

1 D. W. Kallstrom, (SBN 76937)  
2 Donald P. Sullivan (SBN 191080)  
3 M. Michael Cole (SBN 235538)  
4 MORGAN, LEWIS & BOCKIUS LLP  
5 One Market, Spear Street Tower  
6 San Francisco, CA 94105-1126  
7 Tel: 415.442.1000  
8 Fax: 415.442.1001

9 Attorneys for Defendants  
10 CLAIR R. COUTURIER, JR., DAVID R  
11 JOHANSON, and ROBERT E. EDDY

12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF CALIFORNIA

14 GREGORY JOHNSON, WILLIAM  
15 RODWELL AND EDWARD RANGEL,

16 Plaintiffs,

17 vs.

18 CLAIR R. COUTURIER, JR., DAVID R.  
19 JOHANSON, ROBERT E. EDDY AND  
20 THE NOLL MANUFACTURING  
21 COMPANY EMPLOYEE STOCK  
22 OWNERSHIP PLAN AND TRUST,

23 Defendants.

Case No. 2:05-cv-02046 RRB KJM

**INDIVIDUAL DEFENDANTS' NOTICE OF  
MOTION AND MOTION FOR SUMMARY  
JUDGMENT, OR IN THE ALTERNATIVE,  
SUMMARY ADJUDICATION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
INDIVIDUAL DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT, OR IN THE  
ALTERNATIVE, SUMMARY  
ADJUDICATION**

Date: September 1, 2006  
Time: 9:30 a.m.  
Ctrm: 2  
Judge: Hon. Ralph R. Beistline

24 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that on September 1, 2006 at 9:30 a.m., or as soon thereafter as  
26 the matter may be heard in Department 2 of the above entitled court, located at 222 W. 7th  
27 Avenue, Anchorage, Alaska, Defendants Clair R. Couturier, Jr., David R. Johanson, and Robert  
28 E. Eddy (collectively, "Individual Defendants"), will, and hereby do, move the Court pursuant to  
Rule 56 of the Federal Rules of Civil Procedure for an order granting summary judgment, or in  
the alternative, summary adjudication, in their favor and against Plaintiff Gregory Johnson  
("Plaintiff" or "Johnson"). The Individual Defendants move for summary judgment, or in the  
alternative, summary adjudication, because there is no genuine dispute as to any material fact, and

1 Defendants are therefore entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56.  
2 Defendants' motion shall be based on this Notice and Motion, the accompanying Memorandum  
3 of Points and Authorities, the Declarations of David R. Johanson and Clair R. Couturier, the  
4 Individual Defendants' Request for Judicial Notice, the accompanying Statement of Undisputed  
5 Facts, all of the pleadings and papers on file in this case, and the argument of counsel at hearing.

6  
7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 More than three years ago, Johnson brought suit against the Noll Manufacturing  
10 Company, a California corporation ("Noll"), for allegedly unpaid vacation time and wages.  
11 Represented by the same attorney who has brought the present lawsuit, Johnson settled his claims  
12 for \$226,693.52, and entered into a Settlement Agreement and General Release with Noll,  
13 N&NW Manufacturing Company ("N&NW") ("Noll's successor"), Northwest Metal Products  
14 Co. (a Noll subsidiary), and the Noll Manufacturing Company Employee Stock Ownership Trust  
15 ("Noll ESOT") (the "Agreement").<sup>1</sup> Pursuant to the clear language of the General Release,  
16 Johnson released (among others) all present and former fiduciaries of the Noll ESOT for any and  
17 all claims arising under ERISA.

18 Despite the unequivocal language of the Agreement, Johnson and the same attorney now  
19 purport to bring an action against the Individual Defendants claiming that as fiduciaries of the  
20 Noll ESOT, they committed violations of ERISA, 29 U.S.C. §§ 1001, *et. seq.* This he and his  
21 legal counsel cannot do. Having signed the Agreement releasing all of his claims against the Noll  
22 ESOT and its fiduciaries, Johnson's claims in the instant action are barred. For this reason, the  
23 Individual Defendants are entitled to summary judgment, or in the alternative, summary  
24 adjudication, on Johnson's claims.

25  
26  
27 

---

<sup>1</sup> The Parties have stipulated that The Employer Ownership Holding Company Employee Stock Ownership Trust ("TEOHC ESOT") is the  
28 successor to the Noll ESOT. See Rule 26(f) Statement (Docket # 22).

1 **II. FACTUAL BACKGROUND**

2 **A. Johnson Settled and Released All Claims Against the Noll ESOT and its**  
3 **Fiduciaries**

4 Represented by Matthew Righetti, Esq. of the Righetti Law Firm, P.C., Johnson brought  
5 suit against Noll on January 16, 2003, in the Superior Court of California for the County of San  
6 Joaquin. The complaint sought recovery of allegedly vested but unpaid vacation pay and  
7 damages for breach of contract. Declaration of David R. Johanson in Support of Individual  
8 Defendant's Motion for Summary Judgment, or in the Alternative, Summary Adjudication  
9 ("Johanson Decl."), ¶ 5, Ex. A.

10 On October 20, 2003, Johnson settled that lawsuit by signing and executing the  
11 Agreement. Johanson Decl., ¶ 6, Ex. B. Recognizing their desire to "avoid the expense and risk  
12 associated with litigation" and "to amicably resolve all of their differences," including those  
13 arising out of Johnson's "participation in the [Noll Employee Stock Ownership Plan] and the  
14 valuation of his vested benefit under the ESOP," the parties agreed that Noll would pay Johnson a  
15 total of \$291,693.52 (less applicable taxes and statutory deductions). Johanson Decl., ¶ 6, Ex. B  
16 at 1 (emphasis added). Of that sum, the parties expressly recognized that \$226,693.52  
17 represented the repurchase of all of the Noll stock held in Johnson's account under the Noll  
18 Manufacturing Company Employee Stock Ownership Plan (the "Noll ESOP"), and distributed to  
19 him, pursuant to the terms of the Noll ESOP.<sup>2</sup> Johanson Decl., ¶ 6, Ex. B at 1.

20 As it pertains to the instant action, the Agreement contained a general release by which  
21 Johnson released all claims against the directors, officers, agents, representatives, and attorneys of  
22 Noll and the Noll ESOT, and others acting in concert with them, including those claims arising  
23 under ERISA. Specifically, the Agreement provided that:

24 Mr. Johnson . . . does hereby release, acquit and forever discharge  
25 Noll and the Noll ESOT . . . present and former directors, officers,  
26 shareholders, agents, representatives, employees, attorneys,  
accountants, and all others acting for or in concert with Noll, past or  
present (hereinafter collectively, the "Releasees"). . . from any and

27 <sup>2</sup> The ESOP is the written instrument that governs participants' rights. The ESOT is the trust that actually holds legal  
28 title to the ESOP's assets. Johanson Decl. ¶ 8.

1 all liabilities, damages, actions, causes of action, claims, demands  
2 or suits of any nature, kind or description whatsoever whether  
3 accrued or to accrue, whether presently known or unknown . . .  
4 that Mr. Johnson ever had, now has or hereafter may have against  
5 any of the Releasees arising out of any act, omission, or matter  
6 occurring before execution of this Agreement, including, without  
7 limitation, all claims related to Mr. Johnson's employment with the  
8 Company, such as, but not limited to . . . claims under . . . the  
9 Employee Retirement Income Security Act of 1974, as amended.

6 Johanson Decl., ¶ 6, Ex. B at ¶ 4 (emphasis added).

7 Johnson also expressly waived the protections of California Civil Code section 1542,  
8 which provides that a “general release does not extend to claims which the creditor does not know  
9 or suspect to exist in his favor at the time of executing the release, which if known . . . must have  
10 materially affected his settlement with the debtor.” Johanson Decl., ¶ 6, Ex. B at ¶ 4.

11 The Agreement, moreover, is fully integrated: “This Agreement sets forth the entire  
12 Agreement between the Parties hereto, and fully supersedes any and all prior agreement or  
13 understandings between the Parties hereto pertaining to the subject matter thereof.” Johanson  
14 Decl., ¶ 6, Ex. B at ¶ 12.

15 Johnson specifically acknowledged that he entered into the Agreement voluntarily and  
16 knowingly, and after having an opportunity to discuss it with his counsel:

17 Mr. Johnson agrees that the complete release he has granted . . .  
18 the Releasees pursuant to this Agreement is strictly knowing and  
19 voluntary. Specifically, Mr. Johnson agrees as follows:

20 a. Mr. Johnson enters into this Agreement of his own  
21 free will and he has not been pressured or coerced in any way  
22 whatsoever into signing this Agreement. He has been advised, in  
23 writing, to consult with an attorney prior to executing this  
24 Agreement and has done so.

25 b. Mr. Johnson enters into this Agreement carefully,  
26 knows and understands the contents thereof, and has made such  
27 investigation into the facts pertaining to this Agreement and all  
28 matters pertaining hereto as he deems necessary or desirable.

25 Johanson Decl., ¶ 6, Ex. B at ¶ 7 (emphasis added).

26 In addition, Johnson had ample time to review and consider the Agreement and revoke it  
27 after signing it. As the Agreement states:

28 e. Mr. Johnson acknowledges that he has been given

1 the opportunity to consider this Agreement for twenty-one (21)  
2 days, and that he may take, and has taken, as much of that time as  
he wants in order to consider this Agreement before signing it.

3 f. Mr. Johnson understands that he has seven (7) days  
4 following his execution of this Agreement to revoke this Agreement  
and that this Agreement shall not become effective until the  
5 conclusion of that 7-day period.

6 Johanson Decl. ¶ 7, Ex. B at ¶ 7.<sup>3</sup>

7 Pursuant to the terms of the Agreement, Noll paid Johnson \$65,000 for unused vacation  
8 pay and/or severance pay, and an additional \$226,693.52 for the purchase of the Noll stock held  
9 in his Noll ESOP account. Johanson Decl., ¶ 7, Exs. C, D. Shortly thereafter, on December 10,  
10 2003, the court dismissed with prejudice Johnson's complaint. Request for Judicial Notice, Ex. A  
11 (Request for Dismissal).

12 **B. The Individual Defendants Are Among Those Released**

13 Noll's Board of Directors appointed Defendant Clair R. Couturier, Jr. as a trustee of the  
14 Noll ESOT effective April 24, 2001, and appointed him Chief Executive Officer of Noll and  
15 Chairman of the Board of Noll effective in June of 2001. Declaration of Clair R. Couturier, Jr. in  
16 Support of Individual Defendants' Motion for Summary Judgment or in the Alternative,  
17 Summary Adjudication ("Couturier Decl."), ¶ 2. Meanwhile, the Noll ESOT engaged David R.  
18 Johanson as legal counsel to the Noll ESOT on or about March 15, 2000 (a position he resigned  
19 in October of 2003). Subsequently, Noll's Board of Directors appointed him as general counsel  
20 during August of 2001, and the Noll ESOT appointed Mr. Johanson as a director of Noll on or  
21 about June 20, 2001. Johanson Decl., ¶¶ 2-4. Finally, Noll appointed Robert E. Eddy as the  
22 special trustee of the Noll ESOT on or about September 30, 2003, and a director of Noll on or  
23 about January 21, 2004. Couturier Decl., ¶¶ 5-6. Thus, at the time Johnson signed the  
24 Agreement, October 20, 2003, all three Individual Defendants were among those encompassed as

25 \_\_\_\_\_  
26 <sup>3</sup> Paragraph 8 of the Agreement further confirms that Johnson consulted with his attorneys before entering the  
27 agreement and was fully informed of its contents, terms, and conditions. Johanson Decl., ¶ 6, Ex. B at ¶ 8. At the  
28 end of the Agreement, in bold print and all capitals, there is also a clear warning to Johnson to read the entire  
Agreement as it includes a release of all known or unknown claims and advising him to consult with an attorney.  
The warning further reiterates that Johnson had 21 days to review the document and an opportunity to revoke it  
following execution. Johanson Decl., ¶ 6, Ex. B at pg. 5.

1 “Releasees.”

2 C. **Despite Releasing all ERISA Claims, Johnson Brought Suit for ERISA**  
3 **Fiduciary Violations**

4 As noted above, on October 20, 2003, Johnson signed the Agreement releasing the Noll  
5 ESOT and the Individual Defendants and providing him with a full pay-out of his Noll stock  
6 pursuant to the Noll ESOP. From that point on, Johnson had no further relationship with Noll or  
7 the Noll ESOT. Nevertheless, on October 11, 2005, Johnson brought the instant complaint  
8 against the Individual Defendants alleging that they violated their fiduciary duties under ERISA.<sup>4</sup>

9 **III. SUMMARY JUDGMENT STANDARD**

10 Summary judgment should be granted where “there is no genuine issue as to any material  
11 fact and the moving party is entitled to a judgment as a matter of law.” F.R.C.P. 56(c); *see also*  
12 *Toscano v. Prof. Golfers’ Ass’n*, 258 F.3d 978, 982 (9th Cir. 2001). If the evidence in the record  
13 “could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial,”  
14 and the motion should be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
15 574, 587 (1986).

16 **IV. ARGUMENT**

17 A. **The Settlement and Release Agreement Bars Johnson’s Claims**

18 1. **Settlement and Release Agreements Are Enforceable Under California**  
19 **Law**

20 The interpretation of a settlement and release agreement like the Agreement is a matter of  
21 contract and thus, a question arising under state law. *See Botefur v. City of Eagle Point, Or.*, 7  
22 F.3d 152, 156 (9th Cir. 1993) (applying state law in interpreting a settlement agreement even  
23 though a federal cause of action was settled or released).

24 In California, the settlement of disputes, and the enforcement of settlement agreements,  
25 are strongly favored. *See In re Marriage of Hasso*, 229 Cal.App.3d 1174, 1185 (1991) (it is  
26 “unquestionably in society’s best interest for persons to resolve their disputes among  
27

---

28 <sup>4</sup> He has done so despite representation by the same attorney, Mr. Righetti, in both actions.



1 themselves”; “settlement agreements are highly favored as productive of peace and goodwill in  
2 the community, and reducing the expense and persistency of litigation (internal quotations  
3 omitted)). Indeed, Section 1541 of the California Civil Code specifically provides that “[a]n  
4 obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new  
5 consideration, or in writing, with or without new consideration.” Thus, written releases (even of  
6 unknown claims) are fully enforceable in California absent any “fraud, deception,  
7 misrepresentation, duress, or undue influence.” *Skribina v. Fleming Cos.*, 45 Cal.App.4th 1353,  
8 1366 (1996) (“[w]hen a person with the capacity of reading and understanding an instrument  
9 signs it, he is, in the absence of fraud and imposition, bound by its contents . . .”).<sup>5</sup>

10 2. The Express Language of the Settlement and Release Agreement Controls

11 When interpreting a release and settlement agreement, the role of the court (as in all  
12 contract cases) is to give “effect to the mutual intentions of the parties at the time of contract.”  
13 *Giles v. Sardie*, 191 F. Supp. 2d 1128, 1133 (C.D. Cal. 2000). “In doing so, the court will enforce  
14 the outward expression of the parties’ intentions rather than their uncommunicated subjective  
15 intentions.” *Id.*

16 3. The Express Language of Johnson’s Agreement Bars His ERISA Claims

17 It is well settled that ERISA claims may be waived and that releases waiving ERISA  
18 claims are enforceable. *See, e.g., Taylor v. Visteon Corp.*, 149 Fed.Appx. 422, 426 (6th Cir.  
19 2005) (holding that a general release and waiver agreement encompassing ERISA claims is  
20 enforceable); *Mead v. Intermec Tec. Corp.*, 271 F.3d 715, 717 (8th Cir. 2001) (settlement  
21 agreements releasing legal claims in exchange for severance benefits enforceable under ERISA);  
22 *Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, (8th Cir. 1990) (enforcing a release against a  
23 claim by plaintiff for denial of benefits under ERISA; “[a] fiduciary and a beneficiary can settle a

24 <sup>5</sup> As noted, Johnson also explicitly waived the protections of California Civil Code section 1542 which provides  
25 that a “general release does not extend to claims which the creditor does not know or suspect to exist in his favor at  
26 the time of executing the release, which if known . . . must have materially affected his settlement with the debtor.”  
The protections of section 1542 may be waived. *See San Diego Hospice v. County of San Diego*, 31 Cal.App.4th  
1048, 1054 (1995).

1 disputed claim that the fiduciary breached its fiduciary responsibilities under ERISA if the claim  
 2 is knowingly and voluntarily released”); *Fair v. Int’l Flavors & Fragrances, Inc.*, 905 F.2d 1114,  
 3 1116-17 (7th Cir. 1990) (bargained release of an ERISA claim is enforceable); *Fisher v. Standard*  
 4 *Ins. Co.*, No. C-03-4865 MMC, 2004 WL 201505, at \*5 (N.D. Cal. Jan. 26, 2004) (enforcing  
 5 release of ERISA claims); *Everhart v. Allmerica Fin. Life Ins. Co.*, No. C-99-0733-VRW, 1999  
 6 WL 498244, at \*3 (N.D. Cal. July 9, 1999), *aff’d by*, 275 F.3d 751 (9th Cir. 2001) (granting  
 7 defendant summary judgment where plan was proper party but plaintiff had signed agreement  
 8 releasing the plan from further liability); *Harlan v. Sohio Petroleum Co.*, 677 F .Supp. 1021 (N.D.  
 9 Cal. 1988) (release does not violate 29 U.S.C. §§ 1110(a)); *Spann v. AOL Time Warner, Inc.*, 219  
 10 F.R.D. 307 (S.D.N.Y. 2003) (noting that an “individual’s general release of employment claims . .  
 11 . may waive an employee’s right to recover benefits under ERISA”); *Piehl v. Metropolitan Life*  
 12 *Ins. Co.*, No. Civ. 03-669-MO, 2005 WL 627586, at \*3 (D. Or. Mar. 16, 2005) (enforcing release  
 13 of ERISA claim); *Howell v. Motorola, Inc.*, No. 03 C 5044, 2005 WL 2420410, at \*\*5-7 (N.D.  
 14 Ill. Sept. 30, 2005)

15 Here, Plaintiff Johnson signed a Settlement Agreement and General Release whose plain  
 16 and express language makes clear that his instant ERISA claims are barred. That release  
 17 specifically provided:

18 Mr. Johnson . . . does hereby release, acquit and forever discharge  
 19 Noll and the Noll ESOT . . . present and former directors, officers,  
 20 shareholders, agents, representatives, employees, attorneys,  
 21 accountants, and all others acting for or in concert with Noll, past or  
 22 present . . . from any and all liabilities, damages, actions, causes of  
 23 action, claims, demands or suits of any nature, kind or description  
 24 whatsoever whether accrued or to accrue, whether presently known  
 25 or unknown . . . that Mr. Johnson ever had, now has or hereafter  
 may have against any of the Releasees arising out of any act,  
 omission, or matter occurring before execution of this Agreement,  
 including, without limitation, all claims related to Mr. Johnson’s  
employment with the Company, such as, but not limited to . . .  
claims under . . . the Employee Retirement Income Security Act of  
1974, as amended.

26 Johanson Decl., ¶ 6, Ex. B at pgs. 2-3 (emphasis added). *See Skbina*, 45 Cal.App.4th at 1369  
 27 (affirming summary judgment and noting that “[o]n its face, this language could not be plainer.”).

28 Buttrussing this language, the agreement also contained explicit language pursuant to



1 which Johnson waived his rights under California Civil Code Section 1542. *See Giles*, 191  
2 F.Supp.2d at 1134 (“[t]he express waiver of section 1542 is further evidence . . . that the  
3 negotiations produced clear and unambiguous language which reflects the parties’ intentions to  
4 include all unknown claims in the Release”). Such waivers are permissible. *See Winet v. Price*, 4  
5 Cal.App.4th 1173 (1992); *Kaufman & Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468, 1474  
6 (N.D. Cal. 1993) (California law permits waiver of unknown claims by express reference to Cal.  
7 Civ. Code § 1542).

8 Nor is there any dispute that Johnson entered the Agreement knowingly and voluntarily.  
9 Represented by the very same attorney who has brought the instant action, Johnson had twenty-  
10 one days to review the Agreement and up to seven days after signing, to revoke it. The  
11 Agreement further provided that:

12 Mr. Johnson agrees that the complete release he has granted . . .  
13 the Releases pursuant to this Agreement is strictly knowing and  
voluntary. Specifically, Mr. Johnson agrees as follows:

14 a. Mr. Johnson enters into this Agreement of his own  
15 free will and he has not been pressured or coerced in any way  
16 whatsoever into signing this Agreement. He has been advised, in  
writing, to consult with an attorney prior to executing this  
Agreement and has done so.

17 b. Mr. Johnson enters into this Agreement carefully,  
18 knows and understands the contents thereof, and has made such  
investigation into the facts pertaining to this Agreement and all  
19 matters pertaining hereto as he deems necessary or desirable.

20 . . .

21 e. Mr. Johnson acknowledges that he has been given  
22 the opportunity to consider this Agreement for twenty-one (21)  
days, and that may take, and has taken, as much of that time as he  
wants in order to consider this Agreement before signing it.

23 f. Mr. Johnson understands that he has seven (7) days  
24 following his execution of this Agreement to revoke this Agreement  
25 and that this Agreement shall not become effective until the  
conclusion of that 7-day period.

26 Johanson Decl. ¶ 6, Ex. B at pg. 4. The circumstances surrounding the release thus clearly show  
27 that Johnson entered into the Agreement knowingly and voluntarily upon the advice of the legal  
28 counsel who instituted the present action. *See Giles*, 191 F. Supp. 2d 1128 (granting summary

1 judgment where there was no dispute that plaintiff “had access to counsel and . . . could have, had  
2 he chosen to, ask[ ] his attorney to review the settlement agreement and Release”).

3 In his instant complaint, Johnson alleges that the Individual Defendants violated Sections  
4 404 and 406 of ERISA, 29 U.S.C. §§ 1104, 1106 by breaching their fiduciary duties and engaging  
5 in prohibited transactions. Such claims clearly and unmistakably fall within the language of the  
6 Agreement. Each of the Individual Defendants, moreover, is among those released. During the  
7 relevant period of time, Defendant Couturier was a director and officer of Noll as well as a  
8 trustee, *i.e.*, agent, of the ESOT. Defendant Johanson, meanwhile, was a director of Noll as well  
9 as legal counsel to Noll and the ESOT. Finally, Defendant Eddy was a trustee, *i.e.*, agent, of the  
10 ESOT. Consequently, Plaintiff’s current purported claims against the Individual Defendants are  
11 bared by the terms of the Agreement. The Individual Defendants are therefore entitled to  
12 judgment against Plaintiff on his claims in the instant lawsuit as a matter of law.

13 **B. Johnson Lacks Standing Under ERISA**

14 The Individual Defendants are entitled to judgment against Johnson as a matter of law for  
15 the additional reason that he lacks standing to sue under ERISA. ERISA’s statutory protections  
16 are limited to the Secretary of Labor, participants, beneficiaries, and fiduciaries of employee  
17 benefit plans. 29 U.S.C. § 1132(a). Johnson purports to bring this action as a participant in the  
18 Noll ESOP. A participant is defined by ERISA as “any employee or former employee . . . who is  
19 or may become eligible to receive a benefit of any type from an employee benefit plan.” 29  
20 U.S.C. § 1002(7). Former employees are considered participants only where they have (1) a  
21 reasonable expectation of returning to covered employment, or (2) a colorable claim to vested  
22 benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1988).

23 Plaintiff does not allege in his Complaint that he has a reasonable expectation of returning  
24 to covered employment. Indeed, by signing the Agreement, Johnson waived his right to re-  
25 employment with Noll and agreed that he would not apply for or accept any employment with  
26 Noll following the execution of the Agreement. Johanson Decl., ¶ 6, Ex. B at ¶ 2. Nor can  
27 Johnson make out a colorable claim to a vested benefit. As a former employee whose vested  
28 benefits under the Noll ESOP have already been distributed in a lump sum prior to the filing of

1 the instant lawsuit, Johnson is not “eligible to receive a benefit, and [is] not likely to become  
2 eligible to receive a benefit.” *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (holding that  
3 former employees who had received their vested benefits did not have standing to sue under  
4 ERISA), *abrogated on other grounds by Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir.  
5 1995). This is because “if successful, [Johnson’s] claim would result in a damage award, not in  
6 an increase of vested benefits.” *Id.*

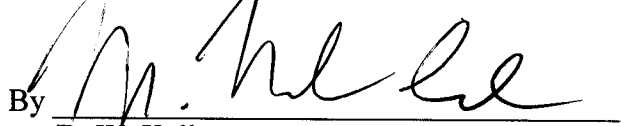
7 Accordingly, Plaintiff lacks standing to sue under ERISA. *See Vaughn v. Bay Envt'l*  
8 *Mgmt*, No. C 03-5727 MJJ, 2005 WL 2373718, at \*4 (N.D. Cal. Sept. 26, 2005) (applying *Kuntz*  
9 and holding that plaintiffs, who had received a distribution of the plan assets, were not seeking  
10 “vested benefits” due and thus, lacked standing under ERISA); *Hargrave v. TXU Corp.*, No.3:02-  
11 CV-2573-K, 2005 WL 2415997, at \*4 (N.D. Tex. Sept. 29, 2005) (plaintiffs, former plan  
12 participants, did not have standing under ERISA where their allegations simply amounted to a  
13 claim that defendant’s actions reduced the value of their benefits). Because Plaintiff lacks  
14 standing to assert his purported claims against the Individual Defendants, the Individual  
15 Defendants are entitled to judgment against Plaintiff as a matter of law.

16 **V. CONCLUSION**

17 For the foregoing reasons, the Individual Defendants respectfully request the Court grant  
18 their Motion for Summary Judgment, or in the Alternative, Summary Adjudication, and enter  
19 judgment against Plaintiff Johnson in favor of the Individual Defendants in this action.

20 Dated: July 7, 2006

MORGAN, LEWIS & BOCKIUS LLP

21  
22 By 

D. W. Kallstrom  
Donald P. Sullivan  
M. Michael Cole  
Attorneys for Defendants CLAIR R.  
COUTURIER, JR., DAVID R  
JOHANSON, and ROBERT E. EDDY