Chapter 44

The fifty-fifty split

The story of the profit-sharing case brought against the owners of the Columbia Falls Aluminum Co. reads like an accumulation of evidence – without a carefully written agreement between the owners and the plant's employees that described what "profit sharing" at CFAC actually meant, the case hinged on statements made to the public, government officials and insiders. The owners vigorously defended themselves with the help of expensive attorneys, loyal plant managers, scare tactics and offshore bank accounts. They even came close to finding a buyer for the plant in the midst of the case. There was some reluctance at first for some people who were directly or indirectly connected to the case to believe the plant's owners could have done what they did, and the misappropriation of funds continued for a time even after lawsuits had been filed and newspaper stories had alerted the public. Cutting off future profit-sharing for salaried employees could be handled on an individual contract-by-contract basis, but for the hourly workers it meant pressuring union members into signing a new labor contract. The owners had allies in high places to help get the new labor contract through, although they also turned to a Virginia security firm with a reputation for intimidating unions.

The owners of the smelter in Columbia Falls were Brack Duker and Jerome Broussard. In August 1985, the Columbia Falls Aluminum Company was organized as a Montana corporation to transfer ownership from the Atlantic Richfield Co. to Duker and Broussard. All of CFAC's stock was purchased from ARCO by the Montana Aluminum Investors Corporation, a Montana corporation formed by Brack Duker. From 1985 to 1989, Duker and Broussard were the sole directors and shareholders in MAIC. In 1989, CFAC and MAIC were merged together under the name CFAC. From 1989 through 1993, Duker and Broussard were the sole directors and shareholders of CFAC. [1] Kalispell attorney Dana Christensen, who represented Broussard in the profit-sharing case, gave more details about the plant's ownership in a 2011 statement to the U.S. Senate Judiciary Committee after he was nominated to replace U.S. Judge Donald Melloy. In his statement, Christensen said Broussard owned 45% of CFAC at the time of the lawsuit. [2] According to the final court order in the profit-sharing lawsuit, from July 31, 1986 through July 31, 1995, Duker earned a total of $28,529,318 in salary, $87,514,954 in dividends and distributions, and $60,665,146 in S-Corporation Tax Payments for a grand total of $176,772,419 over the nine-year period. During the same time period, Broussard earned $24,153,937 in salary, $73,153,374 in dividends and distributions, and $41,205,724 in S-Corporation Tax Payments for a grand total of $138,513,035. [3]

In 1985, as ARCO tried to sell off its metals division, a plan was worked out in which Duker, an ARCO executive, and his fellow investors could purchase the plant for one dollar, plus $3 million for plant inventory. As part of the deal, ARCO and Duker agreed that the workers would take a major share of all future profits. In a letter which later became an important piece of evidence in the profit-sharing lawsuit, ARCO spelled out that condition, stating that employees “will have a claim against at least 50 percent of the profits earned in each year.” Court records later showed that Duker never objected to the idea and, in fact, embraced it. At one point, Duker even suggested giving the workers 90%. An important part of Duker’s plan to keep the plant in operation was to drive down costs. By threatening to close the plant, Duker drove home a labor contract in which hourly workers took a 15% cut in wages plus a 16% cut in benefits in exchange for a 50% share in any future profits. The cost-cutting efforts worked. By July 1986, after one full year of operation under Duker, the plant was in the black and the owners and workers evenly split $2.6 million in profits, according to court documents. [4]

First profit-sharing checks

Duker spent the summer of 1985 closing deals with ARCO, suppliers, managers and labor. “A dollar in your pocket is a dollar in mine,” he was heard several times saying to workers during negotiating meetings. [5] Duker’s business plan split employee compensation into a fixed component, base wages, and a variable component, profit-sharing. In an affidavit made in the 1990s, Broussard stated that the purpose of the profit-sharing provision was to “motivate all employees to work for the success of the new company.” [6] As aluminum prices rose, the plant “became a money-making machine.” For the next five years, Duker and Broussard pocketed $231 million and gave the workers $84 million despite an agreement in which the workers and the owners were to share after-cost profits 50-50. “As it turned out, a dollar in the pockets of workers would be nearly $3 in those of the owners,” Jim Robbins reported in a 1998 story in the New York Times. [7]

According to an affidavit from former ARCO vice-president Claude O. Goldsmith, the profit-sharing concept was Duker’s idea and was initially suggested at 90% for the employees. [8] On Sept. 10, 1985, Goldsmith wrote a letter to Duker regarding conditions in the sale of the smelter to the Montana Aluminum Investors Corporation. Under the heading “Employee Profit Participation,” Goldsmith stated that “MAIC will ensure that the employees of CFAC will have a claim against at least 50 percent of the profits earned in each year by the Columbia Falls Aluminum Company (‘CFAC’) either by reason of stock ownership in CFAC or through profit sharing arrangements.” On March 13, 1997, U.S. Chief Judge Jack Shanstrom ruled that the source of the hourly workers’ right to profit-sharing arose from Attachment B of the November 1985 collective-bargaining agreement made between CFAC and the Aluminum Workers Trades Council, and not from the third-party agreement between MAIC and ARCO. He also ruled that any state law third-party agreement between MAIC and ARCO was pre-empted by Section 301 of the federal Labor Management Relations Act, which had higher authority than state law in collective bargain agreements. [9] The collective-bargaining agreement also stated how profit-sharing payments would be determined: "The (CFAC Board) will determine each year the profits available for distribution. Fifty percent of the distributable profits as determined by the parent company will be distributed to the employees." [10] Duker signed the Goldsmith letter. [11]

Duker retained the firm of Towers, Perrin, Furster & Crosby on Sept. 23, 1985, to develop a profit-sharing plan for the plant workers. The firm prepared a document titled "CFAC Profit Sharing Plan Hourly and Salary," which was Attachment B of the November 1985 collective-bargaining agreement. [12] J. Spencer Letz, a CFAC attorney, described the company's profit-sharing agreement in an Oct. 16, 1985 letter. "Mr. Duker's interest does not represent a majority of the CFAC equity. A majority interest in CFAC's earnings is owned by or committed by agreement with (ARCO) to CFAC employees other than Mr. Duker," Letz said. In November, Duker met with CFAC's salaried employees where he discussed a profit-sharing arrangement. According to affidavits of CFAC accounting department employees Michele Hand and Roberta Gilmore taken in the 1990s, Duker told the employees, "Every time a dollar goes in my pocket, a dollar goes in your pocket." [13]

Sixteen CFAC representatives and 15 Aluminum Workers Trades Council representatives signed a new labor contract for hourly workers on Nov. 13, 1985. Attachment B to the contract read, "The Board of Directors of the Columbia Falls Aluminum Company will determine each year the amount of profits available for distribution. Fifty percent of the distributable profits as determined by the parent company will be distributed to employees." The only reference to a profit-sharing plan in the entire labor contract was in Attachment B. In his recommendation to Judge Shanstrom, U.S. Magistrate Judge Bart Erickson stated that Attachment B was a contractual agreement that described and governed the profit-sharing agreement between the hourly workers and CFAC. Judge Erickson also stated that "Attachment B unambiguously designates 50 percent of the annual distributable profits, as determined by CFAC, for employee profit sharing." [14]

Judge Shanstrom later agreed with Erickson, adding, "The plain and unambiguous language of Attachment B commands such a result. Any argument to the contrary is folly." Accordingly, throughout most of the profit-sharing case, defendants Duker and Broussard never denied that CFAC was obligated to share profits with its employees from 1985 through 1995. Instead the issue turned to defining the meaning of "distributable profits." [15] During the 1985 labor contract negotiations, AWTC's negotiating committee submitted several proposals for how disputes regarding profit-sharing could be resolved, including resorting to arbitration. The company rejected all union proposals, and Attachment B of the labor contract, the only document that mentioned a profit-sharing agreement, contained no reference to AWTC's right to file a grievance. [16]

Duker mentioned the existence of a profit-sharing agreement in several letters over the next year. In a May 29, 1986, letter to R. Stephen Browning, an attorney in Helena, Duker stated that CFAC "has implemented a Profit Sharing Program for all employees. This program calls for one-half of the annual profits, after deducting debt service and capital expenditures, to be distributed to the employees… CFAC's profit sharing program maximizes the individual's cash flow because payments are made from pre-tax profits and the CFAC formal program also creates an entitlement for the employee which is preferred over both equity holders and payments for income tax." [17] In a July 28, 1986 letter to Peter Prowitt, a staff member for Sen. Max Baucus, Duker asked for assistance in a financial dispute over tolling arrangements with ARCO. Duker was worried that excess payments to ARCO would be "paid by our employees. Consequently, the payment to ARCO will eliminate for a long time any possibility CFAC will pay profit sharing to our employees. These employees obtained an entitlement to more than 50% of the CFAC profits in exchange for wage reductions of 21% effective Jan. 1, 1986." [18]

At the end of September 1986, CFAC announced that profit-sharing checks would be distributed on Oct. 15. CFAC spokesman Jack Canavan said management was "pleased with the performance of the past year and congratulated everyone for their faith, support and hard work." Salaried and hourly workers would receive a portion of the company's first-year profits, but the exact amount was not made public. According to Canavan, employees would continue to share in the profits each year the company made a profit, and the November 1985 labor agreement included a profit-sharing plan for hourly workers. Broussard also praised the workforce. "There's a high commitment of our employees to the success of the business," he said. "Without that element, it wouldn't have been worth coming in here like we did a year ago. There's a very solid group of people working here." AWTC President Marvin Torgerson expressed optimism in the plant's future. "The plant looks good right now," he said. "Management looks committed to making it viable for the foreseeable future and we're thankful for that. Naturally we weren't happy with the wage concessions we had to make, but if the plant continues to run as it has been, we'll get some of those back with profit sharing. We're happy the plant is running. It looks much better than it did one year ago." [19] Canavan noted that while the profit-sharing plan had been worked out with the unions, it still needed to be reviewed by the IRS. [20]

Duker's initial business plan succeeded, and in 1986 CFAC split 50-50 on $2.6 million in profits. [21] For the time period between the formation of CFAC and July 31, 1986, CFAC's owners and employees each received $1,302,000. [22] On Oct. 15, Hungry Horse News publisher Brian Kennedy congratulated CFAC for a successful first year of operation. "What a difference one year makes!" he said. Kennedy recalled critics of CFAC's plan to become a tolling company and the bitterness of workers forced to accept wage and benefit cuts. Now, after one year, the company was making money and handing out its first profit-sharing checks. [23]

Ties to a pension plan

After the aluminum plant was acquired by Duker and Broussard, the profit-sharing arrangement was amended several times and structured under the federal Employees Retirement Income Security Act (ERISA) to give employees the option of taking profit shares in cash or deferring them toward retirement. Plaintiffs in the profit-sharing lawsuit claimed that the power to determine how much money was distributable was given to the company's board of directors, whose entire membership consisted of Duker and Broussard, until January 1993. The board also resolved grievances filed under ERISA. This profit-sharing arrangement was initially contested by union workers, but CFAC used the plan to distribute profit-sharing checks and it was eventually acknowledged to be part of the union work contract. [24]

On Sept. 12, 1986, ERISA documents were executed at CFAC based on plans developed during the summer of 1986 called "Profit Sharing Plan and Trust for Production and Maintenance Employees of CFAC" and "Profit Sharing Plan and Trust for Salaried Employees of CFAC." The two plans were intended to establish a profit-sharing plan and trust that met federal ERISA requirements. When executed, the plans were retroactive to Jan. 1, 1986. The only reference to employer contributions in the plan stated, "The amount of Employer Contributions for given Plan Year shall be the Plans' Share of Distributable Profits." In July 1997, Judge Shanstrom ruled that for both hourly and salaried workers, the ERISA plan did not control the resolution of the profit-sharing claims in dispute because the profit-sharing plan also provided current income to employees not deferred to the ERISA plan, and because the compensation plan did not relate to the ERISA plan. The fact that union leadership may have acknowledged that the formal ERISA plan governed the profit-sharing plan was of no consequence, Shanstrom ruled, since such an acknowledgment did not change the nature of the money paid out in the profit-sharing plan. [25]

CFAC's ERISA profit-sharing plan for salaried employees was amended on June 11, 1987. The plan was subsequently amended several more times. According to attorneys representing the salaried workers in the profit-sharing case, the amendments were made without the agreement, participation or knowledge of the employees. [26] The profit-sharing plan was amended on June 15, 1988, to state that the amount of employer contribution for any plan year would be "determined annually in the sole discretion of the Board of Directors to the extent such Net Profits are adequate to justify a contribution hereunder… based on and made out of Net Profits." [27] On June 5, 1990, Duker and Broussard amended the profit-sharing plan and trust document for the salaried employees to include, for the first time, a definition of the profits to be distributed to the trust. [28] The plan was amended to state that "'Distributable profits' means the net income or profits of the Employer for any year determined by the Employer in its discretion." The document stated that the amendment was made to "clarify the Plan to reflect more accurately the consistent past practices used for determining the Employer's contributions to the Plan." [29]

By 1990, many of CFAC's employees were putting their profit-sharing money into the ERISA plan. The June 5, 1990 amendment referred to Attachment B to the union contract, which had declared, "Fifty percent of the distributable profits as determined by the parent company will be distributed to employees." Duker and Broussard, however, declared the attachment to be an "inoperative document" and stated that there was no binding contract, so profit-sharing allocations would be made at the sole discretion of the employer. By December 1993, court documents showed later, Duker and Broussard informed the employees that CFAC would no longer make any profit-sharing payments to them. [30] The establishment of the ERISA plan, however, came after CFAC's owners created a profit-sharing plan, attorney Allan McGarvey argued in a May 15, 1992 brief. The contractual obligation to pay profit-sharing arose out of numerous written documents and oral statements made prior to the creation of the ERISA plan on Sept. 12, 1986, and these were the only documents, promises or representations that referred to the existence of a profit-sharing plan, McGarvey said. [31]

Profits and markets

As the second round of profit-sharing checks approached, Brian Kennedy described CFAC's success after two years of operation in an Aug. 19, 1987 editorial. The checks were expected to be "probably larger than the last," he said. [32] "The union membership is tickled pink we had a good year and that they're still working," AWTC President Ken Beck said in early October. "They realize through their hard work they made this happen, and they're looking forward to improving on it next year. Every year there is profit sharing, it sure helps morale out here." Broussard praised efforts by CFAC employees to control costs and work harder. He said that increased productivity and higher aluminum prices helped the company operate at a profit. Aluminum market prices were the highest since 1980 at 92 cents per pound, nearly double the price in

September 1985 when CFAC began operating. Worldwide aluminum inventories had dwindled in recent months, driving up prices. [33] Plant employees received about $5,998,000 while the owners received about $6,509,000 for the period between Aug. 1, 1986 and July 31, 1987. The split was 50/50 except for Federal Insurance Contributions Act (FICA) withholdings for Social Security and Medicare, but according to the lawsuit filed by Roberta Gilmore on Jan. 30, 1992, Duker and Broussard wrongfully withheld FICA taxes from the employees' share of the company's profits. [34]

By July 1988, the market price for aluminum had reached $1.30 per pound on the London Metals Exchange and $1.20 per pound according to the Midwest Transaction Price index. [35] Profit-sharing checks were scheduled to be distributed on Oct. 14, and rumors in the valley indicated the profit-sharing checks might reach $25,000 per full-time employee. [36] On Sept. 29, CFAC spokesman Jack Canavan explained that a portion of the company's profits was kept by the company for capital improvements and operations, and the rest went to the employees. The amount of profit-sharing distributed to hourly employees was based on a flat rate and the number of hours each employee worked, he said. [37] The third round of profit-sharing checks was issued to hourly and salaried employees on Oct. 14, 1988. The exact amount was not made public to protect the personal finances of the workers, but the pre-tax total for all company employees was estimated to reach $15 million, a figure that was expected to have substantial impacts on the local economy. [38] According to later court documents, CFAC employees received about $20 million in the third round of payouts for the period between Aug. 1, 1987 and July 31, 1988, while the owners received $21.4 million plus interest. [39] Three days after they received their hefty profit-sharing checks and one month before their labor contract was scheduled to expire on Nov. 19, CFAC's hourly workers voted to extend their existing contract for another three years. The contract signed in fall 1985 had reduced wages and benefits by 31.3% but, with significant improvements in the aluminum market, profit-sharing appeared to be making up the difference. [40]

During the first three years of CFAC's profit-sharing arrangement, the company's profits were shared nearly equally, with the workers taking $27 million and the owners taking $29 million, but the split in the fourth round of profit-sharing was $14 million to the workers and $43 million to the owners. [41] For the period between Aug. 1, 1988 and Jan. 26, 1989, Duker and Broussard failed to honor the profit-sharing agreement it had with its employees in an unprecedented manner, giving themselves more than three-quarters of the company's profits, according to the plaintiff's complaint filed on Jan. 30, 1992. [42] This pattern continued from 1989 through 1991, as the two owners allotted $159 million to themselves and only $43 million to the workers. After five years, the owners had given themselves $231 million and given the workers $84 million – nearly a

3 to 1 split, with only $7.5 million going into capital investment for the plant, according to Robbins. [43] The profit-sharing payout schedule changed in the fourth round, as checks came out in less than a year's time and were announced on March 30, 1989. High aluminum prices had made the October 1988 checks the highest yet, but aluminum prices fell from an average of $1.17 per pound in 1988 to 90 cents per pound by April 1989. [44] According to later court documents, CFAC employees received about $17,750,000 while the owners received $73,750,000 for the period between Jan. 27, 1989 and Dec. 31, 1989 – Duker and Broussard had pocketed more than 80% of the profits. [45] For the years 1989 and 1990 together, profits were split $43 million to the workers and $159 million to the owners. Duker and Broussard took home about 78% of the profits, but by that time the two owners denied that an official profit-sharing contract even existed – any payments, Duker argued, were made at the company's discretion. [46]

First employee lawsuit

Conspiracies are difficult to maintain when the conspirators must rely on people outside the group. The same is true of financial malfeasance. At CFAC, Duker and Broussard relied on bookkeepers and accountants at the plant offices to keep track of revenue and expenditures as the smelter tolled other company's alumina into aluminum. There were several reasons why these bookkeepers and accountants couldn't be expected to keep quiet if they caught wind of the way the company's profits were being shared – they were professionals in their fields, they were human beings with moral values, and their share of the profits were lessened by the owners' misbehavior. The first financial officer at CFAC to speak out was Revo Somersille. Somersille grew up in New York City, graduated from the City College of New York, and started his CPA career in New York. [47] He had worked in management for both the Anaconda Company and ARCO before CFAC hired him in 1985 to be the company's administrative manager and chief financial officer. [48] In 1998, Somersille was awarded the Citizen Award from the Montana Trial Lawyers Association for his "honesty, integrity and courage in the pursuit of justice" for his role in the CFAC profit-sharing lawsuit. Somersille served as a deacon at the Whitefish Assembly of God, sang in church choirs, participated in Bible studies and served on the board for the Lighthouse nonprofit in Kalispell. In May 2000, Somersille received his master's degree in business from the University of Montana. He was teaching at Humphreys College in Stockton, Calif., when he died on April 26, 2006. [49]

In 1987 and 1988, Somersille notified Duker and Broussard about minor discrepancies in the distribution of profit-sharing checks to the company's employees, and his observations were viewed with disfavor by the company's owners. [50] In the first instance, Duker and Broussard had borrowed $6.5 million from their projected share of the profits in 1987. Later when they repaid the money on the books, Somersille saw that something was missing. "I asked them how much interest they were going to pay, and they said there wasn't going to be any interest," he later recalled. Somersille thought that was unethical but continued at his job. [51] Somersille also discovered that Duker and Broussard were deducting FICA taxes from the employees' share of the company's profits before determining the split between employees and owners. The result was that the profit-sharing split didn't come out to an even 50/50 split. For the period between Aug. 1, 1986 and July 31, 1987, for example, the employees received $5.9 million while the owners received $6.5 million. [52] Somersille thought that violated the company's profit-sharing agreement with the workers. When he indicated his displeasure, he was moved to a nearly empty office with no duties to perform until he was dismissed. The reason, he said, was because "I was making waves." [53]

The big change came in 1989, when profits were distributed in "an unprecedented manner and in gross violation" of the profit-sharing agreement, with the owners receiving $43 million and the employees receiving $14 million, plaintiff attorney Allan McGarvey said in a May 1992 filing. [54] Somersille noticed another big change. In January and February 1989, "very large sums of money were transferred to Los Angeles, out of the control or record of my office such that I was unable to determine whether profits distributable and/or actually distributed were equally divided between employees and employers," he stated in his 1990 lawsuit against the company. "Subsequent declarations and distributions of profit sharing do not appear to be proportionate to the vast sums of money, profits and cash transferred from Columbia Falls to the Los Angeles office," he said. The only way to accurately determine whether employees got their fair share of the company's profits "would be to examine financial documents of the company that demonstrate actual profits," Somersille said. [55] In September 1989, shortly after the profit distribution was made, Somersille was relieved of his duties and subsequently terminated. Somersille contended in his lawsuit that he was discharged so the owners could hide the breach of the profit-sharing agreement from the employees. [56] With Somersille gone and the plant's workers more concerned about job security than profit-sharing checks, Duker and Broussard continued to siphon off the workers' share of the profits. Somersille's duties as CFAC accountant and chief financial officer fell to Roberta Gilmore. [57]

In September 1989, Somersille signed a termination agreement in exchange for a severance package valued by CFAC at $117,000. The severance package included nine months of salary, 18 months of additional medical insurance for himself, lifetime medical insurance for his wife, who was suffering from Lou Gehrig's disease, and profit-sharing up to his severance date, to be paid in January 1990. The termination agreement, which was signed by Somersille and Duker, contained a waiver in which each released the other from "any and all claims, known and unknown" that might arise in the future over past salaries, profit-sharing or other causes. In January 1990, Somersille received $50,000 as his share of the company's profits, but from his knowledge of CFAC's operations, Somersille estimated he was owed more than $100,000. [58] Somersille sued for wrongful discharge, fraud, breach of contract and other common law tort and contract claims. He also alleged that CFAC had breached its obligations under the company's profit-sharing plan, and he sought profit-sharing losses he claimed he was entitled to both before and after his termination. [59]

Somersille claimed that CFAC had violated the termination agreement by shorting him on his share of profits. CFAC's lawyers contended that Somersille was an experienced executive who had negotiated his own severance package and knew what the agreement and waiver meant. On Aug. 13, 1991, Flathead County District Court Judge Michael Keedy granted summary judgment to CFAC, ruling that Somersille had no case because the waiver he had signed was binding. Judge Keedy also noted that Somersille "was fully aware of certain alleged 'discrepancies'" in the company's profit-sharing program. Somersille's lawyers countered that he was not fully informed about the nature of the allegations regarding improper profit-sharing distribution. In their appeal, his lawyers argued that the termination agreement was violated either by CFAC failing to pay his full share of the profits, or by CFAC failing to honor the complete terms of the agreement. [60]

In his lawsuit, Somersille claimed that the termination agreement with CFAC that he had signed was unenforceable because it was procured by fraudulent misrepresentation and undue influence. He claimed CFAC had falsely promised and misled him to believe that he had received his proper share of profit-sharing with the intent of inducing him to release CFAC from any claims. Somersille also claimed that CFAC used his wife's illness as leverage in inducing him to sign the termination agreement. "Defendants took advantage of my confidence and revelation of my wife's illness and the emotional and economic stresses of such illness by offering to continue my wife on the company health insurance coverage as described in the 'Termination Agreement' if I would agree to sign such purported 'Termination Agreement,'" Somersille said. Judge Keedy, however, found no evidence of a mistake, undue influence, menace or fraud. Keedy noted that Somersille had consulted with an attorney and thoroughly discussed the agreement with his wife before signing it. Keedy noted that Somersille then discussed the agreement further with CFAC officials, even insisting that the company's owner sign the agreement. "He thoroughly read it and understood its terms," Keedy said. "He was aware that in signing the agreement, he was making a firm agreement to not bring the suit which he now seeks to maintain." [61]

Judge Keedy concluded that the execution of the termination agreement was made knowingly and voluntarily. Somersille's claims for not receiving his full payment from the profit-sharing plan came from the wording of the termination agreement. Following the terms of the agreement as understood by CFAC, Somersille received payment equal to his salary from Sept. 30, 1989 through June 30, 1990, which was more than $48,000; profit-sharing distribution for the period Jan. 27, 1989 through Sept. 30, 1989, which was $49,710, which CFAC paid on Jan. 3, 1990; and reimbursement for health insurance coverage, which was $4,320. The total payment from the termination agreement came to more than $102,000. Somersille, however, claimed that the profit-sharing was less than what it should have been and that he didn't become aware that it was disproportionately small until after he received it in January 1990. He claimed that he was unable to accurately determine how profits should be distributed at CFAC because of the way the owners had begun to move around the company's money. Keedy, however, ruled that the facts Somersille relied on to make his claim predated his signing of the termination agreement, and that by signing the agreement, Somersille had relinquished all potential claims against CFAC and was precluded from bringing the lawsuit against the company. Somersille appealed Keedy's ruling to the Montana Supreme Court. [62]

On Nov. 4, 1992, the Montana Supreme Court ruled 7-0 in favor of Revo Somersille's appeal in his wrongful discharge lawsuit against CFAC. The Supreme Court ruled that Somersille's attorneys had raised issues of fact, in particular that Somersille was not fully aware of the nature of the improper profit-sharing distribution until 1990, by which time he had already been terminated. The high court ruling allowed Somersille to pursue his case. [63] Somersille was represented by McGarvey, Heberling, Sullivan & McGarvey of Kalispell. CFAC was represented by Poore, Roth & Robinson of Butte. Supreme Court Justice Fred J. Weber wrote the decision. [64]

The high court agreed with Judge Keedy that the termination agreement was a valid enforceable agreement, but the high court took a closer look at whether Somersille had been given the proper amount of money from the company's profit-sharing plan. The high court looked at the terms of the company's profit-sharing plan, noting that CFAC's board of directors would determine each year the amount of profits available for distribution, that 50% of the profits would be divided among salaried and hourly workers based on the ratio of each group's pay to the total pay of the company, that each salaried employee's share would be based on the amount of pay they had received in that fiscal year, that salaried employees could opt to put some of the money in a 401(k) type retirement fund, and that payments to hourly employees would be determined by the company and the union. The high court ruled that Somersille had raised an issue of fact about whether he had received the correct amount of profit-sharing. The high court reversed that part of Judge Keedy's ruling and remanded that part of the decision back to the district court for additional proceedings. [65]

In May 1994, Somersille's attorneys asked Lincoln County District Court Judge Robert Keller to fine CFAC $25,000 for improperly moving Somersille's case to federal court. Somersille had begun his lawsuit in 1990 by claiming wrongful discharge, but he later amended his lawsuit to include a complaint about missing profit-sharing money. CFAC had successfully moved the lawsuit to federal court, but it was later remanded to district court in Kalispell. Allan McGarvey argued that the move to federal court was a delaying tactic that helped make money for the company's owners – the longer Duker and Broussard held onto the ill-gained money, the more interest the money collected. McGarvey claimed the move to federal court was improper because it was long past the 30-day deadline for such a move. CFAC attorneys James Robischon and Gary Graham argued against the sanctions, claiming that Somersille's amendment made his lawsuit a federal case. Robischon and Graham also argued that Judge Keller should not involve himself in the case until other profit-sharing lawsuits against CFAC were settled in federal court. [66]

Second employee lawsuit

For the period between Jan. 1, 1990 and Dec. 31, 1990, CFAC employees received approximately $14,750,000 in profit-sharing while the owners took $56,115,000, more than 79% of the total profits. [67] This marked the second year that the owners had taken about three-quarters of the profits. But, perhaps unaware of what was going on behind the scenes, Aluminum Workers Trades Council President Larry Craft wrote to Duker on Dec. 28 to acknowledge what he believed to be the company's proper handling of the profit-sharing plan. In the letter, Craft stated that "the Union had the opportunity to review the Plan and, in fact, did review the Plan and required certain changes to be made in the Plan provisions. The Union agrees with the Company that the Plan, as so modified by the Union, accurately reflects and effectuates the required terms of the profit sharing plan as set forth in the Agreement (the collective bargaining agreement including Attachment B). The Union agrees further with the Company that the Plan, as amended from time to time, has been administered by the Company in accordance with such terms." [68] This letter later was regretted by Craft and the union membership.

Secrets of this size can sometimes raise suspicions among news organizations, but the plant employees remained tight-lipped. In mid-January 1991, as CFAC distributed profit-sharing checks for the sixth time since the company took over the aluminum plant from ARCO, Hungry Horse News publisher Brian Kennedy noted in an editorial that management and workers at the plant "are becoming more and more sensitive about discussing their annual profit sharing payments with the public." Kennedy argued that the public had the right to know about the profit-sharing checks because of the impact the company had on the local economy. “There remains public interest in the fortunes of CFAC beyond the circle of people who work there, and it’s more than mere envy,” he said. Kennedy took note of the high morale among workers at the plant, and he congratulated the company on another successful year. [69]

As the owners profited handsomely from the profit-sharing plan, they also took steps to rein in employee salaries. On Feb. 28, 1991, Brack Duker sent a memorandum to CFAC Plant Manager Lee Smith in response to an evaluating committee’s proposal suggesting that salaried employees receive a 6% boost in base wages. Duker opposed the pay hike and advised Smith that the company’s board of directors – that is, Duker and Broussard – could not approve such a proposal. Duker pointed out that the company had adopted a business plan in 1985 with employee compensation based on two parts, “a fixed component comprising base wages and a variable component consisting of a profit sharing program.” Duker went on to describe how the plan was affected by recent aluminum industry business cycles. “During the five profitable years ending 1990, the Company has adhered to this plan and its agreement with the employees. Total compensation paid our employees, including profit sharing, has been well above the industry average. Now, however, aluminum prices, as indicated on the graph, have fallen to the point where the Company needs the protection afforded by its variable cost structure, including compensation. At this critical point, the Company cannot change its compensation to a high base wage, especially after five years of paying profit sharing aggregating $74 million.” [70]

A new labor contract signed on Nov. 26, 1991, recognized that it was up to Duker and Broussard to decide what profit-sharing actually meant. The contract read in part that the “CFAC Profit-sharing Plan shall be continued during the life of this agreement and applied to bargaining unit employees each Plan year… the Union confirms its prior understandings that the Plan provides that the amount of the Employer’s contribution, if any, for any given Plan year shall be determined annually in the sole discretion of the Board of Directors to the extent that distributable profits, as determined by the Board in its sole discretion, are adequate to justify a contribution.” [71] By Dec. 10, the price of aluminum was 48.7 cents per pound, down from 69.3 cents one year earlier and the lowest in a decade. The low metal prices resulted from a worldwide recession and a glut of cheap aluminum from the Soviet Union. The drop in metal prices was expected to affect CFAC’s profit-sharing checks, which were to be distributed the following week, according to CFAC spokesman Jack Canavan. [72] For the period between Jan. 1, 1991 and Dec. 31, 1991, CFAC employees received approximately $10,400,000 in profit-sharing while the owners received $29,228,000. Total profits for the year were down by 44%

from the previous year, and the owners took nearly three-quarters of the money for 1991. [73]

With the departure of Revo Somersille, the position of CFAC accountant and chief financial officer fell to Roberta Gilmore. She started working at CFAC in 1978 as an accountant and over time was promoted to general accounting supervisor. [74] In March 1990, CFAC executives asked Gilmore to sign a letter to the accounting firm Ernst & Young, which was conducting a routine audit, stating that the company had no "contingent liabilities." She refused to sign the letter because she felt the company in fact had huge liabilities – millions of dollars in profit-sharing money owed to the workers. "I knew I couldn't sign the letter, ethically, morally and legally," she said later. Plant managers were not pleased and told her "to keep my mouth shut." For the next two years, Gilmore did keep quiet and the company continued operating without a completed audit during that entire time. Finally in 1992, Gilmore grew frustrated about the missing profit-sharing checks and decided to contact a lawyer who happened to also be a friend and neighbor. [75] By 1992, shares to workers had stopped entirely, Gilmore said later. She notified the law firm of McGarvey, Heberling, Sullivan & McGarvey about the matter and a lawsuit was filed. The next day, Gilmore was put on paid leave. Eleven months later, in August 1993, she was fired. [76]

Gilmore filed a lawsuit against CFAC in Flathead County District Court in Kalispell on Jan. 31, 1992, accusing the plant owners of failing to properly distribute profit-sharing checks. Gilmore accused Duker and Broussard of fraud and breach of trust and argued that profits increasingly flowed to the plant's owners. Soon after Gilmore filed her lawsuit, union leaders filed a grievance under their work contract arguing that the profit-sharing clause in their contract was not being honored. CFAC and its two owners then took the matter to federal court by filing a lawsuit against the union arguing that profit-sharing was an ERISA matter, not a union contract issue, and that the union had failed to follow proper grievance procedures. Eventually the Gilmore and union lawsuits became joined in class-action lawsuits, with Gilmore's lawsuit representing salaried workers and the union lawsuit representing hourly workers. The employees alleged that between 1986 and 1991, Duker and Broussard received or gained control over some $231 million while the employees share was $84 million. [77]

Documents in the lawsuit showed that CFAC's owners took some of that money in low-interest or no-interest loans. The financial restructuring of the company from a Class C to a Class S corporation also became an issue. No profits were shared in 1993 or 1994 and employees tallied those two years with estimates from 1986 through 1991 to reach a grand total of $100 million owed to the employees. The company and its owners argued that the profit-sharing plan was a benefit and not a binding contract with the employees, that it was not intended to last forever and could be terminated at any time, that the employees had already received large benefits which fulfilled any company obligation to share profits, and that profit-sharing was subject to renewal or revocation during union labor contract negotiations. In early 1995, Judge Erickson stated in his recommendation that the profit-sharing agreement was a binding contract with the employees, and Judge Shanstrom upheld and broadened Erickson's decision. [78]

Gilmore's attorneys began by arguing that Gilmore represented "all current and former employees of the Columbia Falls Aluminum Company (CFAC) who are not subject to the collective bargaining agreements" at CFAC. They also stated that Gilmore, as an accounting supervisor, "has personal knowledge of the facts and figures alleged herein." Furthermore, Gilmore was "looked to and relied upon by other CFAC employees to fulfill her legal, professional, and ethical obligations to employees with respect to profit sharing such that she is in the best position to fairly and adequately protect the interests of the class." The lawsuit alleged that Duker and Broussard "induced Plaintiff and class members to accept a reduction in wage rate and benefits of 15%, a cut in the labor force, and other concessions by promising profit sharing to the employees." The plaintiffs presented three exhibits to show that the defendants had promised to share 50% of the profits with the employees. Exhibit A was a copy of the company's profit-sharing agreement, also known as Attachment B of the 1985 labor agreement; Exhibit B was a letter dated Oct. 16, 1985 from CFAC attorney J. Spencer Letz filed in the Hinden-Owen-Engelke lawsuit against CFAC; and Exhibit C was a copy of a front-page article in the Sept. 18, 1985 Daily Inter Lake in which Duker described a profit-sharing plan with the employees. Exhibit C was intended to represent one of many public statements, in written or oral form, made by Duker regarding profit-sharing. [79]

The lawsuit described the distribution of profits from fiscal year ending July 31, 1986 through fiscal year ending Dec. 31, 1991 and alleged that an average of $100,000 had been wrongfully withheld from the salaried workers. Gilmore's attorneys pointed out that the defendants spent only $7.5 million during those years in capital reinvestment and, with a drastic drop in aluminum prices, the company was facing difficulties in continuing business. "Defendants have removed such profits from the company so as to jeopardize its ability to weather the storm of the fluctuating market," the lawsuit argued. "Should the plant fail, Defendants will have gained the benefit of all of the profitable years far in excess of their rightful share." The lawsuit alleged six counts – breach of contract, fraud, constructive fraud, bad faith, wrongful denial of contract, and tortious breach of fiduciary's duty to disclose. The lawsuit alleged that the defendants committed fraud by making promises and statements "knowing they would not and had not honored that commitment" and promised 50% profit sharing "in order to induce Plaintiff and others to accept a reduction in the salary and wages they had been paid."

Regarding the constructive fraud count, the lawsuit alleged the defendants had "concealed the manner in which they have treated profits and distributed profits so as to prevent Plaintiff and other employees from discovering the true amount of profits and the true distribution of such profits," a position based on trust, so that the defendants "gained advantage over Plaintiff and other CFAC employees." [80]

Gilmore's attorneys alleged that the defendants acted in bad faith when they "withheld critical information as to how profits were being handled" and "further failed and refused to address misunderstandings and improprieties in profit sharing with an established policy and definitions understood by Plaintiff and other employees, but rather deliberately perpetuated and took advantage of the Plaintiff and other employees' misunderstandings." Regarding the wrongful denial of contract count, the lawsuit alleged that the defendants had "denied the existence of the profit sharing agreement" and instead "now maintain that the CFAC employees, including Plaintiff, were entitled to no more than a bonus declared in the discretion of the corporation's board." Gilmore's attorneys also alleged the defendants had a fiduciary relationship with the employees but had "failed to disclose and/or have concealed the fact that the employees are not receiving 50% of the profits distributed by the corporation." The lawsuit asked for restitution, together with pre- and post-judgment interest, general damages for mental and emotional distress, punitive damages "in an amount sufficient to punish, deter and make example of the Defendants' conduct, and payment for the cost of litigation. [81]

Going public

The Daily Inter Lake published a front-page article on Gilmore's lawsuit on Jan. 31, 1992. CFAC spokesman Jack Canavan said the company would not have a specific comment until officials had reviewed the contents of the brief. "The company is confident that the majority of employees feel that they have been treated honestly and fairly, and the few who do not, have a misunderstanding of what the profit-sharing plan is and how profits are distributed after business obligations are met," Canavan said. "The Aluminum Workers Trades Council has a negotiated contract with the Columbia Falls Aluminum Company. Since its inception in 1985, CFAC has honored that contract," Larry Craft said. He also confirmed that AWTC's most recent labor contract contained a clarification of the profit-sharing agreement. [82] On Feb. 4, Gilmore showed up for work for the first time since filing her lawsuit on Jan. 31. She was promptly suspended and put on administrative leave with pay and benefits. [83] That same day, CFAC issued an official statement on the Gilmore lawsuit for the company's employees. "This suit arises out of a disagreement which she has previously expressed over the plan administration," the statement explained. "Therefore, the opinions about the matter have been known to us for some time. However, we feel strongly that those opinions, which are the basis of her lawsuit, are totally without merit. Therefore, the company will continue to vigorously defend its position that the profit-sharing plan has been consistently and properly administered since its inception in 1986, in accordance with the company's obligation under the plan." The statement concluded by asking that all employees focus their efforts on improving productivity and efficiency so the company could deal with the present downturn in the aluminum industry. [84]

Gilmore was left on administrative leave for 1 1/2 years, collecting her regular paycheck but no profit sharing. In September 1993, she filed a wrongful discharge lawsuit. Allan McGarvey, her attorney, said there was nothing she could have done to bring about her termination because she was away from the plant during all that time. He also said it was illegal to fire someone for blowing the whistle on superiors. CFAC asked the courts to dismiss the wrongful discharge lawsuit, but the courts denied the request. Gilmore returned to her job at the plant on Aug. 8, 1995. "They offered her a job – it's as simple as that," McGarvey said. "This is not remotely related to a settlement in any way." [85]

The profit-sharing case quickly became a top news story, and over the years it gained traction as litigation took readers on many twists and turns and exotic secrets were revealed. On Feb. 6, 1992, the Hungry Horse News noted that the law firm representing Gilmore had sued the aluminum plant in 1970. In the earlier lawsuit, Dale McGarvey had represented Loren and Mary Kreck in their class action lawsuit over fluoride emissions from the Anaconda Aluminum Co. plant. "The senior McGarvey's suit forced the plant to modify its operation and reduce fluoride emissions to 864 pounds per day," the newspaper said. Allan McGarvey, Dale's son, and Roger Sullivan were representing Gilmore in her lawsuit against CFAC's owners. [86] Brian Kennedy commented on the lawsuit in an editorial. "What a shame that the once good relationship between aluminum plant workers and the plant's newest owners deteriorated into a finger-pointing mess," he said. "Some employees are mad but afraid to speak publicly for fear they might lose their jobs." Kennedy noted that even if the allegations proved to be false, a serious credibility problem would remain. He also noted that "CFAC asked for and received tax breaks from several levels of government when the company started." [87]

On Feb. 6, CFAC officials released to the public the same statement it had made for its workers. "We've known the opinions of this employee for some time," Canavan explained. "The company strongly disagrees with her assertions and believes her suit is totally without merit. The company will vigorously defend its position." Duker had left his offices in Los Angeles to visit company managers in Columbia Falls over the weekend. Allan McGarvey pointed out that the aim was not to put CFAC out of business.

"In no way would this affect how much profit the company could generate, or whether it should be distributed," he said. "It can't affect the company's viability." When asked about whether the Aluminum Workers Trades Council might join the lawsuit, Gilmore's attorneys refused to speculate. [88]

Reactions by CFAC employees ranged from worry about the plant's viability to lingering feelings of mistrust about the company. "Most of us would like to see the truth one way or another," an unnamed salaried worker told the media. "This has been suspected for a few years now, and it has affected morale out here." Rocky Ramey, a maintenance foreman at the plant since 1977, thought many of the company's employees wanted the lawsuit to proceed and didn't believe the lawsuit would put the plant out of business. "I think probably there could have been more equity in profit-sharing," he said. "I certainly don't have anything I'm willing to go to court about. I do have some gut feelings, but those are emotional. I don't have any facts to go on." Gary Kimmet, CFAC's safety coordinator, was concerned about the impact of the lawsuit on the company's future contract negotiations. Kimmet said he had been satisfied with past profit-sharing payments. "I'm not in the accounting department, but I've been pleased with what we get," he said. "I feel it's a pretty good wage as it is, and with the profit-sharing it's just cream." John Lengstorf, an alumina truck driver with 35 years at the plant, said the lawsuit wasn't unexpected. "Basically, from our side of the table, it's really no surprise," he said. "We've known for some time we've made a lot of money and it's not all showing up where it should." Lengstorf doubted the lawsuit would hurt the company. "Why the hell would (Duker) shut it down when he's making millions?" he asked. [89]

Larry Eddy, a mechanic with five years at the plant, also was not surprised. "For the most part, everybody I talked to feels it's a long time in coming," he said, adding that while some workers were concerned about the company's future, "at the same time, how long do you let them take advantage of not only us, but also Flathead Valley and the state?" Many of the workers were afraid to speak out for fear of losing their jobs, and some salaried workers, without a union to protect them, saw civil action as the only recourse. One unnamed employee told local media that the amount of money claimed in the lawsuit was staggering to many workers. "A lot of people thought we got waxed for 10,000 bucks," the employee said, adding, "I believe the greed factor took over. There was so much more money than anyone could ever have imagined." [90] Bruce R. McMaster, a member of the Operating Engineers union at the plant, criticized CFAC for not being honest with union workers in a Feb. 6 letter to the Hungry Horse News. Calling the disputed profits "astronomical," McMaster explained what the word profit meant to him. "My understanding of profit is: all money after all expenses, capital expenditures, future liability accounts, and working capital funds for CFAC has been designated per year, the money left over is profit and would be distributed 50-50." McMaster felt "they should have no problem showing to us, the union members, what CFAC accounts these funds have gone to." He noted that union workers "took the risk, the financial cuts, we increased our workloads, and put our trust in them to be fair and honest businessmen." [91]

The union steps up

On Feb. 13, 1992, Larry Craft wrote to Broussard about missing profit-sharing money. Craft noted that in the past when the union asked about missing profit-sharing money, they were assured by the company that the obligation had been honored. AWTC officials had been offered a chance to inspect the company's books and records but turned down the offer, he said, "based on the requests of the company that the Trades Council should trust the representations of CFAC, the indication by the company that pursuing the inquiry could have potential negative effects on the bargaining relationship and continued operation of the plant." Craft cited Gilmore's lawsuit and its claim that as much as $100,000 on average per employee had been wrongfully withheld by CFAC. Therefore, Craft said, AWTC was filing a grievance alleging that the company had breached its contractual obligation to pay the union's members its share of the profits. AWTC demanded the following information be turned over to them for inspection: 1) annual audit reports and monthly financial statements; 2) corporate tax returns; 3) records of minutes from stockholder and board of director meetings that dealt with profit-sharing; 4) CFAC's articles of incorporation and by-laws; 5) agreements between CFAC and ARCO; 6) records pertaining to stockholder dividend payouts and profit-sharing payments to salaried employees; 7) statements made by CFAC internally or externally regarding its profit-sharing plan; 8) all other documents relating to the initial profit-sharing agreement; and 9) documents reflecting cash transactions, loans or agreement to pay taxes made between CFAC, the Montana Aluminum Investors Corporation, Broussard and Duker. [92]

Federal law generally supported the union's request for legal and financial documents, which union leadership needed to negotiate labor contracts, but the union was also expected to follow procedures normally found in a labor contract. The Aluminum Workers Trades Council filed Grievance No. 2340 against CFAC for failing to pay out profit-sharing money on Feb. 14, 1992. [93] The grievance referred to the collective bargaining agreements signed on Nov. 19, 1985 and Nov. 19, 1988 and claimed that CFAC failed to correctly pay out profit-sharing for the period July 31, 1986 through Dec. 31, 1991. According to the words of the grievance, "This failure is a breach of contract." [94] The grievance marked a turnaround for the union, which initially had not expressed support for Gilmore's lawsuit – soon after Gilmore filed her lawsuit, Craft had told the media that the company had honored its contract with the union. [95] But the union leadership continued to take a soft stance on the issue. “We truly hope that the information supplied will prove that the profit-sharing obligations of CFAC have been met at all times,” Craft told the media. [96]

An internal union document from 1992 provided a rough calculation of the amount of profit sharing generated by hourly workers for seven fiscal years. The last six years had question marks following the figures. For fiscal year one, Aug. 1, 1985 through July 31, 1986, with distribution at $1.38 per hour, the workers’ total was $1,302,000 and the owners’ was $1,302,000. For fiscal year two, Aug. 1, 1986 through July 31, 1987, with distribution at $3.80 per hour, the workers’ total was $5,998,000 and the owners’ was $6,509,000. For fiscal year three, Aug. 1, 1987 through July 31, 1988, with distribution at $12.41 per hour, the workers’ total was $20,000,000 and the owners’ was $21,400,000. For fiscal year four, Aug. 1, 1988 through Jan. 26, 1989, with distribution at $19.29 per hour, the workers’ total was $14,000,000 and the owners’ was $43,135,000. For fiscal year five, Jan. 27, 1989 through Dec. 31, 1989, a total of 48 weeks, with distribution at $12.21 per hour, the workers’ total was $17,750,000 and the owners’ was $73,750,000. For fiscal year six, Jan. 1, 1990 through Dec. 31, 1990, a total of 52 weeks, with distribution at $9.60 per hour, the workers’ total was $14,750,000 and the owners’ was $56,115,000. For fiscal year seven, Jan. 1, 1991 through Dec. 31, 1991, with distribution at $6.87 per hour, the workers’ total was $10,400,000 and the owners’ was $29,228,000. The workers’ total for the seven fiscal years was $84,200,000 and the owners’ total was $231,439,000. The only period in which the shares for the workers and the owners matched was the first fiscal year. The figures were close in the second and third fiscal years. They were nowhere close in the last four fiscal years. [97]

Broussard responded to Craft and the AWTC’s grievance filing on March 20, 1992. Broussard wrote that the matters raised in the grievance filing were not permitted grievances under the provisions of the collective bargaining agreement for several reasons. First, during labor contract negotiations in 1985, AWTC’s negotiating committee submitted several proposals for how disputes regarding profit-sharing could be resolved, including resorting to arbitration. The company had rejected all of AWTC proposals, and Attachment B of the labor contract, the only document that mentioned a profit-sharing agreement, contained no reference to AWTC’s right to file a grievance. Second, Broussard said Attachment B controlled the profit-sharing agreement, not the collective bargaining agreement. Section 11.11 of Attachment B provided the exclusive remedy to resolving any disputes regarding profit-sharing. Third, Broussard said the profit-sharing agreement was subject to the Employee Retirement Income Security Act (ERISA). Fourth, Broussard noted that a letter of agreement attached to AWTC’s Nov. 8, 1991 Memorandum of Agreement, when the union signed a two-year labor contract, stated that "the Union confirms its prior understandings" that profit-sharing distributions were to be made at the sole discretion of the Board of Directors of CFAC. [98]

"It is therefore clear from that Letter of Agreement dated Nov. 26, 1991, that the Union had no complaints about prior plan distributions," Broussard told Craft. "Indeed, the Union sought and received confirmation that the distributions made in future years will be made on the same basis as they had been made in the past. We fail to understand how the Union can now insist upon a review of the prior distributions after it made the foregoing representations in the Letter of Agreement of Nov. 26, 1991." Broussard also addressed AWTC's request for financial information pertaining to profit-sharing. He pointed out that "the Company is of the opinion that it seeks confidential and proprietary information which is well beyond the scope of any right of the Union… It was never the intent of the company or its owners to make all of their confidential records a matter of public record in connection with the profit-sharing plan. Had this been the intent of the Company's owners and directors, the profit-sharing plan would have been fashioned in a far different manner than it was." In conclusion, Broussard rejected AWTC's grievance while noting the existence of complex legal issues under ERISA. "In the event your reply to this response is in disagreement with the position taken by us, our attorneys are prepared to file a declaratory judgment action in the United States District Court for the District of Montana, asking the court to determine the rights and obligations of the respective parties with respect to these issues," Broussard said. [99] The details of Broussard's response to Craft were reported in the Hungry Horse News and the Daily Inter Lake about a week later. [100]

CFAC issued a press release outlining the company's initial response to Gilmore's lawsuit on March 2, 1992. The company's position was that the profit-sharing plan was governed by federal employee benefit laws, ERISA, so the company's attorneys removed the lawsuit from state district court in Kalispell to federal district court in Missoula. [101] On May 15, Allan McGarvey filed a brief in support of remand that argued the case should be removed from federal jurisdiction and sent back to state district court. He argued that the burden of proof lay with the defendants to show that federal court had jurisdiction as pleaded by the plaintiff, and if doubt existed then well-established law demanded that a case be remanded back to state court. McGarvey argued that a contractual obligation to pay profit-sharing existed prior to the establishment of an ERISA plan. He referred to numerous written documents and oral statements made prior to the creation of the ERISA plan on Sept. 12, 1986, noting that these were the only documents, promises or representations that referred to the existence of a profit-sharing plan. [102]

McGarvey also made several arguments about how ERISA law was not applicable in the profit-sharing case. ERISA law was enacted by Congress to regulate the administration of pension plans, so it was up to the court to determine if the profit-sharing agreement was a pension plan. McGarvey pointed out that the plaintiff's complaint was based on a profit-sharing plan, not an ERISA complaint, and that the plaintiffs had not sued a plan trustee or administrator, nor complained about a violation of ERISA laws whatsoever. He noted that money paid out by the profit-sharing plan was not directly paid into the ERISA plan, and in most cases was never handled by the ERISA plan administrator, and there were no references to the profit-sharing arrangements in the original ERISA plan document. If the profit-sharing agreement was "related to" the ERISA plan, then Montana laws that defined contracts, contractual duties and remedies, including the common law of fraud, would be pre-empted by ERISA law, McGarvey said. Citing a Ninth Circuit ruling, however, McGarvey argued that "relates to" meant "arising out of administration" of an ERISA plan. He noted that the congressional purposes in creating ERISA was to protect pension plans against corruption within the plans' administration, but none of the purposes related to profit-sharing or employee contracts. He pointed out that nowhere in the CFAC profit-sharing lawsuit was there an allegation that pension plan benefits were being improperly held, administered or distributed. [103]

Employee buyout offer

On Sept. 24, 1992, Gilmore's attorneys filed a class-action lawsuit on behalf of Gilmore and the salaried workers at the plant. The next day Gilmore was escorted out of CFAC's offices and, eventually, the accounting department was more or less shut down and moved to Los Angeles. [104] Her attorneys also asked the federal court to move her class-action lawsuit back to state district court where the suit was originally filed. "That's where she filed the suit, that's where it belongs," Allan McGarvey said. CFAC had moved the case to federal court by arguing that the profit-sharing program was governed by the federal Employee Retirement Income Security Act. [105] The hourly workers, who filed their lawsuit in April 1993, were represented by Powers & Lewis, a law firm in Washington, D.C. that specialized in labor law. Both lawsuits were certified as class actions and were later consolidated for discovery and trial. In their summary judgment motions, the plaintiffs' claim through 1995 came to about $154 million. The defendants contended that the employees were only entitled to a discretionary amount of the "distributable" profits and were owed nothing beyond the $90 million they had already been paid. [106]

Thomas Powers was the lead attorney for the hourly workers. Powers served two years in the Korean War before attending the University of Buffalo in New York and receiving his law degree from George Washington University in 1965. He was a founding manager in the Volunteers in Service to America program at the Office of Economic Opportunity. He started as assistant director of training and became associate director of VISTA for programs and training before leaving government service in 1971. As a Washington labor lawyer, Powers represented broadcasters, school administrators and aluminum workers for more than 35 years. Power was honored by the AFTRA National Convention in 2005 with AFTRA's highest honor, the George Heller Memorial Gold Card. [107]

The profit-sharing story was a complicated one – attorneys went in many directions as they attempted to prosecute or defend the case, which involved as much accounting as legal arguments. But one simple truth existed – Duker and Broussard owned the Columbia Falls Aluminum Company, and they had made an agreement to share profits with the company's employees. Over the years, several local newspapers made the mistake of reporting that the employees owned the aluminum plant. These later stories were not about CFAC – they were about timber plants that had closed in Columbia Falls and Libby and about attempts by the workers in those plants to buy the plants and get back to work. CFAC was incorrectly cited as an example of how an employee-financed takeover could be done. [108] Perhaps sensing that Duker and Broussard would want to escape the public scrutiny of an upcoming profit-sharing lawsuit, and perhaps thinking that winnings from a successful lawsuit could be pooled into a common acquisition fund, some of CFAC's employees made an attempt to buy the aluminum business in 1992 but were unsuccessful.

On Oct. 27, 1992, CFAC spokesman Jack Canavan confirmed reports that a group of CFAC managers were studying the possibility of an employee buyout of the aluminum plant. He explained that the group was considering putting together an employee stock option plan (ESOP). A similar plan had been considered previously, but the idea was in its infancy and no timetable had been set for its consideration, Canavan said. [109] In early November, the employee group met with Dick Phenneger, a consultant from Spokane who had helped the employees of the Rosauer's supermarket chain buy their company several years earlier. The CFAC managers used Phenneger's advice to put together an employee stock option plan as a way to buy out the company, and the plan was presented along with a letter of intent to Duker and Broussard. If the plan was approved by the owners, the 700-plus employees of the plant would need to vote on it. The unofficial word was that Duker was actively seeking a buyer for the plant. [110]

The ESOP committee also contacted the National Center for Employee Ownership, which provided the committee with statistics on ESOP programs nationwide. According to the center, Congress passed legislation in 1974 exempting a company from capital gains taxes if it was sold to the employees through an ESOP program. The number of ESOPs in the U.S. had climbed from about 1,600 in 1975 to about 10,000 in 1992, and about 70% of those companies with ESOP programs were still in business. [111] A group of CFAC employees, including union leaders, gathered to learn about employee stock option plans on Nov. 10. Most of the information reported in minutes to the meeting pertained to the technical details of how an ESOP would be organized to form a new company, but one important question for workers was, "Could the employees establish an ESOP without management participation?" The answer was "No." [112]

As negotiations between the owners and the ESOP committee continued in early November, Platt's Metals Week reported that Oralco Management Systems of West Virginia was interested in buying the CFAC plant. Oralco managed an aluminum smelter in Hannibal, Ohio. [113] Representatives from CFAC's hourly and salaried workers met with Duker and Broussard on Nov. 9 to discuss the proposed employee buyout plan. For the next four days, offers and counter-offers were exchanged between the company's owners and the managers. The managers made their final offer to the owners on Nov. 13, and three days later Duker took the advice of his investment banker and notified the group that the offer was "unacceptable for a number of reasons." [114] Just days after Duker and Broussard rejected the employee buyout plan, a deal was announced by CFAC to sell the plant to Danielson Holding Co. for $120 million. The employee buyout and stock option plan was rejected because "the high debt service may have placed the company in jeopardy," according to a CFAC statement. [115] But the Danielson Holding offer was also loaded with debt.

The aluminum plant's ESOP committee next turned to state and government officials for assistance. The buyout group announced on Dec. 3 that they intended to hand-deliver a letter to Gov. Stan Stephens asking him to investigate their employee stock option plan. In their letter, which was released to the public, the committee noted that shortly after their ESOP plan was rejected by the plant's owners, a workers-compensation insurance firm from New York, Danielson Holding Co., had announced a $120 million bid to purchase the plant. Although the terms of the ESOP deal were never made public, ESOP committee members argued that their offer was superior to Danielson's. The letter asked that both state and federal officials intervene to find out why their plan was rejected and noted that both Sen. Max Baucus and Rep. Pat Williams had been contacted about the matter. The ESOP committee expressed concern that if Danielson succeeded in buying the plant, it might hide aluminum profits in its tax write-offs as an insurance company, and the employees might never see future profit-sharing. The committee also expressed concern that Danielson might never have the money to pay off missing profit-sharing money claimed in current lawsuits. Finally, the letter expressed concern that Duker might continue to be in control of the company after Danielson bought the plant. [116]

CFAC spokesman Jack Canavan criticized the letter to the governor on Dec. 3, saying it was "full of errors" and that "obviously those involved don't know the facts." That same day, two representatives from Danielson Holding Co. and two financial advisers took a brief tour of the aluminum plant. [117] A week later, Gov. Stephens informed the media that he had decided not to intervene in the pending sale of CFAC to Danielson. Stephens also included comments intended for Duker and Broussard. "Both the employees and the state of Montana have a stake in the future operation of CFAC, just as you do as chief executives and operators," Stephens said. He pointed out that the state helped Duker purchase the plant in 1985. "We encourage you to provide as much open communication as possible with your employees about their futures and the future of the company's operation in Columbia Falls," he said. [118]

Oralco and Danielson

A first hint that Duker and Brossard might be considering selling CFAC came with an Oct. 8, 1992 confidentiality agreement written by Duker in connection with "the possible transaction, involving the stock of CFAC." The agreement was addressed to Lee Smith, Charles Clugston, Harold Lockhart, Thomas Payne, Steven Seifert and Robert Smollack, all of whom signed the document. [119] That month, the Daily Inter Lake reported that representatives from Oralco Management Services Inc. had toured the CFAC aluminum plant. Oralco was headed by R. Emmett Boyle and managed the Ormet aluminum smelter in Hannibal, Ohio. According to Platt's Metals Week, Boyle was interested in buying the CFAC plant, but no offer was made during the tour. According to Business Week, Boyle was the former chairman and chief executive of the Ravenswood Aluminum Corporation, where he had locked out 1,700 union workers from the Ravenswood smelter in West Virginia and replaced them with temporary workers. Boyle, who owned 27% of the Ravenswood Aluminum Corporation, was eventually forced out of the company by Marc Rich, the notorious commodities trader who owned 49% of Ravenswood. [120] Jack Canavan confirmed that Oralco had sent representatives to inspect the CFAC plant as a prospective buyer in late September. A number of companies had looked over the plant so far, Canavan said, "but we've had no offers." [121]

Aluminum Workers Trades Council officials began gathering information on Boyle in November. The union officials were particularly interested in how Boyle had acquired the Ormet aluminum smelter, the plant's condition since then, wages and benefits at the plant, details about Ormet's security force, and Boyle's involvement in the labor dispute at the Ravenswood aluminum plant. Overall, according to AWTC's source, the Ormet plant was in better condition since Boyle invested money in the plant, and the workers felt their jobs were secure. Boyle took over the plant in 1986 when it was being sold to liquidation. He offered to modernize the operation, but he wanted the workers to take a substantial wage and benefit cut. The Ormet union went on strike for 120 days and then ratified a new labor contract with roughly a $5 to $6 cut in wages and benefits. The hourly workers also turned down an offer for profit-sharing. The day-to-day operations at the Ormet plant were run by Oralco Services Management. About 1,200 hourly workers and 500 salaried workers were employed at the Ormet plant. The average hourly pay was $12 to $14 per hour. When asked, "Was Boyle involved in 'Ravenswood' Plant problems?" the answer was, "Yes – (we) feel he masterminded it." [122]

On Nov. 25, 1992, CFAC's owners announced that they had signed a letter of intent to sell the plant to Danielson Holding Co. for $60 million up front and another $60 million in 1996. The latter payment would be contingent on the extension of tolling and electrical power supply contracts, along with earnings before interest, taxes and intangible charges of at least $20 million. While most of the plant's management would stay on with Danielson as the new owner, Broussard said he would leave. [123] CFAC's announcement that a tentative agreement had been reached to sell the plant to Danielson drew questions. Danielson had assets of only $46.6 million in 1991, so the purchase was expected to be leveraged, and attorneys representing employees in the profit-sharing lawsuit moved to attach CFAC's assets in court to prevent a sale that might compromise their class-action lawsuit. [124] The Danielson deal was contingent on power sales continuing until 2000, but CFAC's fixed-price power contract with the Bonneville Power Administration was set to expire at the end of 1995. [125] Favorable power contracts had been the linchpin for success at the Columbia Falls smelter.

The Daily Inter Lake published a front-page story about Danielson on Nov. 25 under the banner headline "Sold! CFAC changes hands." Jack Canavan confirmed that CFAC's owners had signed a letter of intent to sell 100% of their stock to Danielson. As word of the sale leaked to the plant's 550 union workers, Larry Craft told the press, "I hope the plant continues to operate. You never know what a new owner's purpose of buying is." Craft surmised that a company could buy the plant just to "shut it down and sell it for a tax write-off." Craft also noted that Danielson had promised to honor current employee contracts, although union representatives had not yet met with Danielson. [126] According to a July 25, 1991 Standard & Poor's financial report, Danielson had emerged from bankruptcy proceedings on Aug. 15, 1990. Formerly known as Mission Insurance Group Inc., Danielson owned a 62.8% interest in KCP Holding Co., an actively marketed workers compensation and property and casualty insurance company in California and other western states. Danielson had emerged from the bankruptcy proceeding with nearly $1 billion in tax-loss carry-forwards, of which various amounts would expire from 1999 through 2000, subject to IRS challenge. Danielson's common shares began trading on the American Stock Exchange in December 1990. [127]

The chances for Danielson to profitably conclude the deal did not look good to industry experts who pointed to Billiton's and Norsk-Hydro's tolling contracts ending in 1995 and BPA's power supply contract set to end by 1996. Both tolling contracts were based on a sliding-cost scale set by world aluminum prices, and industry experts expected that the BPA would significantly increase power prices in October 1993. CFAC had been on the sales block for some time, and the $120 million price tag was well below greenfield costs for a new smelter plant. "It's strictly a cash-flow deal," one analyst explained to Platt's Metals Week. "The profit margins are fixed assuming the power costs and supplies don't change." [128] By December, Danielson still expected to acquire CFAC – the company was bullish on the economy and expected the aluminum market to rebound. Danielson hoped to make $20 million in annual earnings, but industry experts anticipated a significant increase in the cost of BPA power as soon as October 1993. The BPA was talking about a 16% rate increase. [129]

The Hungry Horse News put the Danielson story on the front page on Dec. 3, 1992, with a banner headline that proclaimed, "Danielson buying CFAC sight unseen." The $120 million price was close to the smelter plant's estimated market value as of Jan. 1, 1992, set by the Montana Department of Revenue, the newspaper reported. Danielson wanted to defer payment of $60 million until 1996, and it wanted $20 million in annual earnings before interest, taxes and tangible charges were deducted. CFAC employees were taking a "wait-and-see" attitude about the pending sale, but some wondered why CFAC's owners had turned down an earlier employee buyout plan. In the meantime, Jack Canavan announced that profit-sharing checks would be issued on schedule. Attorneys representing the employees in the profit-sharing lawsuit expressed concern that the company's assets should be secured in event of a sale so the workers could collect if the judgment went their way. Allan McGarvey anticipated filing a writ of attachment to assure asset security. [130] Brian Kennedy noted in an editorial that negotiations between CFAC's owners and both Danielson and the ESOP committee had turned mysteriously quiet. Kennedy attributed the nature of the negotiations to ill-will related to the profit-sharing lawsuit. "Duker felt betrayed by the lack of loyalty," he said. "The agreement he had with his employees was damaged." [131] In the newspaper's weekly man-on-the-street interviews, Helen Schaeffer, Stacie Stoddard and Irene Baeth expressed concern about the impact of CFAC's sale on the community, while Stan Meyer said he had hoped the employees would have bought the company. [132]

The Aluminum Workers Trades Council filed a motion for a "writ of attachment" in the U.S. District Court in Missoula on Dec. 10, 1992, asking for protection in case the plant should be sold. [133] The union asked for the sheriff to seize any proceeds from the sale, along with stock, equipment, real estate, raw materials and machinery that made up CFAC. Larry Craft explained that the union was not trying to shut down the aluminum plant, pointing out that the proposed writ would not seize goods held for sale or supplies used in the normal course of business. [134] But on Dec. 18, CFAC announced that the sale to Danielson had been called off. In a written statement, CFAC officials said "certain business-related conditions" stood in the way of the deal, and that there were no other buyers in sight. [135]

Critics of the sale noted that Danielson had no direct experience in aluminum smelting, and that the company was relying on substantial leveraging and borrowed money using CFAC as collateral. CFAC's owners and management said no more plans existed to sell the plant, no possible suitors were in the wings, and an employee buyout plan was no longer being considered. Larry Craft agreed that the employee stock option plan was a dead issue. He said the union intended to devote its efforts to the profit-sharing lawsuit. The ESOP terms were never made public and negotiators had signed confidentiality agreements, but union officials claimed that the offer from the workers was better than the one made by Danielson. [136] With Danielson backing out, Broussard asked that workers turn their full attention back to running the plant. "We ask everyone to refocus on their jobs, on safety and on teamwork," he said. "The most important thing is to keep CFAC working well." [137] CFAC's owners said in a statement they did not anticipate a return to discussions about an employee buyout. "I'm gratified the existence of the (profit-sharing) suits was not a factor in the Danielson negotiations," Broussard said. The lawsuits were without merit and distracting to the employees, he said, and the company planned to aggressively defend against them. [138]

Morale and terminations

Gilmore's attorneys filed a second lawsuit against Duker and Broussard on Dec. 9, 1992. The first lawsuit had been moved to federal court by request of the defendants, but Gilmore's attorneys were appealing that ruling and trying to bring the lawsuit back to state district court. Like the first lawsuit, the new lawsuit alleged that Duker and Broussard had taken about $231.4 million owed to the plant's employees. The new lawsuit also alleged that CFAC's owners only invested $7.5 million in CFAC during their ownership. The new lawsuit also cited a Sept. 10, 1985 agreement between ARCO and Duker, as president of the Montana Aluminum Investors Corp., in which Duker agreed to provide 50% of the plant's profits to its employees either through a stock plan or by a profit-sharing arrangement. The new lawsuit alleged the company's owners owed each employee about $100,000 in missing profit-sharing money and $40,000 in interest. [139]

In a statement two days later, Jack Canavan criticized the role he claimed KOFI radio station owner and newscaster George Ostrom played in the profit-sharing lawsuit. "The latest attack that lawyers for Roberta Gilmore and their apparent publicist G. George Ostrom of radio station KOFI have launched against the company appears to have the purpose of bolstering the sagging lawsuit brought by Ms. Gilmore against the company in January 1992 and which is now pending in federal court," Canavan said. Ostrom replied to Canavan's statement that same morning. "As Montana's leading news radio station, KOFI doesn't answer to anyone and doesn't work for anyone," he said. "But I, George Ostrom, will not hide my great disappointment in some of the obvious actions taken by the management of CFAC. If I have any bias, it is for the loyal people who made sacrifices to keep the plant going back in 1985. That includes county and state government and private businesses, but above all, the people who work at the aluminum plant." [140]

Canavan's statement also referred to rumors about an upcoming meeting between CFAC workers and Gilmore's attorneys on Dec. 14. Canavan suggested the purpose of the meeting was to raise money for legal expenses in the profit-sharing lawsuit, but attorney Allan McGarvey denied the story. "We have meetings with clients and potential clients all the time," he said. "We don't go around and take up collections. There is no meeting to do that." [141] In a Dec. 14, 1992 press release, CFAC's owners criticized AWTC's attorneys for filing a writ of attachment tied to the possible sale of the company to Danielson. Duker and Broussard claimed that the writ threatened the company's existing tolling contracts and its ability to negotiate future tolling contracts. The press release stated that the union's writ was not grounded in fact or law, and the owners threatened "to proceed against the union and its lawyers for an appropriate sanction as provided by law" once the writ was rejected by the courts. [142]

By 1993, employee morale at CFAC was low and anger at the company's owners was expressed as curses, graffiti and even threats. According to one rumor that went around the plant, Duker had left the Flathead and moved permanently to Los Angeles after a worker's vehicle swerved toward him while he was jogging on Aluminum Drive. But Duker and Broussard could have been simply following their attorney's advice when they announced on Jan. 8, 1993, that they would remove themselves from active management of the aluminum company pending a resolution of the profit-sharing lawsuit. [143] The two would remain owners of the plant, and successors would be in place by the end of January 1993. [144] In the interim, they were replaced by Lee Smith and John Cook as vice-presidents. [145] Sometime later in 1993, CFAC laid off about 40 workers including Roger Beck, the foreman of the electrical crew. Beck said the layoffs were perceived as a purge by CFAC management of workers who supported the profit-sharing lawsuit against the company. "We were playing against the heavyweights," he said. "They were leaving casualties all along the road. They wanted this thing stopped. Everyone was afraid for their jobs." Beck later sat on the negotiating advisory committee for salaried workers in the profit-sharing case. [146] On Aug. 18, Doug K. Bolender filed a wrongful discharge lawsuit in Flathead County District Court. Bolender claimed CFAC fired him because the company believed he used his knowledge of the plant's financial affairs to support pending litigation by salaried employees in the profit-sharing case. He asked for compensatory damages, including lost past and future wages, costs of the lawsuit and other damages. [147] Bolender's case was dismissed on Sept. 17, 1993. [148]

On Jan. 20, 1993, three employees in CFAC's accounting office were asked to leave in a departmental reorganization. One was asked to return after a fourth employee quit. [149] The two who were fired subsequently filed lawsuits against the company. In her lawsuit, Michele Hand alleged that she had worked for the company for 15 years and was fired after she became an active supporter of the employees' profit-sharing claims. Linda Christensen alleged she was discharged in retaliation for her part in a class-action lawsuit brought by employees seeking missing profit-sharing checks. Christensen also said her work as a financial-performance analyst gave her access to and knowledge of financial information pertinent to the lawsuit filed by CFAC's salaried workers for missing profit-sharing money. [150] Hand and Christensen filed wrongful discharge lawsuits in June. Hand claimed she had acted voluntarily as an employees' advocate in matters related to the pending profit-sharing suit. Both sought a jury trial and asked for compensatory damages, including lost past and future wages and benefits, plus court costs. [151] Hand's wrongful discharge lawsuit was dismissed by Flathead County District Court Judge Ted O. Lympus on May 13, 1997. [152]

Christensen filed her wrongful discharge complaint and jury demand in Flathead County District Court on June 4, 1993. She had been employed by CFAC for nine years and worked as a financial-performance analyst in CFAC's accounting department since Nov. 1, 1985. According to her complaint, she "had access to and/or knowledge of financial information regarding CFAC which was pertinent to pending class action litigation brought by salaried employees against CFAC for allegedly failing to share profits equitably." She claimed she was not given a good cause when she was terminated "within the meaning of state law." CFAC's attorneys responded to her complaint on July 8 by saying that Christensen was terminated as part of a reorganization and reduction of workforce. CFAC offered to arbitrate on July 9, but Christensen declined. In a Dec. 29, 1993 brief in support of a motion to dismiss, CFAC's attorneys argued that Christensen's allegations about the on-going profit-sharing case were "pre-empted by ERISA" and federal jurisdiction. Although denying any wrong-doing, CFAC's attorneys claimed for the sake of argument that the profit-sharing agreement was an "ERISA-qualified plan," and according to federal law, "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." [153]

In a Jan. 7, 1994 response to CFAC's motion to dismiss, Christensen's attorneys argued that 1) CFAC failed to raise the ERISA defense in appropriate time; 2) both state and federal courts had jurisdiction when it came to enforcing ERISA rights, if the profit-sharing agreement actually was an ERISA plan; 3) CFAC's use of two ERISA arguments – one denying ERISA activity had anything to do with Christensen's termination, and another claiming federal jurisdiction because the profit-sharing plan was an ERISA plan – was wrong and "CFAC should not have it both ways"; and 4) the essence of the wrongful discharge claim was that Christensen was terminated "without just cause, and in violation of CFAC's personnel policies. That is the claim she must prove, and she must prove that independent of any speculation on her part relative to the real reasons for her termination." On May 3, 1994, Judge Lympus denied the motion to dismiss, noting that Christensen had not alleged that her termination was done to avoid paying pension benefits. Furthermore, Lympus said, "Plaintiff's theoretical assertion that her termination somehow related to a separate profit-sharing dispute carried on by another set of employees is not sufficient to state a claim under ERISA and to preempt the state (Wrongful Discharge From Employment Act)." CFAC requested a protective order on Dec. 6, 1994, to keep the facts of the case confidential. A settlement offer was announced by both parties on Oct. 15, 1997, and the case was dismissed by Judge Lympus on Oct. 20, 1997. [154]

Christensen began working for ARCO shortly after completing a master's in business administration and was working at the plant in Columbia Falls before it was sold to Duker and Broussard. In the first years under CFAC, Broussard took her under his wing and "was like a father to me," she recalled in 2003, but that all changed following the profit-sharing lawsuit. She recalled that on Jan. 20, 1993, personnel in the CFAC financial office gathered together to listen to a talk by Harold Lockhart that seemed like a combination pep talk, general understanding talk and loyalty test. When Lockhart asked if there were any questions at the end of the talk, both Christensen and Hand put up their hands and asked about the profit-sharing dispute. Later in the day, Doug Bolender was fired, which came as a complete surprise to the rest of the staff. Christensen was called into Lockhart's office and read a prepared speech and terminated. She described the prepared speech as meaningless. She said she couldn't believe what had just happened because she had worked so much overtime without compensation and worked very hard for the company. Hand was fired shortly after that. Both filed lawsuits and eventually their cases were rolled into the salaried personnel's class-action lawsuit. [155]

When the class-action lawsuit eventually became sorted out, Christensen recalled, a point came where about $100 million was available for a settlement with the workers, and the McGarvey firm felt it couldn't make any more money if they continued to fight for a larger settlement. A continued fight also posed a risk because the money might get lost in offshore banks, or the workers might lose the case altogether, so the McGarvey law firm decided to settle, she said. When the McGarvey law firm made that motion, without asking for a vote by the salaried or hourly workers, the case was removed from the court's docket, meaning it would be delayed for a long time if the workers decided to pursue the case any further, Christensen said. At that point, many of the workers agreed to just take what was offered and get on with their lives. Christensen noted that because the workers agreed to work for less money and benefits for so long, often overtime without compensation, Duker couldn't later break the profit-sharing agreement he made when the company was created in 1985 – the workers were actually owed "future profit-sharing," and that commitment could not be transferred to future plant owners without the permission of the workers. The profit-sharing agreement ended for the hourly workers when they voted away their profit-sharing agreement in the 1995 labor contract, but the salaried workers were still entitled to profit-sharing to this day, Christensen claimed. [156]

Public debate

CFAC set an all-time production record in 1992 with 681 employees, the fewest number of workers ever when the potlines were operating at full capacity. Profit-sharing checks were scheduled to be distributed on Jan. 21, 1993, the day after Bolender, Christensen and Hand were terminated from the CFAC accounting office. [157] On April 5, 1993, four representatives of the Aluminum Workers Trades Council filed a profit-sharing lawsuit in federal court in Missoula. President Larry Craft, Vice President Allan Fredenberg, former President Marvin Torgerson, and former President Roger Wendt each personally sued Duker and Broussard for $10 million in the latest round in the profit-sharing case. According to Mike LaBelle, an attorney representing the union workers, the class-action lawsuit alleged that Duker and Broussard breached their fiduciary responsibility when they failed to keep a 1985 agreement with ARCO regarding profit-sharing. "It was their personal responsibility to see that the plan was done properly," Craft said. In total, the AWTC profit-sharing lawsuit alleged that Duker and Broussard took $231 million in profit-sharing revenues through 1991 while the employees received only $84 million. The allegations paralleled those made by the salaried employees. AWTC filed the new lawsuit under ERISA, unlike an earlier AWTC lawsuit that could be thrown out by a federal judge, Craft said. "We're just making sure we cover all the bases," Craft said. CFAC spokesman Jack Canavan called the new lawsuit "more legal maneuvering" by the union and said the claims did not come as a surprise to plant management. [158]

Duker and Broussard now faced four class-action lawsuits – two by Gilmore on behalf of the salaried employees and two by AWTC on behalf of hourly workers. According to

Allan McGarvey, AWTC's second lawsuit added legal claims to its first lawsuit, but the basic intent was the same. Both AWTC lawsuits were filed in federal court, while both of Gilmore's lawsuits were filed in state court and then moved to federal court by CFAC. McGarvey said they were waiting for a ruling on a motion to return Gilmore's lawsuits to state court. [159] In January 1993, Craft sent a letter to the Daily Inter Lake to explain the union's position in filing the lawsuit. The union first became aware of discrepancies in the profit-sharing plan in January 1992, he said, at which point it filed a grievance under provisions of the collective bargaining agreement. According to Craft, CFAC's owners did not want to have the issue heard by a federal arbitrator and turned instead to the courts to have the grievance dismissed. The union counter-sued, demanding that the company provide information to clarify the issue. "I have made a good living at CFAC, but should I idly stand by and allow a California businessman to take money home with him that he promised to give to the employees?" Craft asked. He also wanted the public to understand that the union had no intention to harm the company's business. He noted that 1992 was a record production year at CFAC. "Owners don't make that happen," Craft said, "workers do." He hoped that the case would be settled in 1993. [160]

Jack Canavan responded to Craft's letter on May 9, 1993. Canavan agreed with Craft that the lawsuits had no effect on the day-to-day operations of the plant "because I believe every CFAC employee remains committed to maintaining a safe and productive work environment." But he disagreed with Craft about the overall picture. "In a one-plant company like CFAC, the only cash we have is what we generate," he said. "Normally, the answer would be to find interim financing until the (extremely low aluminum) price goes up. However, because of the lawsuits, CFAC is not likely to attract that financial support. Bankers know that lawsuits like this can drag on for years, and as long as they are out there, the corporation can't be sold. In case of default, the bankers would have a tough time getting their money back." [161] Douglas Ren responded to Canavan in the Hungry Horse News. Ren pointed out that the union was forced to file a lawsuit against CFAC because the company would not provide answers to their questions about missing profit-sharing money. "At this point, the union cannot simply drop the suit without obtaining its answers," he said. Ren suggested that a jury trial would be in the plant owners' best interests – if they were indeed not guilty of taking the missing money. [162]

Winning over public opinion in the newspapers soon became a CFAC strategy. CFAC had received bad news after it hired McGuire Research Services of Nevada to poll Flathead residents about their economic situation. When 373 residents were asked on June 6, 1993, about the profit-sharing lawsuits, the poll found that 73% were aware of the lawsuits and 70% tended to agree with the employees. [163] In a June 30 filing, CFAC's attorneys noted that AWTC President Larry Craft had signed an agreement on Nov. 26, 1991, that gave the CFAC board of directors "sole discretion" in distributing profit-sharing money. "By signing this, they agreed to the company's position on profit-sharing," Canavan told media. "These documents show the plan has been operated exactly as was agreed to with the union." CFAC's attorneys were confident they would prevail against the union's lawsuit, he added. "The fact is, the union was offered the opportunity to do an audit and declined to do so," Canavan said. "It seems to me that speaks for itself." [164] According to Canavan, CFAC employees received $90 million in profit-sharing, an average of $11,311 per year per employee, since 1986. Salaries and benefits for all employees over the same time period totaled $190 million. [165] There was more to the story, Craft told reporters. "We've been asking for an audit all along, but they won't give us the books that show how much money came in and where it went before profit-sharing distribution," he said. Craft admitted that the Nov. 26, 1991 letter of agreement did give the CFAC board of directors' sole discretion over profit-sharing distribution, but he also pointed to an earlier 50-50 profit-sharing agreement with ARCO. [166]

In a July 15, 1993 letter to the Hungry Horse News, Canavan commented on how the profit-sharing story was being reported. Each time a news article appeared in the paper about the profit-sharing lawsuit, "up pops the figure of $231 million" allegedly stolen by the owners, he noted. That money had been paid out in the form of profit-sharing checks, corporate expenses, taxes and capital improvements, he said. [167] Ren responded to Canavan in a letter to the newspaper, noting that his base wage in 1993 was equivalent to his base wage in 1977. With profit-sharing added in, his wages in 1993 were equivalent to his wages in 1985. Union lawyers were just as confident of winning the case as the company's lawyers were, he said, and the case should be argued in court, not in the newspapers. Ren also noted the hollowness of the company's argument that the lawsuit was bad for business. "As far as this lawsuit being 'detrimental to the plant's life,' that's been the owners' standard 'negotiating technique' since 1985," he said. "All things considered, it doesn't tip the scale the way it used to." [168]

The Canavan-Ren debate continued for another two weeks in the newspaper. On July 22, Canavan responded to Ren's point about past wages by providing actual figures for wages earned by workers at the plant. "While it is not acceptable policy to reveal specific salaries, a quick look at the average compensation paid by CFAC during this period might suggest that Mr. Ren is not as bad off as he would apparently like everyone to believe," Canavan said. According to Canavan's figures, the average annual wage for a Grade 6 production worker in 1977 was $14,251, while the average wage in 1985, the year ARCO sold the plant, was $28,080. For the years in which there was profit-sharing, from 1986 through 1992, the average wages were $25,777; $32,288; $51,969; $43,436;

$48,603; $44,961 and $38,996. The best year was 1988 and the decline in 1992 was due to a significant fall in aluminum prices that affected profit-sharing. In comparison, Canavan noted, the average annual wage in the Flathead Valley was $18,898. “I am sure there are a lot of folks who would be extremely happy to trade places with Doug Ren,” Canavan said. [169]

In his July 29 response, Ren claimed his privacy had been violated by Canavan. “By putting my income in the papers, the owners have apparently adopted a more open policy regarding personnel and company finances,” he said. “It also seems apparent they have abandoned any defense based on privacy and need to know.” The dispute between CFAC’s owners and the company employees should be handled in court and not in the open media, Ren said, and the debate should focus on whether the profit-sharing money was improperly withheld. “Though the public may want to know more about the company’s finances, I would suggest the owners bypass the news media and exercise this new found openness with the CFAC employees and their representatives first,” he said. John Hines also responded to Canavan, claiming the CFAC spokesman earned $72,437 in 1992. Hines also wondered what Canavan did to earn his money. [170]

Roberta Gilmore was formally dismissed from her job in August 1993 and soon filed a lawsuit against the company for wrongful discharge. CFAC quickly responded with a countersuit contending breach of confidentiality. [171] On Aug. 25, Allan McGarvey and Roger Sullivan updated the salaried class members with a progress letter. Depositions of 37 salaried employees and a number of union officials and employers were completed in May. Thousands of pages of documents relating to the case had been obtained from the defendants, including tax records and financial statements that were under a protective order precluding disclosure of their financial data. McGarvey and Sullivan felt they were “now in the position to be able to prove in Court that the allegations in the Complaints are more than justified.” One significant development was the court’s designation of the case as “complex litigation,” which would make the case move more quickly as the judge reviewed matters more frequently and a speedier access was made available to the court to resolve disputes. [172]

McGarvey and Sullivan, however, were concerned about the effects of the media on members of the salary class. “You are all well aware of the media blitz and campaign which CFAC is directing at employees and the community,” they said. “The contention is that the company is running out of money and may be unable to weather the current storm of increasing power rates and low aluminum prices. This suggestion confirms the allegation in Bobbie Gilmore’s complaint that the owners took too much money out of the company and further confirms the need for the owners to return this money. It is ludicrous for the owners to contend that the company has no source of financing when the owners themselves hold such enormous distributions from the company." McGarvey and Sullivan also addressed the issue of the 30 to 40 salaried employees who were recently laid off. Some were presented with a voluntary severance option that contained language meant to preserve the employee's stake in the outcome of the profit-sharing case. McGarvey and Sullivan recommended inserting stronger language into severance contracts to protect those rights. [173]

On Oct. 25, 1993, Judge Shanstrom ruled that Gilmore's profit-sharing lawsuit would be moved from state district court in Kalispell to federal court in Missoula. McGarvey had argued that the case should be decided in state court because the profit-sharing agreement involved state contract law, but Judge Shanstrom said the class-action lawsuit should be heard alongside Gilmore's first lawsuit, which alleged more general violations of the profit-sharing contract. McGarvey filed a motion asking the court to penalize CFAC's owners for moving the lawsuit from state court to federal court. With procedural motions behind them, McGarvey said he expected the case's tempo to pick up. "We're very pleased how the case is progressing and the documents we're discovering," he said. [174]

On Dec. 8, 1993, CFAC workers received a memo signed by plant manager John Cook with a short and simple statement: "Due to the forecasted financial position of the company in 1994, the Board of Directors has determined that there will be no distributable profits for the year 1993." [175] The next day, AWTC President Lowell Eckelberry wrote to Cook about his message. Eckelberry acknowledged that CFAC faced difficult times, with high electrical power costs and low metal prices, but he pointed out that AWTC officials did not have access to the company's books and could not ascertain the overall situation. "While we understand the importance of having sufficient cash flow for the year 1994, we do not know if there is a need to retain profit in reserve accounts at this time," he said. Eckelberry went on to acknowledge that the profit-sharing agreement "reserves to the discretion of the Board of Directors the right to reasonably choose not to distribute profits via profit sharing payments," but "this right does not confer on the Board of Directors a right to distribute profit to the owners of CFAC while withholding from the employees their entitlement to share in fifty (50%) percent of distributed profits." [176]

Eckelberry also noted that on Dec. 2, CFAC officials had told AWTC officials that the owners would be receiving $1.5 million in distributed profits. Eckelberry wanted to know where the $1.5 million was that belonged to the employees. "If CFAC continues with its plans to distribute this $1.5 million payment to its owners and pay nothing in profit sharing, the AWTC will continue to pursue all appropriate legal action and appropriate payments from CFAC in federal court," he said. Furthermore, Eckelberry wrote, “Because CFAC has taken the position that issues concerning profit sharing are not grievable, no grievance will be filed as it would be futile to do so. In any event, the matter is already before the federal court as the existing lawsuit covers all past and future profit sharing calculations.” Finally, Eckelberry requested financial information from CFAC that specified the amount of reserve cash CFAC would need to protect its business interest. So far, he said, CFAC had told the union that the company made a $6 million profit in 1993 and intended to retain $4.5 million of that, with the rest going to the owners. [177]

The profit-sharing case took various twists and turns over the next four years before an historic settlement was reached. Much of the maneuvering was done in court, but outside elements played key roles. As worker dissatisfaction grew and an important labor contract approached, CFAC’s owners brought in a security force – the first seen at the smelter since the Sumitomo conversion. A tolling customer tipped off plant workers about Duker and Broussard using offshore banks and a shell company to handle financial transactions. Top state and federal government officials stepped in to keep the plant running – which some workers saw as taking sides with the owners. While the employees’ ultimate victory was treated by the media as a David versus Goliath story, the settlement was treated like a big lottery win, not just rewards. The smelter continued to plug along after the smoke cleared as it awaited news of a buyer. When that came, it triggered another story in the aluminum plant’s history.

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