stock but instead relied on valuations obtained by Defendants Alliance and Fenkell, whose interests were adverse to the Trachte ESOP; (d) they did not obtain their own fairness opinion but instead relied on the Fairness Opinion issued by BWVS to the Trachte Trustee Defendants and did not have adequate information to assess any valuation conclusions performed by BWVS; (e) they did not act independently, but instead relied on directions from Defendant Mastrangelo, the lending banks, and the Alliance Defendants and/or representatives of the Alliance Defendants in determining what direction should be given; (f) they did not have a copy of the final valuation and Fairness Opinion until August 29, 2007, the date of the transaction and the date they issued the direction; and (g) they performed an insufficient analysis of the valuations and Fairness Opinion to determine whether the information and assumptions upon which they were based were accurate and complete.

260. An appropriate investigation of the 2007 Transaction would have revealed at least that (a) the Alliance and AH Transition stock was not as valuable after the transfer and, therefore, the Trachte ESOP did not receive the assets to which it was entitled, (b) the price paid for the Trachte shares exceeded the fair market value of the stock, (c) the debt assumed by Trachte in connection with the Buyback diminished the value of the Trachte shares, (d) much of the value already allocated to participants' accounts in the Alliance ESOP was destroyed by the purchase of the Trachte stock and the associated debt load, and (e) the Company would likely have difficulty servicing the debt assumed in connection with the transactions.

261. By causing the Trachte ESOP to engage in the 2007 Transaction, which was not in the interests of the Trachte ESOP's participants and beneficiaries, the Alpha Defendants breached their fiduciary duties under ERISA by failing to discharge their duties with respect to

the Plan solely in the interest of the participants and beneficiaries (1) for the exclusive purpose of providing benefits to participants and their beneficiaries; (2) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and like aims, and (3) in accordance with the documents and instruments governing the Trachte ESOP, all in violation of ERISA § 404(a)(1)(A), (B) and (D), 29 U.S.C. § 1104(a)(1)(A),(B), and (D).

COUNT IX

**(VIOLATION OF ERISA § 406(a)(1)(A) AND (D) AGAINST THE
ALPHA DEFENDANTS ON BEHALF OF THE CLASS)**

262. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

263. As part of the 2007 Transaction, the Alpha Defendants caused the Trachte ESOP to engage in the 2007 Transaction with Defendant Pagelow and the Alliance Defendants.

264. By causing the Trachte ESOP to engage in the \$26 million stock purchase from Defendants Pagelow and A.H.I., Inc. described above, in which the Trachte ESOP paid more than “adequate consideration,” the Alpha Defendants violated their fiduciary duties under ERISA by causing the Trachte ESOP to engage in a transaction which they knew or should have known constituted a direct or indirect (1) sale or exchange of property between the Plan and parties in interest, or (2) transfer to, or use by or for the benefit of, a party in interest, of any assets of the Plan, all in violation of ERISA § 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D).

COUNT X

**(VIOLATION OF ERISA § 404 AGAINST DEFENDANT PAGELOW
ON BEHALF OF THE CLASS)**

265. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

266. Pursuant to the terms of the Trachte ESOP Plan Document, Trachte was the Administrator, Employer and Plan Sponsor of the Trachte ESOP. As the Plan Sponsor and Employer, Trachte had the authority to designate other persons or entities to be the Administrator.

267. Under the terms of the Trachte ESOP Plan Document, the Administrator had the sole authority to direct the Trachte ESOP Trustees.

268. On August 13, 2007, Defendant Pagelow was the CEO, Chairman of the Board of Directors and one of two shareholders of Trachte. In one or more of these positions, Defendant Pagelow appointed Defendant Alpha on August 13, 2007 to be an independent fiduciary with purported authority to review the proposed 2007 Transaction and direct the Trachte Trustee Defendants.

269. Defendant Pagelow knew or should have known that Defendant Alpha did not have authority as an independent fiduciary under the terms of the Trachte ESOP Plan Document to direct the Trachte Trustee Defendants with respect to the 2007 Transaction.

270. By authorizing Defendant Alpha to direct the Trachte Trustee Defendants when it had no authority to do so under the terms of the Trachte ESOP Plan Document, Defendant Pagelow breached his fiduciary duties under ERISA by failing to discharge its duties with respect to the Trachte ESOP solely in the interest of the participants and beneficiaries (1) for the exclusive purpose of providing benefits to the participants and beneficiaries, and (2) with the

care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and like aims, all in violation of ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

COUNT XI

**(VIOLATION OF ERISA § 405(A) AGAINST DEFENDANT PAGELOW
ON BEHALF OF THE CLASS)**

271. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

272. Pursuant to the terms of the Trachte ESOP Plan Document, Trachte was the Administrator, Employer and Plan Sponsor of the Trachte ESOP. As the Plan Sponsor and Employer, Trachte had the authority to designate other persons or entities to be the Administrator.

273. Under the terms of the Trachte ESOP Plan Document, the Administrator had the sole authority to direct the Trachte ESOP Trustees.

274. On August 13, 2007, Defendant Pagelow was the CEO, Chairman of the Board of Directors and one of two shareholders of Trachte. In one or more of these positions, Defendant Pagelow authorized the engagement of Defendant Alpha on August 13, 2007 to be an independent fiduciary with purported authority to review the proposed 2007 Transaction and direct the Trachte Trustee Defendants, and was thereby a fiduciary to the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21).

275. As a fiduciary of the Trachte ESOP, Defendant Pagelow is liable, in addition to any other liability for his own personal acts, for the breach of fiduciary responsibility of another

fiduciary with respect to the Trachte ESOP, pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

276. Defendant Pagelow knew or should have known that Defendant Alpha did not have authority as an independent fiduciary under the terms of the Trachte ESOP Plan Document to direct the Trachte Trustee Defendants with respect to the 2007 Transaction. Defendant Pagelow also knew or should have known that Defendant Alpha had no prior experience as a discretionary trustee, was not provided with enough information to assess the 2007 Transaction, and had insufficient time to perform an adequate review of the 2007 Transaction.

277. By authorizing the engagement of Defendant Alpha for the purpose of directing the Trachte Trustee Defendants, and by failing to take steps to remedy the breach, Defendant Pagelow breached his fiduciary duties under ERISA:

- a. by knowingly participating in an act or omission of such other fiduciaries, the Trachte Trustee Defendants and Alpha Defendants, knowing that such act or omission was a breach;
- b. by failing to comply with the duties imposed on him by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of the specific responsibilities which gave rise to his status as a fiduciary, enabling the Trachte Trustee Defendants and Alpha Defendants to commit a breach; and
- c. by knowing of the breach by the Trachte Trustee Defendants and Alpha Defendants and failing to make reasonable efforts under the circumstances to remedy the breach;

and, as such, is liable for the breaches of fiduciary responsibility of the Trachte Trustee Defendants and Alpha Defendants, pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

COUNT XII

**(VIOLATION OF ERISA § 405(A) AGAINST THE TRACHTE TRUSTEE
DEFENDANTS ON BEHALF OF THE CLASS)**

278. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

279. As the Trustees of the Trachte ESOP at the time of the 2007 Transaction, the Trachte Trustee Defendants were fiduciaries of the Trachte ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because they exercised discretionary authority and control respecting management of the Trachte ESOP and/or authority and control respecting management or disposition of its assets.

280. As fiduciaries of the Trachte ESOP, the Trachte Trustee Defendants are liable, in addition to any other liability for their own personal acts, for the breach of fiduciary responsibility of another fiduciary with respect to the Trachte ESOP, pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

281. The Trachte Trustee Defendants knew or should have known that the Alpha Defendants did not have authority to direct them to complete the transaction and did not undertake an adequate investigation of the sale. By accepting their direction, and by otherwise failing to take steps to protect the Trachte ESOP in the 2007 ESOP transaction, the Trachte Trustee Defendants breached their fiduciary duties under ERISA:

- a. by knowingly participating in an act or omission of such other fiduciaries, the Alpha Defendants, knowing that such act or omission was a breach;

- b. by failing to comply with the duties imposed on them by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of the specific responsibilities which gave rise to their status as fiduciaries, enabling the Alpha Defendants to commit a breach; and
- c. by knowing of the breach by the Alpha Defendants and failing to make reasonable efforts under the circumstances to remedy the breach;

and, as such, are liable for the breaches of fiduciary responsibility of the Alpha Defendants, pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

282. Each of the Trachte Trustee Defendants in their individual capacity also knew or should have known that the other Trachte Trustee Defendants did not have authority to accept the direction of the Alpha Defendants. By failing to take steps to protect the Trachte ESOP in the 2007 ESOP Transaction, the individual Trachte Trustee Defendants breached their fiduciary duties under ERISA:

- a. by knowingly participating in an act or omission of such other fiduciaries, the other Trachte Trustee Defendants, knowing that such act or omission was a breach;
- b. by failing to comply with the duties imposed on them by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of the specific responsibilities which gave rise to their status as fiduciaries, enabling the other Trachte Trustee Defendants to commit a breach; and
- c. by knowing of the breach by the other Trachte Trustee Defendants and failing to make reasonable efforts under the circumstances to remedy the breach;

and, as such, are liable for the breaches of fiduciary responsibility of the other Trachte Trustee Defendants pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

COUNT XIII

(VIOLATION OF ERISA § 405(A) AGAINST DEFENDANTS ALLIANCE AND FENKELL ON BEHALF OF THE SUBCLASS)

283. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

284. Defendant Alliance is and was at the time of the 2007 Transaction a fiduciary with respect to the Alliance ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because of its position as the Named Fiduciary and because of its discretionary authority or discretionary responsibility in the administration of the Alliance ESOP.

285. Defendant Fenkell is and was at the time of the 2007 Transaction a fiduciary with respect to the Alliance ESOP within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21), because of his position as Trustee, his exercise of authority and control respecting management or disposition of the Alliance ESOP's assets, and his discretionary authority or discretionary responsibility in the administration of the Alliance ESOP.

286. As fiduciaries of the Alliance ESOP, Defendants Alliance and Fenkell are liable, in addition to any other liability for their own personal acts, for the breach of fiduciary responsibility of another fiduciary with respect to the Alliance ESOP.

287. Defendant Alliance, by failing to properly monitor and remove Defendant Fenkell as the Alliance ESOP Trustee, breached its fiduciary duties under ERISA:

- a. by knowingly participating in an act or omission of such other fiduciaries, knowing that such act or omission was a breach;

- b. by failing to comply with the duties imposed on it by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of the specific responsibilities which gave rise to its status as a fiduciary, enabling Defendant Fenkell to commit a breach; and
- c. by knowing of the breach by Defendant Fenkell and failing to make reasonable efforts under the circumstances to remedy the breach;

and, as such, is liable for the breaches of fiduciary responsibility by Defendant Fenkell, pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

288. Defendant Fenkell, to the extent he accepted direction from Defendant Alliance as the Alliance ESOP Named Fiduciary, breached his fiduciary duties under ERISA:

- a. by knowingly participating in an act or omission of such other fiduciaries, knowing that such act or omission was a breach;
- b. by failing to comply with the duties imposed on it by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of the specific responsibilities which gave rise to its status as a fiduciary, enabling Defendant Alliance to commit a breach; and
- c. by knowing of the breach by Defendant Alliance and failing to make reasonable efforts under the circumstances to remedy the breach;

and, as such, is liable for the breaches of fiduciary responsibility by Defendant Alliance, pursuant to ERISA § 405(a)(1)-(3), 29 U.S.C. § 1105(a)(1)-(3).

COUNT XIV

(LIABILITY FOR KNOWINGLY PARTICIPATING IN FIDUCIARY BREACHES AND PROHIBITED TRANSACTIONS BY THE TRACHTE TRUSTEE DEFENDANTS AND ALPHA DEFENDANTS UNDER ERISA § 502(a)(3) AGAINST THE ALLIANCE DEFENDANTS & DEFENDANT PAGELOW ON BEHALF OF THE CLASS)

289. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

290. The Alliance Defendants and Defendant Pagelow knew or should have known of the existence of the Trachte ESOP and had actual or constructive knowledge that the Alpha Defendants and/or the Trachte Trustee Defendants caused the Trachte ESOP to pay more than adequate consideration for the Trachte stock purchased from Defendants A.H.I. and Pagelow. Nonetheless, the Alliance Defendants and Defendant Pagelow enabled the Alpha Defendants and/or the Trachte Trustee Defendants to engage in the 2007 Transaction.

291. By knowingly participating in the foregoing breaches of fiduciary duty of ERISA § 404(a), 29 U.S.C. § 1104(a), and a prohibited transaction under ERISA § 406(a), 29 U.S.C. § 1106(a), by the Alpha Defendants and/or the Trachte Trustee Defendants through the transfer of the assets of the Alliance ESOP, the transfer of the Alliance stock to Alliance and AH Transition and the sale of the Selling Defendants' stock to the Trachte ESOP, the Alliance Defendants and Pagelow are liable to disgorge any benefit that they received which is traceable to such breaches, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

292. Upon information and belief, the proceeds that the Selling Defendants received from the sale of Trachte stock to the Trachte ESOP are traceable because, (a) as to Defendant Pagelow, in order to obtain the tax benefits from the sale, the proceeds must be invested in qualified replacement property (generally stocks and bonds or other debt instruments issued by United States operating companies) pursuant to Section 1042 of the Internal Revenue Code or

other traceable assets, and (b) as to the Alliance Defendants, the proceeds were used to invest in other companies and/or investments.

293. By knowingly participating in the foregoing breaches of fiduciary duty of ERISA § 404(a), 29 U.S.C. § 1104(a), and a prohibited transaction under § 406(a), 29 U.S.C. § 1106(a), by the Trachte Trustee Defendants and/or the Alpha Defendants through the sale of the Selling Defendants' stock to the Trachte ESOP, Defendants A.H.I. (and as necessary to effect relief, any other Alliance Defendant) and Pagelow may also be ordered to rescind the sale of their shares to the Trachte ESOP, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

COUNT XV

(LIABILITY FOR KNOWING PARTICIPATING IN FIDUCIARY BREACHES AND PROHIBITED TRANSACTIONS BY DEFENDANT FENKELL & ALLIANCE PURSUANT TO ERISA § 502(a)(3) AGAINST THE ALLIANCE DEFENDANTS AND DEFENDANT PAGELOW ON BEHALF OF THE SUBCLASS)

294. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

295. Defendants Alliance, AH Transition, A.H.I. and Pagelow knew or should have known of the existence of the Alliance ESOP and had actual or constructive knowledge that Defendant Fenkell (and/or Alliance) caused the Alliance ESOP to improperly spin-off the accounts of the Trachte employee-participants. Nonetheless, the Alliance Defendants and Defendant Pagelow enabled Defendant Fenkell and/or Defendant Alliance to engage in the 2007 Transaction.

296. By knowingly participating in the foregoing breaches of fiduciary duty of ERISA § 404(a), 29 U.S.C. § 1104(a), and a prohibited transaction under ERISA § 406(a) and/or ERISA § 406(b), by Defendants Alliance and/or Defendant Fenkell through the spin-off of the accounts of the Trachte employee participants, the Alliance Defendants and Defendant Pagelow are liable

to disgorge any benefit that they received which is traceable to such breaches, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

297. Upon information and belief, the proceeds that the Alliance Defendants and Defendant Pagelow received from the 2007 Transaction are traceable because, (a) as to Defendant Pagelow, in order to obtain the tax benefits from the sale, the proceeds must be invested in qualified replacement property (generally stocks and bonds or other debt instruments issued by United States operating companies) pursuant to Section 1042 of the Internal Revenue Code or other traceable assets, and (b) as to the Alliance Defendants, the proceeds were used to invest in other companies and/or investments.

298. By knowingly participating in the foregoing breaches of fiduciary duty of ERISA § 404(a), and a prohibited transaction under ERISA § 406(a) and/or ERISA § 406(b) by Defendant Fenkell and/or Defendant Alliance through the spin-off of the Trachte employee-participant accounts, the Alliance Defendants and Defendant Pagelow may also be ordered to rescind the sale of or exchange of their shares to the Trachte ESOP, pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

COUNT XVI

(LIABILITY AS GRATUITOUS TRANSFEREE OF PHANTOM STOCK PLAN PROCEEDS PURSUANT TO ERISA § 502(a)(3) AGAINST DEFENDANT KAREN FENKELL ON BEHALF OF THE CLASS

299. Plaintiffs repeat and incorporate the allegations contained in the foregoing paragraphs as if fully set forth herein.

300. On August 30, 2007, Defendant David Fenkell received \$ 2,896,100 as a payment from the Phantom Stock Plan for Alliance Employees, which was deposited to a Morgan Stanley account (“MS6444) held jointly in the name of Defendant David Fenkell and Karen Fenkell.

301. Between August August 31, 2007 and October 31, 2007, all of the monies in MS6444, including the proceeds from the payment for the Phantom Stock Plan, were transferred directly or indirectly to accounts held solely in the name of Karen Fenkell.

302. At least as of October 31, 2007, a portion of the proceeds that Defendant Karen Fenkell received between August 31, 2007 and October 31, 2007 are traceable to the \$2.896 million payment made to Defendant David Fenkell from the Phantom Stock Plan in connection with the 2007 Transaction.

303. Upon information and belief, David Fenkell did not receive anything of tangible value from Karen Fenkell in exchange for the transfer of funds from MS6444 to accounts held solely in the name of Karen Fenkell.

304. Upon information and belief, Karen Fenkell did not pay or provide anything of tangible value to David Fenkell or anyone else in exchange for the transfer of funds from MS6444 to accounts held solely in the name of Karen Fenkell.

305. As a result, Karen Fenkell was not a bona fide purchaser of value with respect to the proceeds that are traceable to the Phantom Stock Plan payment received by David Fenkell in connection with the 2007 Transaction.

306. By receiving proceeds traceable to the payment from the Phantom Stock Plan in connection with the 2007 Transaction without paying value in exchange (i.e. being a bona fide purchaser for value), Defendant Karen Fenkell may be ordered to disgorge the funds in her possession as well as the proceeds and/or profits made on those funds pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

ENTITLEMENT TO RELIEF

307. By virtue of the violations of ERISA described in the preceding paragraphs, Plaintiffs are entitled to sue the fiduciaries who committed the breaches of fiduciary duty

described therein pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) for relief on behalf of the Alliance ESOP and Trachte ESOP as provided in ERISA § 409, 29 U.S.C. § 1109, including recovery for the Alliance ESOP and Trachte ESOP of any losses to the Alliance ESOP and Trachte ESOP or recovery of profits resulting from each such breach, and such other equitable or remedial relief as the court may deem appropriate.

308. Plaintiffs are entitled to sue Defendants Alliance, AH Transition, A.H.I., Inc., and Pagelow pursuant to ERISA § 502(a)(3), whether or not they are fiduciaries, for appropriate equitable relief including disgorgement of profits traceable to their knowing participation in the forgoing breaches and/or prohibited transactions or rescission of the 2007 Transaction, whichever is in the best interests of the Trachte ESOP.

309. Plaintiffs are entitled to sue Defendant Karen Fenkell pursuant to ERISA § 502(a)(3), whether or not she is a fiduciary, for appropriate equitable relief including the imposition of a constructive trust on the phantom stock payments made to Defendant Fenkell in connection with the 2007 Transaction and transferred to Karen Fenkell, and any profits thereon.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants on each Count of the Amended Complaint and the following relief:

1. An order rescinding the Spin-off and either restoring the accounts of members of the Subclass in the Alliance ESOP or rescinding the transfer of Alliance shares to the Alliance and/or AH Transition (as occurred in Step 3 of the Transaction).
2. An order requiring each fiduciary alleged herein to have breached his fiduciary duty to the Alliance ESOP and Trachte ESOP to jointly and severally pay such amount to the Alliance ESOP and Trachte ESOP as is necessary to make the Alliance ESOP and Trachte ESOP

whole for any losses which resulted from said breaches of fiduciary duty or by virtue of liability pursuant to ERISA § 405, 29 U.S.C. § 1105, and to disgorge any profits which have been made through the use of the assets of the Alliance ESOP and/or Trachte ESOP and/or the proceeds of the 2007 Transaction, including a declaration of a constructive trust over the proceeds and/or profits traceable to payment received by Defendant David Fenkell pursuant to the Phantom Stock Plan.

3. An order requiring (a) the disgorgement of profits made by the Selling Defendants, (b) rescission of the purchase of stock from the Selling Defendants, (c) a declaration of a constructive trust of the assets of the Trachte ESOP held by the Selling Defendants, or (d) any other appropriate equitable relief against the Selling Defendants, whichever is in the best interest of the Trachte ESOP.

4. An order requiring the proceeds of any recovery for the Trachte ESOP to be allocated to the accounts of participants in the Trachte ESOP in proportion to the injury that they suffered as a result of the breach of fiduciary duty.

5. An order requiring the forfeiture of any interest in the Alliance ESOP of any fiduciary alleged to have breached his fiduciary duty to the Plan to the extent necessary after any recovery for Subclass to make whole the innocent participants of the Trachte ESOP who were participants of the Alliance ESOP at the time of the 2007 Transaction.

6. An order requiring the forfeiture of any interest in the Trachte ESOP of any fiduciary alleged to have breached his fiduciary duty to the Plan to the extent necessary after any recovery for the Trachte ESOP to make whole the innocent participants of the Trachte ESOP.

7. A declaration pursuant to ERISA that the Defendants have violated their fiduciary duty in the manner described.

8. An injunction preventing any of the breaching fiduciaries from acting as fiduciaries for any plan that covers the employees of Trachte and/or any members of the Class or Subclass.

9. To the extent that the Alliance ESOP accounts of the members of the Subclass are restored or members of the Subclass are otherwise determined to be participants of the Alliance ESOP, an order removing Defendant Fenkell from his roles as fiduciary of the Alliance ESOP and appointing an Independent Fiduciary to manage the Alliance ESOP.

10. An order removing the Trachte Trustee Defendants from their role as such for the Trachte ESOP and appointing an Independent Fiduciary to manage the Trachte ESOP.

11. The cost of the suit, including attorneys' fees under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), and this Court's inherent equitable authority and powers.

12. Pre-judgment and post-judgment interest.

13. Other such and further relief as the Court deems appropriate.

Dated: May 3, 2012

Respectfully submitted,

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