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CI QUERCUS CORPORATION, INC. and
ARBORWELL, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ARBORWELL, LLC, a California limited liability company; CI QUERCUS CORPORATION, INC., a Delaware corporation,

Plaintiff,

v.

ALERUS FINANCIAL, N.A.; ANDREW G. LAVELLE, an individual; NEIL WOOLNER, an individual; ALVIN F. SORTWELL and ANNE B. SORTWELL as Co-Trustees of the A&A SORTWELL FAMILY TRUST; and DOES 1 through 10, inclusive,

Defendants,

and

ARBORWELL, INC. EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

Case No.

COMPLAINT

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I. NATURE OF THE ACTION

1. Plaintiffs Arborwell, LLC ("Arborwell") and CI Quercus Corporation, Inc. ("CI Quercus" or the "Buyer") bring this action under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA"), against Defendants Alerus Financial, N.A. ("Alerus"), Andrew G. LaVelle ("LaVelle"), Neil Woolner ("Woolner"), Alvin F. Sortwell (a/k/a Peter Sortwell and referred to herein as "Sortwell") and Anne B. Sortwell as Co-Trustees of the A&A Sortwell Family Trust (collectively, the "Sortwells") and Does 1-10 (collectively, the "Defendants"). As described herein, Defendants breached their ERISA fiduciary duties and knowingly participated in transactions prohibited by ERISA by orchestrating for their benefit the sale of stock of Arborwell's predecessor entity, Arborwell, Inc. ("Arborwell, Inc." or the "Company"), by the Arborwell, Inc. Employee Stock Ownership Plan (the "ESOP" or the "Plan") to CI Quercus (the "2020 Sale"). In direct violation of ERISA and with Defendant Alerus's knowledge and participation, Defendants Sortwells, LaVelle and Woolner used the ESOP's sale of Arborwell, Inc. stock to unjustly enrich themselves at the expense of the ESOP, the ESOP's employee participants, and the Buyer CI Quercus.

2. Defendants LaVelle and Woolner further harmed and are continuing to harm Arborwell by breaching their noncompete and confidentiality obligations that they entered into as part of the 2020 Sale in order to maximize the purchase price paid by CI Quercus, further damaging Arborwell, CI Quercus, and the ESOP participants, many of whom are still employed by Arborwell and/or SavATree, LLC ("SavATree"), a subsidiary of CI Quercus, and rolled over their individual proceeds from the 2020 Sale into SavATree's retirement plan.

3. The ESOP was a type of pension plan, specifically an employee stock ownership plan that was designed to invest primarily in the stock of its sponsor, Arborwell, Inc., pursuant to ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6). In 2017, the ESOP purchased 100% of Arborwell, Inc.'s stock from Defendants Sortwells, LaVelle, and Woolner and each of them received subordinated notes for their stock.

4. Defendants Sortwells, LaVelle and Woolner were ERISA fiduciaries for the ESOP. Sortwell was the Chairman of the Board of Directors of Arborwell, Inc. (the "Board") and a

member of the Arborwell, Inc. ESOP Administrative Committee (the "ESOP Committee"). LaVelle was Arborwell, Inc.'s President, a member of the Board, and a member of the ESOP Administrative Committee. Woolner was a senior executive at Arborwell, Inc. who actively participated in key decisions made by the Board and the ESOP Committee.

5. In contravention of their ERISA fiduciary duties and ERISA's prohibited transaction rules, in 2020 the Sortwells, LaVelle and Woolner orchestrated the ESOP's sale of 100% of Arborwell, Inc.'s stock to CI Quercus, which closed on December 9, 2020. As part of the 2020 Sale, the Sortwells, LaVelle and Woolner received a combined total of $13,589,662[1] in payments for allocated and unallocated ESOP shares, stock warrants, subordinated notes, and stock appreciation rights ("SARs"), plus other extensive personal benefits. At the time of the 2020 Sale, the ESOP had not fully paid back the purchase price for the shares that the Sortwells, LaVelle and Woolner had transferred into the ESOP at the time of its formation in 2017, *i.e.*, they had not completed vesting their shares in the ESOP. The full allocation, vesting, and payout of their shares were accelerated; the full payoff of their subordinated notes was accelerated by nearly six years; the full payout of their warrants was accelerated by nearly seven years, and the full payout of their SARS was accelerated by almost two years. LaVelle and Woolner also received five-year extensions of their real property leases to Arborwell, Inc. and its successor entity, Arborwell. LaVelle also received an improved employment agreement with SavATree, a rollover equity in SavATree, and participation in SavATree's profit incentive units ("PIU") plan. The Sortwells also received rollover equity in SavATree.

6. Defendants Sortwells, LaVelle and Woolner benefited disproportionately from the ESOP's Sale of Arborwell, Inc. stock, at the expense of the ESOP participants. Out of the $34,700,000 total CI Quercus paid at closing pursuant to the terms of the Stock Purchase Agreement ("SPA"), attached hereto as **Exhibit A**, the ESOP only received $12,467,810 for 100% of the shares of Arborwell, Inc. stock. The 2020 Sale and subsequent termination of the ESOP were premature, taking place just over three years after the ESOP had been established in 2017.

[1] All of the dollar amounts contained in this Complaint have been rounded, where appropriate, to eliminate fractions of a dollar.

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At the time of the 2020 Sale, most of the ESOP's holdings of Arborwell, Inc. stock had not even been released to the ESOP participant's accounts. Arborwell, Inc.'s senior bank debt was substantially unpaid and its subordinated debt was wholly unpaid. And there were only two years remaining for Arborwell, Inc.'s re-eligibility to elect S corporation status and thereby become fully exempt from federal income taxes, and partially exempt from California state income taxes. Arborwell, Inc. was growing successfully year-to-year and, in the absence of the 2020 Sale, would have grown even faster at a tax-free rate, thus generating extensive additional financial benefits for the ESOP and its participants.

7. Defendant Alerus was the ESOP's independent trustee and a named ERISA fiduciary. Alerus was responsible for determining whether the ESOP should approve, consent to, and engage in the 2020 Sale, and ensuring that the price the ESOP received during the 2020 Sale was for no less than adequate consideration. Alerus did not do so. Instead, Alerus allowed Defendants Sortwells, LaVelle and Woolner to personally enrich themselves at the ESOP's expense. Alerus breached its fiduciary duty, facilitated the fiduciary breaches of Defendants Sortwells, LaVelle and Woolner, and knowingly participated in their prohibited transactions.

8. To make matters worse, immediately after orchestrating the ESOP's 2020 Sale of Arborwell, Inc. stock, Defendants LaVelle and Woolner severely damaged, and continue to damage, Arborwell, Inc.'s successor entity, Plaintiff Arborwell, by breaching their contractual covenants not to compete with Arborwell, not to solicit or induce employees of Arborwell for employment or hire, and not to divert, solicit, take away or accept business from any customer, client or account of Arborwell. These covenants were material to CI Quercus and Defendant Alerus, the ESOP's Trustee. Indeed, without these covenants, there would have been no 2020 Sale. Yet, within a month of the 2020 Sale, Defendants LaVelle and Woolner began preparations to buy a competing tree care business. Within a few months thereafter, they completed their purchase of a direct competitor, Arbor MD Tree Care, Inc. ("Arbor MD"), resigned from Arborwell, joined Arbor MD, and began poaching key employees and high-level customers, causing substantial financial harm to Arborwell, the ESOP, the ESOP participants, and CI Quercus. Because these covenants were an integral part of the sale of the ESOP's assets and a transaction to

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which the ESOP's Trustee Alerus was a party and beneficiary, these covenants must be enforced under ERISA.

9. Defendants Sortwells, LaVelle and Woolner planned and orchestrated the 2020 Sale to obtain accelerated and additional personal benefits they would not otherwise have been entitled to, diverted ESOP assets to themselves, and then LaVelle and Woolner unjustly enriched themselves further by breaching their non-compete covenants and soliciting Arborwell's employees and clients. Sortwell knew or should have known that LaVelle and Woolner had no intention of honoring their noncompete covenants, but he failed to disclose this information to Arborwell, Inc., Arborwell and CI Quercus. As the ESOP's Trustee, Defendant Alerus enabled Defendants Sortwells, LaVelle and Woolner's self-dealing, and knowingly participated in the prohibited transactions.

10. Plaintiffs bring this action against Defendants to recover their losses under ERISA § 502(b)(2), and for other appropriate equitable relief under ERISA § 502(a)(3). Plaintiffs also seek damages and other relief as a result of LaVelle and Woolner's breach of their contractual obligations and covenants.

II. JURISDICTION, VENUE, STANDING, AND DIVISIONAL ASSIGNMENT

Subject Matter Jurisdiction

11. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331 because this action arises under the laws of the United States and pursuant to ERISA § 502(e)(1), 29 U.S.C. §1332(e)(1), which provides for exclusive federal jurisdiction of actions brought under ERISA.

Personal Jurisdiction

12. This Court has personal jurisdiction over Defendants because Defendants transact business in and have significant contacts with this District, and because ERISA provides for nationwide service of process under ERISA §502(e)(2), 29 U.S.C §1132(e)(2).

Venue

13. Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), for at least the following reasons:

(a) The ESOP is administered in this District;

(b) Defendants may be found in this District, as they transact business in, and/or have significant contacts with this District;

(c) Some Defendants reside in this District; and/or

(d) Some of the alleged breaches took place in this District.

Standing

14. Plaintiff Arborwell is the successor-in-interest to Arborwell, Inc.—the named fiduciary of the ESOP, its sponsor and its administrator, which selected and monitored the Trustee and the ESOP Administrative Committee (the "ESOP Committee")—and thus has statutory standing to bring the instant claims under ERISA §502(e)(2), 29 U.S.C. §§1132(e)(2).

15. Plaintiff Arborwell, as a Plan fiduciary, has constitutional standing to bring the instant claims because the Plan has suffered "actual harm," including but not limited to diminution in value of the Plan and its assets, and Arborwell is the fiduciary successor-in-interest to the Plan sponsor and administrator.

16. Plaintiff CI Quercus has standing because it entered into a noncompete agreement with LaVelle and Woolner, which is governed by ERISA, and Defendants breached that agreement.

Divisional Assignment

17. The instant action arises in the County of Alameda, including because the agreements relevant to this action were entered into in that County, Arborwell is headquartered in that County, and the ESOP is administered in that County. Thus, under Civil Local Rule 3-2(c)-(d), assignment of this action to the Court's San Francisco division or Oakland division is proper.

III. PARTIES

18. Plaintiff Arborwell is a California limited liability company with its principal place of business in Hayward, California. Arborwell is the successor-in-interest to Arborwell, Inc., which CI Quercus acquired on or about December 9, 2020 pursuant to the SPA. In connection with the 2020 Sale, Arborwell, Inc. was converted to Arborwell, LLC on or about December 22,

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2020, and it is now a subsidiary of SavATree, LLC ("SavATree"). Arborwell operates a tree care business on the West Coast.

19. Plaintiff CI Quercus Corporation, Inc. is a Delaware corporation with its principal place of business in New York. CI Quercus is a holding company for a family of professional tree, shrub and lawn care businesses operating throughout the United States, including SavATree, which provides tree care services on the East Coast, the Midwest, and on the West Coast (through its acquisition of Arborwell).

20. Defendant Alerus Financial, N.A. ("Alerus") is a federally chartered bank organized under the National Banking Act with an active business address at 501 N. El Camino, Suite 200, San Clemente, California 92672 and is a wholly owned subsidiary of Alerus Financial Corporation, a publicly owned financial holding company incorporated in Delaware and headquartered in Grand Forks, North Dakota, involved through its subsidiaries in the commercial and mortgage banking, diversified financial services and trust advisory and trust services businesses. Alerus has been from the ESOP's inception, and it remains, the ESOP Trustee. As Trustee, Alerus is a named fiduciary of the ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102.

21. Defendants Peter Sortwell and his spouse Anne B. Sortwell, as Co-Trustees of the A&A Sortwell Family Trust, were equity warrant holders, the largest ESOP stock holders at the time of the 2020 Sale, and members of the Board of Directors of Arborwell, Inc. Additionally, Peter Sortwell was the founder of the Company, the Chairman of the Board of Directors of the Company and a member of the ESOP Administrative Committee leading up to and at the time of the 2020 Sale. The Sortwells were at all relevant times fiduciaries of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a "party in interest" as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14). Upon information and belief, the Sortwells reside in San Jose, California.

22. Defendant Andrew G. LaVelle ("LaVelle") LaVelle was Arborwell, Inc.'s President, Secretary, a member of its Board of Directors, and a member of the ESOP Administrative Committee leading up to and at the time of the 2020 Sale. LaVelle was also an

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equity warrant holder in Arborwell, Inc. and one the largest ESOP stock holders at the time of the 2020 Sale. LaVelle was at all relevant times a fiduciary of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a "party in interest" as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14). Upon information and belief, LaVelle resides in Orinda, California.

23. Defendant Neil Woolner ("Woolner") was a senior Arborwell, Inc. executive who worked closely with LaVelle. Woolner actively participated in key decisions made by the Board and the ESOP Committee, including the decision to sell Arborwell, Inc. to CI Quercus. Woolner was also an equity warrant holder and one of the largest ESOP stock holders at the time of the 2020 Sale. Woolner was at all relevant times a fiduciary of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), and a "party in interest" as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14). Upon information and belief, Woolner resides in San Jose, California.

24. Plaintiffs are unaware of the names of Defendants identified herein as DOES 1 through 10, inclusive, and therefore sues them by those fictitious names. Plaintiffs are informed and believe, and thereon allege, that Defendants sued herein as DOES are responsible in some manner for the practices, acts, conduct, and occurrences alleged herein, as either actual perpetrators or coconspirators, aiders and abettors, officers, directors, and/or managing agents with the knowledge, control, authority, direction, and/or ratification of the other Defendants, and each of them. Plaintiffs will seek leave of the Court to amend this Complaint to allege the true names and capacities of the DOE Defendants, and the roles they played, once their identities and/or manner of participation in the wrongful conduct herein described is ascertained.

25. Defendants were at all times working in concert and/or as each others' agents.

IV. FACTUAL ALLEGATIONS

A. Arborwell, Inc.

26. Arborwell, Inc. was a California corporation founded in 2001. It rapidly grew to become a leading provider of commercial tree care and management services on the West Coast by cultivating long-term, mutually beneficial relationships with customers and employees. Arborwell, Inc.'s experienced salespeople, International Society of Arboriculture ("ISA") certified

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arborists, field labor and administrative staff serve marquee commercial clients, property management companies, real estate developers, contractors, municipalities, homeowner associations and homeowners.

B. The Formation of the ESOP

27. Prior to 2017, the Sortwells, LaVelle and Woolner were the only shareholders of Arborwell, Inc. The Sortwells and LaVelle were each directors of Arborwell, Inc. Sortwell held the title of Chairman of the Board and LaVelle held the title of President and Secretary.

28. In 2017, Defendants decided to form the ESOP, effective January 1, 2017. The Sortwells, LaVelle, and Woolner together then sold 100% of Arborwell, Inc.'s stock to the ESOP, effective November 1, 2017 (the "2017 Stock Purchase"). In connection with the ESOP's 2017 Stock Purchase, the Sortwells, LaVelle, and Woolner received subordinated notes and warrants and LaVelle and Woolner were granted retention SARs, which, as set forth herein, were not cashed out or paid off until LaVelle and Woolner later sold their interests in Arborwell, Inc. to CI Quercus during the 2020 Sale pursuant to the SPA.

29. The Sortwells, LaVelle, and Woolner formed the ESOP and sold their shares to it as a part of strategic plan to market Arborwell, Inc. for a sale or merger. Sortwell, in particular, intended to retire from Arborwell, Inc. and was looking to be bought out. On information and belief, the Sortwells, LaVelle, and Woolner also formed the ESOP to maximize their individual tax benefits upon such a sale.

C. The ESOP

30. The ESOP's Plan Document states that "[t]he Plan will be administered by [Arborwell, Inc.] and an Administrative Committee composed of one or more individuals appointed by the [Arborwell, Inc.] Board of Directors . . . ." LaVelle and Sortwell appointed themselves to the ESOP Committee. The remaining members of the ESOP Committee were Brad Carson, Arborwell, Inc.'s Chief Financial Officer who answered to Sortwell and LaVelle, and another Arborwell, Inc. director who was appointed by the Sortwells. Accordingly, Defendants LaVelle and Sortwell effectively controlled and directed Arborwell, Inc., the ESOP Committee, and the ESOP at all times.

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31. The Plan states that "[Arborwell, Inc.] shall be the named fiduciary with authority to control and manage the administration of the Plan, except where the Plan otherwise delegates such responsibility to the Committee." Thus, the Plan designates Arborwell, Inc. as the ERISA "plan administrator," *see* ERISA §3(16), 29 U.S.C. § 1002(16), and thereby also as an ERISA "fiduciary," *see* ERISA §3(26), 29 U.S.C. § 1002(26), with the power and responsibility to control and manage the administration of the Plan.

32. The Plan further states that "[t]he members of the Committee shall be the named fiduciaries with authority to invest the Trust Assets except where the Plan otherwise delegates such responsibility to the Trustee." Thus, LaVelle and Sortwell controlled the investment of the ESOP's assets, including Arborwell, Inc.'s stock.

33. Acting through the ESOP Committee, LaVelle and Sortwell also had control over the daily administration of the Plan. The Plan states "[t]he Committee shall have all powers necessary to enable it to administer the Plan and Trust Agreement in accordance with their provisions," including, without limitation, fiduciary and ministerial administrative functions relating generally to managing the accruals, accounting, maintenance and distributions, and related directions to the trustee, in respect of the ESOP participants' individual accounts.

34. The ESOP Committee was also authorized and empowered to direct the Trustee with respect to the sale of Arborwell, Inc. stock held in the ESOP. In other words, as to this function, the Trustee was a "directed trustee" and the ESOP Committee was the functioning fiduciary (the "named fiduciary" for this purpose). *See* ERISA §403(a)(1) (29 U.S.C. §1103)(a)(1)).

35. Thus, the ESOP Committee through its members had three separate powers and fiduciary responsibilities: (1) to invest trust assets unless otherwise delegated to the ESOP trustee; (2) to perform and manage Plan's administrative functions; and (3) to direct the Trustee in respect of certain actions, including the sale of Arborwell, Inc. stock held in the ESOP trust.

36. Defendant Alerus, the ESOP trustee, was a one-time only "discretionary" trustee for the original 2017 Stock Purchase and thereafter was the continuing, day-to-day directed trustee of the ESOP. The ESOP Trust Agreement provides that the Trustee generally is a directed trustee,

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including with respect to the sale of the stock of Arborwell, Inc., and the Plan provides that the trustee is a directed trustee with respect to sales of Arborwell, Inc. stock, but at a price for not less than Fair Market Value (defined as the ESOP's appraised value for the stock).

37. Directions to the Trustee under both the Plan and Trust Agreement were to come from the ESOP Committee, which in making the decision to direct the Trustee to sell Arborwell, Inc. stock "must comply with the fiduciary duties applicable to the Committee [under ERISA § 404(a)(1), 29 U.S.C.§ 1104(a)(1)] and the primary benefit rule [of ERISA§ 408(b)(3)(A), 29 U.S.C. § 1008(b)((3)(A) and Internal Rev. Code § 4975(d)(3)(A), 26 U.S.C. § 4975(d)(3)(A)]".

D. The ESOP's 2020 Sale of 100% of Arborwell, Inc. Stock

38. Sortwell became ill in or about 2020. In June 2020, Arborwell, Inc., acting at the direction of the Sortwells, LaVelle and, on information and belief, Woolner, entered into negotiations regarding the sale of Arborwell, Inc. to CI Quercus. Plaintiffs are informed and believe that due to Sortwell's illness, and with his authorization, Woolner and LaVelle exercised substantial control and discretion over those negotiations. By the end of June 2020, CI Quercus had made an offer to acquire 100% of Arborwell, Inc.'s stock for a total enterprise value of $35,000,000.

39. In August 2020, Arborwell, Inc., on information and belief acting at the direction of the Sortwells, LaVelle and Woolner, signed a letter of intent to proceed with the 2020 Sale of 100% of Arborwell, Inc. stock from the ESOP to CI Quercus for total consideration of $35,000,000, which was just $1,000,000 more than the final purchase price at the time of the 2020 Sale. At the time Arborwell, Inc. signed the Letter of Intent and agreed to the general terms of the 2020 Sale of the ESOP's stock, Alerus was still a "directed trustee" as set forth in paragraphs 36 and 37 above.

40. In September 2020, *after* the total purchase price and material terms of the 2020 Sale had already been negotiated, Alerus was engaged to evaluate (and on information and belief, "rubber stamp") the merits of the 2020 Sale of Arborwell, Inc. to CI Quercus. Alerus agreed "to act as an independent trustee of the ESOP for the purpose of reviewing, analyzing, and making a determination as to whether the ESOP should approve, consent to, and/or otherwise engage."

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Alerus further agreed to "determine that the price paid for the stock in any sale transaction will not be less than adequate consideration" under ERISA § 3(18)(B), 29 U.S.C. § 1002(18)(b) and the Department of Labor's proposed regulations regarding the definition of adequate consideration.

41. Alerus, however, remained a "directed trustee" until the closing of the 2020 Sale on December 9, 2020, at which point LaVelle and Sortwell caused Arborwell, Inc. to amend the Plan to grant Alerus "discretionary power and authority to negotiate any proposed sale of Company Stock" and the "power and authority to take any actions necessary or appropriate (including, but not limited to, the execution of documents on the [ESOP] Trust's behalf) to effect any such sale of Company Stock." Incredibly, this amendment was adopted on the same day that the 2020 Sale closed. Conspicuously, Alerus's grant of discretionary power and authority was made retroactive to the ESOP's formation in 2017, even though in actuality Alerus had served as a "directed trustee" during that entire period between the ESOP's formation and the 2020 Sale.

42. On December 9, 2020, at the same time LaVelle and Sortwell caused Arborwell, Inc. to amend the Plan to grant Alerus retroactive discretionary authority to sell Arborwell, Inc. stock on behalf of the ESOP, Arborwell, Inc., the ESOP, Alerus, the Sortwells, LaVelle and Woolner, on the one hand, and the buyer CI Quercus, on the other hand, executed a SPA finalizing the 2020 Sale of Arborwell, Inc.

43. CI Quercus paid a total purchase price of $34,000,000 for Arborwell, Inc. Of this amount, the ESOP received only $10,267,810 for its beneficiaries (which includes $730,076 for Woolner and LaVelle's vested stock held through the ESOP). The Sortwells, LaVelle and Woolner, on the other hand, directly received most of the remaining proceeds from the sale, as well as additional personal benefits:

(a) $10,380,978 to the Sortwells to pay off the Company's subordinated debt to them;

(b) $145,024 to the Sortwells to cash out a portion of their warrants in the Company;

(c) $750,000 to the Sortwells in the form of SavATree equity to cash out their remaining warrants in the Company;

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(d) $613,136 to LaVelle to pay off the Company's subordinated debt to him;

(e) $158,978 to LaVelle to cash out his SARs in the Company;

(f) $118,228 to LaVelle in the form of SavATree equity to cash out Lavelle's warrants in the Company;

(g) $463,787 to Woolner to pay off the Company's subordinated debt to him;

(h) $151,151 to Woolner cash out his SARs in the Company; and

(i) $78,304 to Woolner to cash out his warrants in the Company.

The balance of the purchase price was used to pay off the transaction costs for the acquisition (e.g., fees to Alerus, the investment advisor and attorneys) and to pay off Arborwell, Inc.'s senior debt.

44. Sortwell, LaVelle and Woolner, all of whom were ERISA fiduciaries and parties-in-interest, therefore received extensive personal benefits as a result of the 2020 Sale they had orchestrated, including total combined payments of $12,859,586 in cash and SavATree stock (not including the $730,076 that Woolner and LaVelle later received through the ESOP for the vested stock they held through the ESOP). Via their self-dealing, the Sortwells, LaVelle and Woolner obtained for themselves the following personal benefits:

(a) The Sortwells, LaVelle and Woolner obtained the early payout of their allocated *and unallocated* vested *and unvested* ESOP Arborwell, Inc. stock accounts. Neither LaVelle nor Woolner were fully vested in his ESOP Arborwell, Inc. stock account because a participant's interest in his ESOP accounts vested on a graded basis over six full years, and the Plan did not afford hours of service credit for periods of employment prior to the effective date of the ESOP, January 1, 2017. Indeed, as of the Closing, LaVelle and Woolner were only 40% vested in their respective ESOP accounts.

(b) The Sortwells, LaVelle and Woolner obtained the early payoff of the subordinated notes they received as part of the 2017 Stock Purchase. The subordinated notes issued to them in 2017 had original maturities of nine years (maturing in 2026) and were payable interest-only until full principal payment, such interest, at 6% annually, to be paid 41% currently in cash and 51% deferred as pay-in-kind quarterly compounded interest *to be added to principal*. Thus, as a direct result of the 2020 Sale, these payoffs were accelerated by nearly six years.

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(c) The Sortwells, LaVelle and Woolner obtained the full payout of stock warrants issued in connection with the 2017 Stock Purchase. The fully vested warrants issued to the Sortwells, LaVelle and Woolner in 2017 were exercisable after 10 years at $2.57 per share. Thus, as a direct result of the 2020 Sale, this payout was accelerated by nearly seven years.

(d) LaVelle and Woolner obtained the full payout of SARs issued in connection with the 2017 Stock Purchase. The SARs vested at 20% per year and were exercisable (if vested) at $2.57 after five years (2023 for Defendant LaVelle and 2023 and 2024 for Defendant Woolner). The SARs were only partially vested at the time of the 2020 Sale. Thus, as a direct result of the 2020 Sale, the payout of the SARs was accelerated by nearly two years.

(e) LaVelle and Woolner obtained the renewal and extension of Arborwell, Inc.'s real property leases on two of its operating properties, co-owned by LaVelle and Woolner, for five years post-Closing at an escalated rent.

(f) The Sortwells and LaVelle obtained a rollover equity interest in SavATree, a significantly improved employment agreement with SavATree (providing a generous salary increase and a one-year severance not provided by Arborwell, Inc.), and participation in CI Quercus's PIU incentive plan.

45. Although the Sortwells, LaVelle and Woolner benefited extensively from the 2020 Sale they had orchestrated, the ESOP and its participants did not. Out of the $34,000,000 purchase price, the ESOP received (before adjustments) only $10,267,810 for 100% of Arborwell, Inc.'s stock, which was only approximately 30% of the total purchase price. The premature nature of the 2020 Sale also deprived the ESOP and its participants of extremely valuable future benefits, as further described below in paragraph 49 below. Crucially, at the time of the 2020 Sale, most of the ESOP's holdings of Arborwell, Inc. stock had not been released to participant accounts.

46. In violation of their ERISA fiduciary duties and the ERISA prohibited transaction rules, the Sortwells, LaVelle and Woolner orchestrated the 2020 Sale to obtain accelerated and additional personal benefits and personally enrich themselves at the expense of Arborwell, Inc., the ESOP, the ESOP participants, and the Buyer, Plaintiff CI Quercus.

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47. Defendant Alerus approved the 2020 Sale on behalf of the ESOP and signed the SPA in its capacity as the ESOP Trustee. By doing so, Alerus breached its own fiduciary duties, facilitated the breaches of fiduciary duty by the Sortwells, LaVelle and Woolner, and knowingly participated in prohibited transactions.

48. Plaintiffs are informed and believe that Alerus failed to perform appropriate due diligence and financial determinations regarding the 2020 Sale. For example, Plaintiffs are informed and believe that Alerus failed to conduct the required "hold or sell" analysis in light of Arborwell, Inc.'s near-imminent S Corporation election or evaluate the adequacy of seller indemnities, covenants, and representations. Plaintiffs are informed and believe that Alerus also failed to consider the fairness of payments and other benefits provided to the non-ESOP parties to the 2020 Sale, namely, the extensive personal benefits the Sortwells, LaVelle and Woolner received. Moreover, as set forth above in paragraphs 36 and 37, Alerus was still a "directed trustee" up until the date of the closing of the 2020 Sale, and it was not even engaged to consider the fairness of the 2020 Sale until *after* the terms and purchase price of the 2020 Sale had been negotiated.

49. Rather than conduct a prudent investigation of the merits of the 2020 Sale, Alerus merely "rubber stamped" the 2020 Sale orchestrated by the Sortwells, LaVelle and Woolner. A prudent fiduciary who had conducted a prudent investigation would have determined that the 2020 Sale was not in the ESOP's best interest and that the 2020 Sale was instead designed to personally enrich Defendants Sortwell, LaVelle and Woolner at the ESOP's expense. As noted above, the 2020 Sale was premature, taking place just three years after the ESOP's formation. At the time of the 2020 Sale, most of the ESOP's holdings of Arborwell, Inc. stock had not even been released to participant accounts. Arborwell, Inc.'s senior bank debt was also substantially unpaid and its subordinated debt was wholly unpaid. Additionally, there were only two years left until Arborwell, Inc. would be eligible to elect S corporation status, at which point Arborwell, Inc. would become fully exempt from federal income taxes and at both the corporate and shareholder level, and partially exempt from California state income taxes (reduced for S corporations from 8.84% to 1.5%) at the corporate level and fully exempt at the shareholder level. Arborwell, Inc.'s financial

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performance was improving year-to-year. In the absence of the premature 2020 Sale, Arborwell, Inc.'s financial performance would have improved at an even greater rate after the upcoming S corporation status election and the scheduled repayment of debt Arborwell, Inc. incurred in the 2017 Stock Purchase. The benefits the ESOP and its participants would have received from this near-certain future financial growth would have vastly outweighed the payments the ESOP and its participants received as a result of the 2020 Sale.

E. The Non-Compete Covenants

50. The goodwill of Arborwell, Inc. was expressly negotiated and included in the 2020 Sale. First, the SPA specifically references a transfer of goodwill to CI Quercus. Second, CI Quercus purchased the entire business as a going concern for fair market value, determined as a multiple of Arborwell, Inc.'s EBITDA. The purchase of a going business concern for a multiple of its recurring annual earnings (rather than book value) creates an inference that goodwill was included in the sale. Third, by definition under California law, "fair market value" includes goodwill. Indeed, the Fairness Opinion issued by Defendant Alerus's financial advisor in connection with the 2020 Sale stated that the "analysis also examined the impact of any *employment, consulting, or non-compete agreements entered into by Management*, as well as the form and timing of all consideration to be received by any party in the proposed transaction." (Emphasis added.)[2]

51. To protect the goodwill CI Quercus was purchasing, it required as a condition of its purchase that Woolner and LaVelle, two of the three principal owners of Arborwell, Inc., who had committed to working for Arborwell after the sale, agree to a non-compete in connection with the 2020 Sale. (Sortwell represented that he planned to retire following the 2020 Sale and did so.) Woolner and LaVelle covenanted to not compete with Arborwell or solicit its customers, directly or indirectly, for a period of three years, and not to solicit employees for a period of five years, within the California counties in which Arborwell does business. This covenant is contained in

[2] Plaintiff's have requested, but have not received, from Defendant Alerus a copy of the year-end appraisal of the fair market value of the Company.

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Section 5.1 of the SPA (the "Non-Compete"), which LaVelle and Woolner heavily negotiated and voluntarily signed in their individual capacities:

> 5.1 Covenant Not to Compete; Confidentiality.
>
> In consideration of the promises herein contained and in consideration of the payments and other consideration to be provided to Seller and the Warrant Holders, as set forth in this Agreement, the Covered Persons, each of whom is, directly or indirectly, receiving a material portion of the payments and other consideration to be provided by Buyer hereunder, and in consideration thereof and as a material inducement to Buyer to enter into this Agreement (it being understood that, absent such inducement, Buyer would not have entered into this Agreement), do hereby agree for the benefit of Buyer and any Affiliate, successor or assign of Buyer as follows:
>
> (a) Restrictive Covenant. During the Restricted Period, each Covered Person shall not:
>
> (i) directly or indirectly engage in the Business and shall not directly or indirectly, own, manage, operate, control, be employed by, be a consultant to, participate in or have a financial interest in, or be connected in any manner (including as an employee, consultant, officer, director, owner or lender) with the ownership, management, operation or conduct of any entity (other than on behalf of Buyer or its Affiliates) engaged in the Business or any similar Business for the Restricted Period, as set forth in this Agreement, anywhere within the Business Territory;
>
> (ii) divert, take away, solicit, or accept business from any individual, firm, partnership or other entity that is then or has been at any time in the past six (6) months a client, customer or account of the Company or any of its Affiliates; or
>
> (iii) solicit, attempt to solicit or induce for employment, hire, employ, train or supervise any Person who then is or has been at any time in the past six (6) months employed by the Company; provided, however, that, without limiting the restriction on hiring set forth in this Section 5.1(a)(iii), the foregoing will not prevent any Covered Person from conducting any general advertisements or internet solicitations for employment, not specifically targeted at such Persons, directly or through any agent (including placement and recruiting agencies).
>
> "Covered Person" means each of the Sortwell Parties, ***Mr. LaVelle and Mr. Woolner***. "Restricted Period" means a period of five (5) years following the Closing Date; provided, that solely for purposes of (a) Section 5.1(a)(i) and Section 5.1(a)(ii), in the case of any Covered Person other than the Sortwell Parties, "Restricted Period" means a period of three (3) years following the Closing Date; and (b) Section 5.1(a)(iii), in the case of any Covered Person other than the Sortwell Parties, "Restricted Period" means a period of five (5) years following the Closing Date; provided, further, that the Restricted Period shall be tolled during (and shall be deemed automatically extended by) any period in which any Covered Person is in violation of any of the provisions of Section 5.1(a). "Business Territory" means the following counties: Alameda, Amador, Butte, Contra Costa, El Dorado, Fresno, Los Angeles, Marin, Merced, Monterrey, Napa, Orange, Placer, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Solano, Sonoma, Stanislaus, Sutter, Yolo, and Yuba. Each

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> of the covenants of the parties to this Agreement contained in this Section 5.1(a) shall be deemed and shall be construed as a separate and independent covenant.

(Emphasis added.)

52. LaVelle and Woolner were fully aware of the Non-Compete's requirements prior to signing it. On October 13, 2020, prior to the closing, Defendant LaVelle emailed Defendant Woolner a copy of the draft SPA with the subject line "This is the first draft of the stock purchase agreement sent today from SavATree," in which he stated:

> This is only the starting point with other documents to follow. The Arborwell team will be negotiating this part first. Where this impacts you (and me) is in Article V - Covenants. This is the restriction they want to put on us after close. Look at it and we can talk. Our [Employee Stock Ownership Plan] attorney thinks a 3 year non-compete would be more appropriate and she thinks we can get that. At some point we will bring you in to the conversation since you'll have to sign this. I just don't want you to waste your time until some of the technical bugs are taken out first.
>
> Again, this is only the first draft we will be negotiating this week and there are several more documents to come.

Defendants LaVelle and Woolner exchanged this email nearly two months before the closing. Over the next two months, the parties through counsel exchanged multiple revisions to the Non-Compete provision. Defendants did not sign the SPA until on or about December 9, 2020, and so they had nearly two months from receipt of the first draft to review any issues with Plan's counsel, or to consult other counsel before signing (which they may have done).

53. The Non-Compete was material to CI Quercus and to Alerus as the ESOP's Trustee. Without the Non-Compete, the 2020 Sale would not have taken place, and Defendants LaVelle and Woolner would have received nothing.

54. In addition to agreeing to the Non-Compete, Woolner and LaVelle represented in writing and orally that they would continue in their roles at Arborwell following the 2020 Sale, to induce CI Quercus to close the deal. For example, in the SPA LaVelle and Woolner represented that "[t]o the Knowledge of the Company, no director, officer, member of senior management, other key employee, or group of key employees of the Company intends to terminate employment or service with the Company." (Ex. A (SPA) at 20.) In addition to this signed, written representation in SPA, LaVelle and Woolner each affirmatively represented multiple times in-

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person to CI Quercus and SavATree senior management that they would "stay on" after the 2020 Sale of Arborwell and that they were "all in." CI Quercus reasonably relied on these representations to its detriment.

55. Plaintiffs are informed and believe that LaVelle and Woolner intentionally and knowingly misrepresented their intent to continue with their employment with Arborwell and to honor the Non-Compete, and they always intended to compete following the closing of the SPA. LaVelle and Woolner concealed their true intent and instead affirmatively misrepresented that they would not compete to induce CI Quercus to close the deal and cash them out of Arborwell, Inc. Although discovery has not commenced, and much of the evidence proving that LaVelle and Woolner concealed their plan to compete will come from their testimony and their private communications, LaVelle and Woolner's private communications that Defendants have already obtained show that LaVelle and Woolner began looking for competing tree care business to purchase less than a month after the 2020 Sale, which demonstrates that their contention -- that they decided to leave Arborwell over their dissatisfaction with the integration of Arborwell into SavATree -- lacks credibility.

56. Plaintiffs are informed and believe that Sortwell, who had a close personal and professional relationship with LaVelle and Woolner spanning nearly two decades, knew or should have known that LaVelle and Woolner had no intention to continue their employment with Arborwell and had intended to start a competing tree care business. Plaintiffs are informed and believe that Sortwell concealed this information from CI Quercus in order to induce CI Quercus to purchase Arborwell, Inc. and maximize the purchase price.

57. Plaintiffs are further informed and believe that Alerus failed to conduct due diligence into whether LaVelle and Woolner intended to honor the Non-Compete in breach of its fiduciary duties. Proper diligence would have revealed that LaVelle and Woolner had no intention of honoring the Non-Compete, to the detriment of the Company, and the 2020 Sale was merely an attempt to accelerate the pay off of their loan to the ESOP, their warrants and their SARs.

F. Defendants LaVelle and Woolner Breach the Non-Compete to the Detriment of Plaintiffs, the ESOP, and the ESOP Participants

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58. After the 2020 Sale, Woolner kept his role as the Regional Vice-President for the Peninsula and South Bay regions, responsibilities and compensation. LaVelle retained his prior scope of work, which included managing all aspects of Arborwell's business, and, as a Regional Vice-President for SavATree, was also in charge of integrating Arborwell into SavATree.

59. By no later than early January 2021, LaVelle and Woolner had retained a broker to look for competing tree care business for purchase. In March 2021, just three months after the closing of the SPA, LaVelle abruptly announced that he was resigning from Plaintiff Arborwell, stating that he intended to retire and spend time with his family. About two months later, in May 2021, Woolner also resigned with no notice or explanation. Plaintiffs have since learned that in May 2021, before Woolner resigned, LaVelle and Woolner and another Arborwell employee purchased Arbor MD Tree Care, Inc. ("Arbor MD"), a competitor of Arborwell, which LaVelle and Woolner continue to own and operate. Plaintiffs are informed and believe that LaVelle and Woolner capitalized the purchase and/or operations of Arbor MD using funds they received from the 2020 Sale, and that they could not have purchased or operated a business at the scale of Arbor MD without the proceeds from the 2020 Sale.

60. Within a few weeks of Defendant Woolner's resignation, three of Arborwell's management-level employees – Matt Dickinson, Kris Yamaguchi and Doug Hagge – abruptly resigned with no notice or explanation. They were immediately hired by Arbor MD and continue to work there. Dickinson is also a co-owner of Arbor MD. Plaintiffs are informed and believe that LaVelle and Woolner solicited these employees while the employees were still employed by Arborwell and likely while LaVelle and Woolner were still employed by Arborwell, as well. LaVelle and Woolner's solicitation of Arborwell's employees constitutes competition, in direct violation of the Non-Compete.

61. Since that time, LaVelle and Woolner have been directly competing with Plaintiffs in Northern California in the tree and plant care business, including successfully soliciting numerous of Arborwell's high-value customers such as Apple, Equity Residential, CBRE and other corporate parks and institutional landlords. So far, LaVelle and Woolner have taken customers representing tens of millions in annual revenue for Arborwell.

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62. LaVelle and Woolner's ongoing competition has also substantially harmed the Plan participants. Many of the employees of Arborwell, Inc., who continued to work for Arborwell following the 2020 Sale, chose to roll over their distributions from the ESOP into SavATree equity (in part to avoid a tax event). LaVelle and Woolner's competition has had a detrimental impact on SavATree's performance, which has directly harmed the Plan participants who now own SavATree equity.

G. The California Lawsuit

63. On July 17, 2021, in the Superior Court of California for the County of Alameda, CI Quercus, SavATree and Arborwell sued LaVelle and Woolner, Arbor MD, and the other three key Arborwell, Inc. employees who joined the individual Defendants at Arbor MD (the "California Lawsuit"). That action is pending in the early stages of discovery. Plaintiffs have alleged causes of action for misappropriation of trade secrets under the California Uniform Trade Secrets Act, breach of the SPA's confidentiality and non-disclosure agreements, and interference with contract and prospective economic advantage. The focus of the California Lawsuit is LaVelle and Woolner's theft of Arborwell's trade secrets, including Arborwell's compilation of customer information, which defendants have used to solicit Arborwell's (now former) customers.

H. This ERISA Lawsuit

64. Plaintiffs have filed this lawsuit to address the Defendants' breach of their ERISA fiduciary duties, *see* ERISA § 404, 29 U.S.C. § 1104, and their knowing participation in transactions prohibited by ERISA, *see* ERISA § 406, 29 U.S.C. § 1106. Plaintiffs seek to recover the losses to the ESOP under ERISA § 502(b)(2), their direct losses, and other appropriate equitable relief under ERISA § 502(a)(3).

65. Plaintiffs also seek to enforce the Non-Compete, which LaVelle and Woolner have intentionally and blatantly breached. LaVelle and Woolner have argued in the California lawsuit that the Non-Compete is unenforceable under California law. Although Plaintiffs disagree and prevailed in defeating their demurrer on the issue, Plaintiffs determined in the course of briefing the issue that there was no California law addressing enforceability of non-competes as part of a sale structured through an ESOP, which LaVelle and Woolner conceded at the hearing on the

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demurrer. Indeed, there is no such law in California because ESOPs are governed exclusively by ERISA, which preempts state law. *See* ERISA § 514(a), 29 U.S.C. § 1144(a). On that basis, Plaintiffs have filed this lawsuit, which focuses on the ERISA claims, the *per force* enforceability of the Non-Compete and the damages to the ESOP arising from the Sortwells, LaVelle and Woolner's self-dealing and breach of the SPA. However, if the Court determines that the Non-Compete is not governed by ERISA law or enforceable thereunder, Plaintiffs contend that the Non-Compete is nonetheless enforceable under California Business and Professions Code section 16601, which generally provides that non-competes are enforceable if agreed to as part of the sale of a business. (Plaintiffs have dismissed the Non-Compete claims in the California Lawsuit entirely.)

V. CLAIMS

FIRST CLAIM
Breach of Fiduciary Duties Under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)
Against All Defendants

66. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

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

68. The Sortwells, LaVelle and Woolner breached their fiduciary duties by orchestrating the ESOP's 2020 Sale of Arborwell, Inc. Stock to unjustly enrich themselves at the expense of the ESOP and its participants, including through the receipt of nearly $14 million in accelerated payments and the other personal benefits described herein.

69. The Sortwells, LaVelle and Woolner further breached their fiduciary duties by agreeing in the SPA that they would not compete with Arborwell in order to obtain extensive personal benefits, even though they never intended to fulfill their contractual obligations in the SPA once those personal benefits had been paid.

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70. The Sortwells, LaVelle and Woolner are thus liable for losses caused to the Plan under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and subject to other appropriate equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

71. To fulfill its fiduciary duties, Alerus was required to undertake an appropriate and independent investigation of the 2020 Sale and determine whether it was in the best interests of the ESOP and its participants and whether the ESOP received adequate consideration for 100% of Arborwell, Inc. stock. Defendant Alerus was also required to ensure that the 2020 Sale would not be used by the Sortwells, LaVelle and Woolner to unjustly enrich themselves at the expense of the ESOP and its participants.

72. An appropriate investigation would have revealed that the 2020 Sale was not in the ESOP's best interest and that the 2020 Sale was instead specifically designed to personally and unjustly enrich the Sortwells, LaVelle and Woolner at the expense of the ESOP and its participants.

73. Additionally, Alerus was required to remedy LaVelle and Woolner's breach of the SPA and Non-Compete, including seeking to recover any overpayments received by them and to enforce the SPA.

74. By allowing the Sortwells, LaVelle and Woolner to use the ESOP's 2020 Sale of Arborwell, Inc. stock to unjustly enrich themselves at the expense of the ESOP and its participants, Alerus breached its fiduciary duties, and knowingly participated in the fiduciary breaches of the Sortwells, LaVelle and Woolner. Alerus then further breached its fiduciary duties by failing to take necessary action to remedy the Sortwells, LaVelle and Woolner's fiduciary breach and to enforce the SPA.

75. Alerus is thus liable for losses caused to the Plan under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and subject to other appropriate equitable relief for knowingly participating in Defendants Sortwell, LaVelle and Woolner's ERISA violations under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

WHEREFORE, Plaintiffs pray for relief as set forth below.

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SECOND CLAIM
Engaging in Transactions Prohibited by ERISA § 406(a), 29 U.S.C. § 1106(a)
Against All Defendants

76. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

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

78. ERISA § 3(14), 29 U.S.C. § 1002(14) defines a "party in interest" to include (A) any fiduciary … of such employee benefit plan", (E) a relative -- which includes a spouse, ancestor, lineal descendant or the spouse of a lineal descendant -- of a fiduciary, (G) a trust of or in which 50 percent or more the beneficial interest of such trust is held by a fiduciary of such plan, and (H) an employee, officer or director or a 10 percent or more shareholder of an employer covered by the Plan.

79. At least as a result of being fiduciaries of the ESOP, and as a result of being officers and/or directors of Arborwell, Inc., the Sortwells qualified as a party in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

80. At least as a result of being a fiduciary of the ESOP, and as a result of being an officer and director of Arborwell, Inc., LaVelle qualified as a party in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

81. At least as a result of being a fiduciary of the ESOP, and as a result of being an officer and employee of Arborwell, Inc., Woolner qualified as a party in interest within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

82. In violation of ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), Defendants caused the ESOP to engage in the 2020 Sale, during which the Sortwells, LaVelle and Woolner as parties in interest received ESOP assets and personally enriched themselves at the expense of the ESOP.

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83. Alerus (itself a party in interest), the Sortwells, LaVelle, and Woolner were also aware of facts sufficient to establish that the 2020 Sale constitute a prohibited transaction with parties in interest, and knowingly participated in the prohibited transaction.

84. Defendants are liable for losses caused to the Plan under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and subject to other appropriate equitable relief for knowingly participating in the prohibited transactions under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

WHEREFORE, Plaintiffs pray for relief as set forth below.

THIRD CLAIM
Engaging in Transactions Prohibited by ERISA § 406(b), 29 U.S.C. § 1106(b)
Against All Defendants

85. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

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

87. As set forth herein, the Sortwells, LaVelle and Woolner were fiduciaries of the ESOP both prior to and at the time of the 2020 Sale.

88. As set forth herein, the Sortwells, LaVelle and Woolner received extensive personal benefits and consideration in connection with the ESOP's 2020 Sale of Arborwell, Inc. stock.

89. By orchestrating the ESOP's 2020 Sale of Arborwell, Inc. stock, the Sortwells, LaVelle and Woolner acted in a transaction involving a plan where their own interests were adverse to the those of the ESOP with this meaning of ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1).

90. By orchestrating the ESOP's 2020 Sale of 100% of Arborwell, Inc.'s stock, the Sortwells, LaVelle and Woolner dealt with assets of the Plan, namely, the ESOP's stock in Arborwell, Inc. and Arborwell, Inc.'s goodwill, in their own interests, within the meaning of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

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91. In connection with the ESOP's 2020 Sale of 100% of Arborwell, Inc.'s stock, the Sortwells, LaVelle and Woolner received consideration for their own personal accounts in connection with a transaction involving assets of a plan within the meaning of ERISA § 406(b)(3).

92. The Sortwells, LaVelle and Woolner used the 2020 Sale to personally enrich themselves at the expense of Plaintiffs, the ESOP, and the ESOP's participants.

93. Having personally orchestrated the 2020 Sale, the Sortwells, LaVelle and Woolner were aware of facts sufficient to establish that the 2020 Sale constituted a prohibited transaction with plan fiduciaries, and knowingly participated in each other's prohibited transactions.

94. As the ESOP's Trustee and a fiduciary, as well as a party-in-interest, Alerus was aware of facts sufficient to establish that the 2020 Sale constituted a prohibited transaction with plan fiduciaries, and knowingly participated in the Sortwells, LaVelle and Woolner's prohibited transactions.

95. Defendants are liable for losses caused to the Plan under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and subject to other appropriate equitable relief for knowingly participating in the prohibited transactions under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

WHEREFORE, Plaintiffs pray for relief as set forth below.

FOURTH CLAIM
Injunctive and Other Equitable Relief Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) Against Defendants LaVelle and Woolner

96. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

97. Under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), a civil action may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

98. LaVelle and Woolner have violated and continue to violate ERISA, the terms of the Plan, their fiduciary duties to the Plan, the SPA, and the SPA's Non-Compete provision.

99. In direct violation of the SPA, LaVelle and Woolner have breached their Non-Compete obligations and have solicited key Arborwell employees and high-value clients.

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100. LaVelle and Woolner's wrongful conduct has caused Plaintiffs to suffer continuing injury for which there is no other adequate remedy at law.

101. Plaintiffs thus seek appropriate equitable relief, including an injunction, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

WHEREFORE, Plaintiffs pray for relief as set forth below.

FIFTH CLAIM
Breach of Contract for Damages
Against Defendants LaVelle and Woolner

102. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

103. Defendants LaVelle and Woolner each entered into the SPA.

104. Through the acts and omissions alleged herein, Defendants LaVelle and Woolner breached the Non-Compete in the SPA.

105. CI Quercus performed all of its covenants, conditions and obligations under the SPA, except those that have been excused.

106. As a direct and proximate result of LaVelle and Woolner's breaches, CI Quercus has suffered damages in an amount according to proof.

WHEREFORE, Plaintiffs pray for relief as set forth below.

SIXTH CLAIM
Specific Performance of the SPA
Against Defendants LaVelle and Woolner

107. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

108. Defendants LaVelle and Woolner each entered into the SPA, which contains the Non-Compete. The Non-Compete is sufficiently definite and certain in its terms to be enforced and is just and reasonable.

109. Through the acts and omissions alleged herein LaVelle and Woolner breached the Non-Compete.

110. CI Quercus performed all of its covenants, conditions and obligations under the SPA, except those that have been excused.

111. CI Quercus has no adequate remedy at law.

112. CI Quercus is entitled to and seeks specific performance of the Non-Compete.

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WHEREFORE, Plaintiffs seek relief as set forth below.

SEVENTH CLAIM
Declaratory Relief
Against Defendants LaVelle and Woolner

113. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

114. There presently exists a real and actual controversy between Plaintiffs and Defendants LaVelle and Woolner regarding whether the Non-Compete is enforceable.

115. Plaintiffs maintain that the Non-Compete is enforceable, whereas Defendants LaVelle and Woolner maintain that the Non-Compete is unenforceable.

116. Accordingly, a judicial declaration is necessary so that the parties can determine their respective rights and obligations going forward, including but not limited to their rights and obligations under the parties' agreement alleged herein.

EIGHTH CLAIM
Express Contractual Indemnity
By Arborwell Against Defendant Alerus

117. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

118. Pursuant to its Independent Trustee Engagement Agreement, a true and correct copy of which is attached hereto as **Exhibit B** and incorporated herein by reference Alerus is required to

> indemnify, defend and hold the Company Indemnitees harmless from and against and shall reimburse the Company Indemnitees for all Losses that are found, in a Final Judgment, or acknowledged by Alerus to have arisen from the negligence, willful misconduct, or a Breach of Fiduciary Duty by Alerus.

Ex. B, § H(2)(b).

119. The herein-alleged conduct by Alerus constitutes negligence, willful misconduct, and/or Breach of Fiduciary Duty by Alerus within the meaning of the foregoing provision of the Independent Trustee Engagement Agreement. Further, Arborwell has suffered, and will continue to suffer, "Losses" within the meaning of the foregoing contractual provision, including without limitation attorneys' fees and expenses in connection with the initiation and prosecution of this action.

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120. Accordingly, Arborwell is entitled to indemnification by Alerus in an amount according to proof.

WHEREFORE, Plaintiffs pray for relief as follows.

VI. PRAYER FOR RELIEF

Plaintiffs prays for relief as follows:

1. Damages in an amount in excess of $75,000;
2. Restitution;
3. Disgorgement;
4. Surcharge;
5. Estoppel;
6. A preliminary and permanent injunction;
7. An accounting;
8. A constructive trust;
9. Reformation;
10. Attorneys' fees and costs; and
11. Such other relief, in law or equity, that the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury of all issues so triable pursuant to Federal Rule of Civil Procedure 38.

Dated: June 5, 2023

SHARTSIS FRIESE LLP

/s/ Richard F. Munzinger
By: RICHARD F. MUNZINGER

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CI QUERCUS CORPORATION, INC. and
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