

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
MAR 24 PM 12:42
CLEVELAND, OHIO

CHARLES C. GUNNING, On Behalf of
Himself And All Others Similarly Situated,

Plaintiff,

vs.

NATIONAL CITY CORPORATION, JON E.
BARFIELD, JAMES S. BROADHURST,
CHRISTOPHER M. CONNOR, DAVID A.
DABERKO, BERNADINE P. HEALY,
JEFFREY D. KELLY, ALLEN H. KORANDA,
MICHAEL B. MCCALLISTER, PAUL A.
ORMOND, PETER E. RASKIND, GERALD L.
SHAHEEN, JERRY SUE THORNTON,
MORRY WEISS, and UNKNOWN
FIDUCIARY DEFENDANTS JOHN DOES 1-
30,

Defendants.

Case No.: **1:08cv0724**

CLASS ACTION **JUDGE DOWD**

**COMPLAINT FOR BREACH OF
FIDUCIARY DUTIES AND
VIOLATIONS OF THE EMPLOYEE
RETIREMENT INCOME SECURITY
ACT**

**JURY TRIAL REQUESTED OF
ALL ISSUES SO TRIABLE**

Plaintiff, Charles C. Gunning, on behalf of himself and a class of similarly situated participants (the "Participants") in the National City Savings and Investment Plan (the "Plan"), respectfully submits this class action complaint alleging Employee Retirement Income Security Act ("ERISA") violations against National City Corporation and its subsidiaries ("National City" or the "Company") by his attorneys, and alleges as follows:

INTRODUCTION

1. This class action lawsuit is brought pursuant to § 502 of ERISA, 29 U.S.C. § 1132, against the Plan's fiduciaries, including National City, on behalf of Participants in and beneficiaries of the Plan.

2. From February 16, 2007 to the present (the “Class Period”), the Plan invested in National City common stock (“National City Stock” or “Company Stock”), which was offered as one of the investment alternatives in the Plan as described in the Plan’s statement in its Summary Plan Description. The Plan incorporated by reference the Company’s current, quarterly and annual reports filed with the Securities and Exchange Commission (“SEC”).

3. Plaintiff’s claims arise from the failure of defendants, defined below, who are the Plan’s fiduciaries, to act solely in the interest of the Participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan’s assets during the Class Period, as required by ERISA.

4. Specifically, Plaintiff alleges in Count I that defendants breached their fiduciary duties of care and loyalty to Plaintiff and the Participants in violation of ERISA by failing to manage the Plan’s investment in National City Stock by continuing to offer Company Stock as an investment option, and to make contributions in Company Stock, instead of suitable short-term options within the Plan, when the stock was not a prudent investment for Participants’ retirement savings.

5. In Count II, Plaintiff alleges that defendants who communicated with Participants regarding the Plan’s assets, or had a duty to do so, failed to provide Participants with complete and accurate information regarding National City Stock sufficient to advise Participants of the true risks of investing their retirement savings in Company Stock.

6. In Count III, Plaintiff alleges that defendants, responsible for the selection, removal, and, thus, monitoring of the Plan’s fiduciaries, failed to properly monitor the performance of their fiduciary appointees and remove and replace those whose performance was inadequate.

7. In Count IV, Plaintiff alleges that defendants breached their duties and responsibilities to avoid conflicts of interest and serve the interests of the Participants in and beneficiaries of the Plan with undivided loyalty.

8. In Count V, Plaintiff alleges that defendants breached their duties and responsibilities as co-fiduciaries in the manner and extent set forth.

9. Finally, in Count VI, Plaintiff states a claim against National City for knowingly participating in the fiduciary breaches alleged herein.

10. This action is brought on behalf of the Plan and seeks restoration to the Plan for losses which defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Plaintiff seeks other equitable relief from defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, and other monetary relief.

11. As a result of defendants' breach of their fiduciary duties, as hereinafter enumerated and described, the Plan suffered substantial losses, resulting in the depletion of millions of dollars of the retirement savings and anticipated retirement income of the Plan's Participants. Under ERISA, the breaching fiduciaries are obligated to restore to the Plan the losses resulting from their fiduciary breaches.

12. Because Plaintiff's claims apply to the Participants and beneficiaries as a whole, and because ERISA authorizes Participants such as Plaintiff to sue for plan-wide relief for breach of fiduciary duty, Plaintiff brings this lawsuit as a class action on behalf of all Participants and beneficiaries of the Plan during the Class Period. Plaintiff also brings this action as a participant seeking relief for defendants' breach of fiduciary duty on behalf of the Plan.

13. In addition, because Plaintiff's claims are based, for the most part, solely on information and documents in defendants' possession, certain of Plaintiff's allegations are by necessity based upon information and belief. At such time as Plaintiff has had the opportunity to conduct additional discovery, Plaintiff will, to the extent necessary and appropriate, further amend the Complaint, or, if required, seek leave to amend to add additional facts as are discovered that further support each of the following Counts below.

JURISDICTION AND VENUE

14. ***Subject Matter Jurisdiction.*** This is a civil enforcement action for breach of fiduciary duty brought pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a). This Court has original, exclusive subject matter jurisdiction over this action pursuant to the specific jurisdictional statute for claims of this type, ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). In addition, this Court has subject matter jurisdiction pursuant to the general jurisdictional statute for "civil actions arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

15. ***Personal Jurisdiction.*** ERISA provides for nation-wide service of process, ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All defendants are residents of the United States, accordingly, this Court has personal jurisdiction over the defendants. This Court also has personal jurisdiction over defendants pursuant to Fed. R. Civ. P. 4(k)(1)(A), because they would be subject to the jurisdiction of a court of general jurisdiction in this District.

16. ***Venue.*** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan was administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and/or some defendants reside or maintain their primary place of business in this district.

PARTIES

17. ***Plaintiff Charles C. Gunning*** resides at 112 Marimac Lane, Vernon Hills, Illinois 60061. Plaintiff is a former National City employee and is a participant in the Plan.

18. ***Defendant National City***, successor to a banking business founded on May 17, 1845, is a \$150 billion financial holding company headquartered in Cleveland, Ohio. National City operates through an extensive distribution network in Ohio, Florida, Illinois, Indiana, Kentucky, Michigan, Missouri, Pennsylvania, and Wisconsin, and also conducts selected lending and other financial services businesses on a nationwide basis. The primary source of National City's revenue is net interest income from loans and deposits, revenue from loan sales and servicing, and fees from financial services provided to customers. Operations are primarily conducted through more than 1,400 branch banking offices located within National City's nine-state footprint. In addition, National City operates over 410 retail mortgage offices throughout the United States. The Company's businesses are organized by product and service offerings as well as the distribution channels through which these products and services are offered. The Company has organized its operations into five businesses: Retail Banking, Commercial Banking-Regional, Commercial Banking-National, Mortgage Banking, and Asset Management.

19. National City is incorporated under the laws of Delaware and is headquartered at 1900 East Ninth Street, Cleveland, Ohio 44114-3484. The Company is the Plan's sponsor.

20. Throughout the Class Period, National City's responsibilities included, along with its officers, directors and executives, broad oversight of and ultimate decision-making authority respecting the management and administration of the Plan and the Plan's assets, as well as the appointment, removal, and, thus, monitoring of other fiduciaries of the Plan that it appointed, or to whom it assigned fiduciary responsibility. Throughout the Class Period, the Company

exercised discretionary authority with respect to management and administration of the Plan and/or management and disposition of the Plan's assets.

21. ***Defendant National City Board of Directors.*** The Directors who served on the National City Board of Directors (the "Board") were fiduciaries of the Plan, because they exercised decision-making authority regarding the appointment of the Plan's fiduciaries and the management of the Plan's assets throughout the Class Period. National City acted through the Board in carrying out its Plan-related fiduciary duties and responsibilities, and, thus, members of the Board were fiduciaries to the extent of their personal exercise of such responsibilities.

22. ***The Director Defendants.*** The Director Defendants, who served on the Board and acted as fiduciaries with respect to the Plan during the Class Period are as follows: Jon E. Barfield, James S. Broadhurst, Christopher M. Connor, David A. Daberko, Bernadine P. Healy, Jeffrey D. Kelly, Allen H. Koranda, Michael B. McCallister, Paul A. Ormond, Peter E. Raskind, Gerald L. Shaheen, Jerry Sue Thornton, Morry Weiss have served as directors of the Company during the Class Period. During the Class Period, defendants were fiduciaries within the meaning of ERISA, because each exercised discretionary authority or discretionary control with respect to the appointment of the Plan's fiduciaries and with respect to the management of the Plan, each possessed discretionary authority or discretionary responsibility in the administration of the Plan, and each exercised authority or control with respect to the management of the Plan's assets.

23. ***Unknown Fiduciary Defendants 1-30*** are residents of the United States and are or were fiduciaries of the Plan during the Class Period. These defendants' identities are currently unknown to Plaintiff and, may include additional National City employees. Once their identities are ascertained, Plaintiff will seek leave to join them under their true names.

CLASS ACTION ALLEGATIONS

24. Plaintiff brings this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of himself and the following class of persons similarly situated (the "Class"):

All persons who were participants in or beneficiaries of the Plan at any time between February 16, 2007 to the present (the "Class Period") and whose accounts included investments in National City Stock.

25. Plaintiff meets the prerequisites of Rule 23(a) to bring this action on behalf of the Class because:

26. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are, at a minimum, over forty thousand members of the Class who participated in, or were beneficiaries of, the Plan during the Class Period.

27. **Commonality.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

- (a) Whether defendants acted as fiduciaries;
- (b) Whether defendants breached their fiduciary duties to the Plan, Plaintiff and members of the Class by failing to act prudently and solely in the interests of the Plan, and the Plan's Participants and beneficiaries;
- (c) Whether defendants violated ERISA;
- (d) Whether the Plan and members of the Class sustained a loss in vested benefits; and

(e) What is the proper measure of loss to the Plan and subsequent allocation of vested benefits to the Plan's Participants.

28. *Typicality.* Plaintiff's claims are typical of the claims of the members of the Class because the Plan, Plaintiff and Class, sustained a decrease in vested benefits arising out of defendants' wrongful conduct in violation of federal law as complained of herein.

29. *Adequacy.* Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

30. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

31. Class action status is also warranted under the other subsections of Rule 23(b) because: (a) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for defendants; (b) defendants have acted or refused to act on grounds generally applicable to the Plan and the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (c) questions of law or fact common to members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

THE PLAN

32. ***The Plan.*** The Plan is an “employee pension benefit Plan” as defined by §§ 3(3) and (3)(2)(A) of ERISA, 29 U.S.C. §§ 1002(3) and 1002(2)(A).

33. The Plan is a legal entity that can sue or be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1).

34. In this action for breach of fiduciary duty, the Plan is neither plaintiffs nor defendants. Rather, Plaintiff requests relief for the benefit of the Plan and for the benefit of its Participants.

35. The Plan is a “defined contribution Plan” or “individual account Plan” within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34), in that the Plan provides for individual accounts for each Participant and for benefits based solely upon the amount contributed to the Participants’ account, and any income, expenses, gains and losses, and any forfeitures of accounts of other Participants which may be allocated to such Participants’ accounts.

36. Consequently, retirement benefits provided by the Plan are based solely on the amounts allocated to each individual’s account.

37. The Plan is a voluntary contribution Plan whereby Participants make contributions to the Plan (“Voluntary Contributions”) and direct the Plan to purchase investments with those contributions from options pre-selected by defendants which are then allocated to Participants’ individual accounts.

38. In the Company’s most recent Form 11-K, dated June 25, 2007, the plan is described as the following:

The following description of the National City Savings and Investment Plan (the Plan) provides only general information. Participants should refer to the Plan agreement for a more complete description of the Plan’s provisions.

The Plan is a defined contribution plan for substantially all National City Corporation (NCC) personnel who are employed by any subsidiary of NCC which has adopted the Plan (Employers). The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). All administrative expenses of the Plan are paid by the Employers.

39. Eligible employees may become participants after age 21 and the completion of 30 days of service. Participants may contribute between 1% and 20% of compensation to the Plan. Participants are eligible for matching contribution following one year of service. All contributions are initially invested in Company Stock.

The Plan's Fiduciaries

40. *Named Fiduciaries.* ERISA requires every plan to provide for one or more named fiduciaries of the plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1002(21)(A). The person named as the "administrator" in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

41. *De Facto Fiduciaries.* ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under ERISA § 402(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management of disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

42. Each of the defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and its Participants under ERISA in the manner and to the extent set forth in the governing documents for the Plan, through their conduct, and under ERISA.

43. As fiduciaries, defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) to manage and administer the Plan -- and the Plan's investments -- solely in the interest of the Plan's Participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

44. Plaintiff does not allege that each defendant was a fiduciary with respect to all aspects of the Plan's management and administration. Rather, as set forth below, defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them, and, as further set forth below, the claims against each defendant are based on such specific discretion and authority.

COMMON FACTUAL ALLEGATIONS

45. National City provides a wide range of financial services, including mortgage finance services as described above. During times relevant hereto, the defendants directed National City provide those services in connection with mortgages made to subprime borrowers -- those with a low credit score, high debt-to-income ratio, or other characteristics associated with a high probability of default relative to "prime" or less-risky borrowers.

46. In an environment of appreciating home prices and low interest rates, subprime borrowers are typically able to stay current due to the rising equity in their property. In an

environment of depreciating home prices, however, increasing default rates are the norm. This is exactly what has been occurring since at least mid 2006.

47. In fact, as early as 2005, bankers and economists alike were expressing concern over the rising delinquency rates in nontraditional mortgages such as subprime mortgages, especially because the risk of delinquency would be heightened by a downturn in the housing market.

48. Starting in 2006, the real estate and mortgage industry, faced with news about the housing bubble softening and an impending “burst,” responded with a plethora of published reports concerning, among other things, the impact they would have on mortgages and subprime mortgage backed securities, which included the following:

- September 13, 2006: The Senate Banking Committee heard testimony from “leading economists” as to the economic ramifications of the housing bubble, including from Richard Brown of the FDIC, who stated, “According to the Federal Housing Finance Board, over 30 percent of all conventional mortgages closed in 2004 and 2005 were ARMs. The ARM share moderated to 25 percent by the second quarter of 2006. The percentage of ARMs among subprime mortgages is higher. Within subprime mortgage backed securities, the share of ARMs was far higher, close to 80 percent. The prevalence of subprime loans among all mortgage originations doubled from 9 percent in 2003 to 19 percent in 2004.”
- October 23, 2006: *Bloomberg* article reports that “[d]elinquency trends and home prices’ show a weakening real estate market, said Scott Eichel, head of credit trading for New York-based Bear Stearns & Co., the biggest underwriter of bonds backed by mortgages. ‘A lot of investors that have concerns about the housing market’ are using the ABX index to speculate on a continued drop, he said.”
- October 26, 2006: The Commerce Department reported that the median price for a new home sold in September was \$217,100, a drop of 9.7 percent from September 2005. It was the lowest median price for a new home since September 2004 and the sharpest year-over-year decline since December 1970. The weakness in new home prices was even sharper than a 2.5 percent fall in the price of existing homes last month, which had been the biggest drop on record.

- December 14, 2006: The Mortgage Bankers Association reported in its quarterly National Delinquency Survey that late payments and new foreclosures on U.S. homes rose in the third quarter and are likely to grow as a massive wave of adjustable-rate mortgages reset at higher interest rates. MBA also reported that delinquencies rose for all home loans, but most notably for adjustable loans to subprime borrowers who were already stretched before mortgage rates climbed and predicted that between \$1.1 trillion and \$1.5 trillion of mortgages face rate resets in 2007.
- December 22, 2006: Center for Responsible Lending (CRL) study reveals that 2.2 million American households are likely to lose their homes and as much as \$164 billion due to foreclosures in the subprime mortgage market. CRL's research suggests that risky lending practices have triggered the worst foreclosure crisis in the modern mortgage market, projecting that one out of five (19.4%) subprime loans issued during 2005-2006 will fail.
- Moreover, from December 2006 to the present, several material events have occurred demonstrating the ongoing housing crisis and deterioration of the subprime market.
- December 28, 2006: Ownit Mortgage Solutions files for bankruptcy.
- January 30, 2007: J.P. Morgan's CEO, speaking at a Citigroup annual financial services conference, stated that "defaults are rising at J.P. Morgan 'a little bit,'" adding, "'home equity is subject to deterioration' from a recession, but that the bank is well positioned to sustain a downturn in the economy. The bank has largely exited the subprime lending area." (MarketWatch, January 30, 2007 Article, "Dimon sees a sign of recession.")
- February 2: *Bloomberg* reports the subprime market is facing record levels of collapse:
 - Defaults on mortgages to people with poor credit histories or large debt burdens rose in November above their worst levels during the last recession six years ago, according to Friedman Billings Ramsey Group Inc.
 - The percentage of subprime mortgages packaged into bonds and delinquent by 90 days or more, in foreclosure or already turned into seized properties climbed to 10.09 percent from 9.08 percent in October, analysts led by Michael D. Youngblood at the Arlington, Virginia-based firm said in a report today. The default rate fell to 5.37 percent in May 2005 from 10.05 percent in November 2001, when economic growth resumed.

- Defaults on subprime loans have surged as rates on ones made in 2002, 2003 and 2004 adjust higher as their fixed-rate periods end following an increase in short-term interest rates from the lowest in 45 years. Subprime mortgages made in 2005 and 2006 are suffering from slumping home prices and looser lending standards.
- “These borrowers are very leveraged and have little skin in the game” because they took out loans with small, or no, down payments and many of them haven't seen their properties appreciate, Debashish Chatterjee, an analyst at Moody's Investors Service in New York, said in an interview Jan. 26.
- February 7: The Senate Banking Committee holds the first hearing of the 110th Congress addressing legislative solutions to predatory lending in the subprime sector.
- February 9: “The Financial Express” reports online that HSBC Holdings Plc’s Chief Executive Officer will change lending policies after the bank’s losses from bad home loans in the US increased, stating “I am responding, and more action will be taken . . . [t]his is a problem, we have taken the severity on board.” HSBC was forced to set aside nearly \$2 billion of its funds for 2006 due to souring subprime-mortgage loans.
- February 12: ResMae Mortgage files for bankruptcy.
- February 13: Dr. Mark Dotzour, the chief economist for the Real Estate Center at Texas A&M University, issued a warning with respect to these “rescue loans” because homebuyers who bought homes with subprime loans are especially vulnerable. “Texas Economist Warns of Foreclosure Rescue Scams,” www.mortgagefraudblog.com, February 13, 2007.
- February 20: NovaStar Financial reports a loss.
- March 2: The Federal Reserve announces draft regulations to tighten lending standards.
- March 2: Fremont General stops making subprime loans and puts its subprime business up for sale.
- March 8: New Century Financial, the second largest subprime lender in 2006, stops making loans.
- March 20: People’s Choice files for bankruptcy.

- April 2: New Century Financial files for bankruptcy.
- April 6: American Home Mortgage writes down the value of risky mortgages rated one step above subprime.
- April 18: Freddie Mac announces plans to refinance up to \$20 billion of loans held by subprime borrowers who would be unable to afford their adjustable-rate mortgages at the reset rate.
- April 24: The National Association of Realtors announces that sales of existing homes fell 8.4% in March from February, the sharpest month-to-month drop in 18 years.
- May 25: The National Association of Realtors reports that sales of existing homes fell by 2.6 percent in April to a seasonally adjusted annual rate of 5.99 million units, the slowest sales pace since June 2003. The number of unsold homes left on the market reached a record total of 4.2 million.
- June 12: RealtyTrac announces U.S. foreclosure filings surged 90 percent in May from May 2006. Foreclosure filings were up 19 percent from April. There were 176,137 notices of default, scheduled auctions and bank repossessions in May.
- June 14: Goldman Sachs reports flat profit from a year ago due to mortgage market problems.
- June 22: Bear Stearns pledges up to \$3.2 billion to bail out one of its hedge funds because of bad bets on subprime mortgages.
- July 10: Standard and Poor's and Moody's downgrade bonds backed by subprime mortgages. Fitch follows suit.
- July 18: Bear Stearns announces its two hedge funds that invested heavily in the subprime market are essentially worthless, having lost over 90% of their value, equal to over \$1.4 billion.
- July 18: Commerce Department announces housing starts are down 19.4 percent over the last 12 months. Also announced is a 7.5 percent plunge in permits to build new homes, the largest monthly decline since January 1995. Permits are 25.2 percent below their level a year ago, reflecting continued pessimism among builders over the near-term outlook for new homebuilding.
- July 18 and 19: In two days of testimony in Congress, Chairman Bernanke said there will be "significant losses" due to subprime mortgages, but that such losses are "bumps" in "market innovations" (referring to hedge fund

investments in subprime mortgages). Bernanke reiterated that problems in the subprime mortgage market have not spilled over into the greater system. Bernanke also said the problems “likely will get worse before they get better.”

- July 30: IKB Deutsche Industriebank, a German bank, is bailed out because of bad bets on U.S. mortgage-backed securities.
- August 1: Two hedge funds managed by Bear Stearns that invested heavily in subprime mortgages declare bankruptcy. Investors in the funds file suit against Bear Stearns, alleging that the investment bank misled them about the extent of the funds' exposure.
- August 6: American Home Mortgage files for bankruptcy.
- August 9: American International Group, one of the biggest U.S. mortgage lenders, warns that mortgage defaults are spreading beyond the subprime sector with delinquencies becoming more common among borrowers in the category just above subprime.
- August 9: BNP Paribas, a French bank, suspends three of its funds because of exposure to U.S. mortgages.
- August 9 and 10: European Central Bank and Federal Reserve intervene in markets by pumping billions of dollars of liquidity into the markets.
- August 13: Aegis Mortgage files for bankruptcy.
- August 16: Countrywide Financial, the nation's largest mortgage lender, draws down \$11.5 billion from its credit lines.
- August 22: RealtyTrac, Inc. announces foreclosures were up 93% in July 2007 from July 2006. The national foreclosure rate in July was one filing for every 693 households. There were 179,599 filings reported last month, up from 92,845 a year ago.
- September 6: The Mortgage Bankers Association releases a quarterly report showing that the delinquency rate (the number of people who are behind in their payments but have not yet entered the foreclosure process) for mortgage loans on one-to-four-unit residential properties was 5.12 percent of all loans outstanding in the second quarter of 2007, up 28 basis points from the first quarter of 2007, and up 73 basis points from one year ago. The delinquency rate for subprime loans was up from 13.77 in the first quarter to 14.82 percent in the second quarter. The delinquency rate for prime loans rose from 2.58 percent to 2.73 percent. Compared to this

time last year, the seriously delinquent rate is 23 basis points higher for prime loans and 304 basis points higher for subprime loans.

- September 14: Merrill Lynch & Co., the biggest underwriter of collateralized debt obligations, signals that the subprime mortgage crisis may hurt third-quarter earnings. The New York-based firm reports that it made “fair value adjustments” for potential losses to date on unspecified holdings and financing commitments.
- September 17: NovaStar Financial Inc. gives up its real estate investment trust, effectively abandoning the lending business, because it cannot pay a \$157 million dividend.
- September 17: Merrill Lynch & Co. Inc.'s \$1.3 billion bet on subprime lending takes a turn for the worse when the world's largest brokerage confirms job cuts at its First Franklin Financial Corp. unit. Merrill Lynch declines to say how many jobs are being cut. Recently filed reports with U.S. banking regulators show that Merrill Lynch Bank & Trust Co., where a lot of the First Franklin franchise is housed, lost \$111 million through the first half of 2007.
- September 18: The mortgage lending crisis intensifies as Impac Mortgage Holdings Inc. says it will quit most lending activities, while Accredited Home Lenders Holding Co. posts a major quarterly loss and says its survival remains in doubt.
- September 21: HSBC Holdings announces its plans to close its U.S. subprime unit, Decision One Mortgage, and record an impairment charge of about \$880 million. HSBC states that it no longer believes the mortgage business is sustainable. Approximately 750 U.S. employees are expected to be affected by the decision.
- September 27: Luminent Mortgage Capital, a home-loan investment company, downgrades its second-quarter profit as the company struggles to gain access to credit and bankers seize assets.
- October 1: UBS reports its first quarterly loss in nine years. The largest wealth manager in the world plans to write down \$3.4 billion in its fixed-income portfolio and other departments and to cut 1,500 jobs in its investment bank. The loss is attributed to the spreading credit crisis stemming from the emerging housing depression.
- October 4: The credit ratings agency, Moody's Investors Service, reports that subprime mortgage bonds originated in the first half of 2007 include loans that are going delinquent at the fastest recorded rate. The Moody's

report predicts that accelerating delinquencies from 2007 bonds are likely to surpass the number of delinquencies in 2006, which hit a peak not seen since 2000.

- October 11: Countrywide Financial Corp. reports that September mortgage lending was down 44.3 percent from a year ago. Funding for adjustable-rate mortgages fell 76 percent, which was still lower than the 92 percent decline in nonprime loan funding. Delinquencies as a percentage of unpaid principal balances rose 1.81 percent to 5.85 percent from a year earlier.
- October 18: Standard & Poor's cuts the credit ratings on \$23.35 billion of securities backed by pools of home loans that were offered to borrowers during the first half of the year. The downgrades even hit securities rated AAA, which is the highest of the 10 investment-grade ratings and the rating of government debt.

49. In spite of the parade of negative information concerning the market, National City repeatedly reassured its investors and the Plan's Participants about the Company and its prospects.

50. Even before the commencement of the Class Period, on July 18, 2006, the defendants caused or allowed National City to issue a press release announcing its fiscal second quarter 2006 earnings. The press release reported earnings of \$473 million. Defendant Daberko noted that that: "Credit quality continues to be sound for the company as a whole."

51. On October 17, 2006, the defendants caused or allowed National City to issue a press release announcing its earnings for its third fiscal quarter 2006. The press release reported earnings of \$551 million. Defendant Daberko commented that "the mortgage-related businesses are performing well in a cyclically tough mortgage environment." In particular, the press release provided as follows:

"We were very pleased with the results for the quarter. Commercial and retail lending volumes were quite good. Total revenues were up 6% over last year, led by strong growth in fees and other income. Net interest margin has been stable, despite a challenging interest rate picture. Our corporate and retail banking

businesses are well on their way to producing record results this year, while the mortgage-related businesses are performing well in a cyclically tough mortgage environment.”

52. Defendant Daberko also noted that “[c]redit quality continues to be relatively stable.”

53. On January 23, 2007, the defendants caused or allowed National City to issue a press release announcing its earnings for its fiscal fourth quarter and fiscal year 2006. The press release reported earnings of \$398 million for the quarter and \$2.3 billion for the year. In the press release, defendant Daberko emphasized that the sale of First Franklin, the Company's subprime lending unit, would allow National City to “now focus more intently on [its] core businesses, almost all of which performed well in 2006.”

54. Only one month later, National City Stock hit a 52 week high of \$38.49 per share on March 1, 2007.

55. On April 30, 2007, defendants caused or allowed National City to issue a press release announcing its earnings for its first fiscal quarter 2007. The press release reported earnings of \$319 million. Defendant Daberko noted that National City's “mortgage business continues to operate in a difficult environment, but [the Company has] *less exposure* to the mortgage sector than in prior years. Overall, we expect each successive quarter from here to show improved earnings.”

56. On July 26, 2007, the defendants caused or allowed National City to issue a press release announcing its fiscal second quarter 2007 earnings. The press release reported earnings of \$347 million. Defendant Raskind commented in the press release that “[s]econd quarter earnings were up from the first quarter due to better mortgage results, both operating and hedging, and strong performance in retail banking.”

57. On October 24, 2007, defendants finally admitted National City's true exposure to the subprime market crisis. Specifically, National City announced a restructuring of its mortgage business in response to "unprecedented disruption and weakness in the mortgage and housing markets." In connection with the restructuring, the Company transferred \$4.4 billion of held for sale home equity lines and loans from "held for sale" to "portfolio" because those assets were no longer suitable for sale. The Company also increased its provision for credit losses to \$361 million, up from \$143 million in the previous quarter.

58. The Company also announced the elimination of 2,500 positions. National City's press release provided as follows:

"Our third quarter results were clearly affected by the unprecedented disruption and weakness in the mortgage and housing markets. In response to these conditions, we have ***restructured our mortgage business***. The former National Home Equity unit has been merged into National City Mortgage, and production of non-agency eligible mortgages has been either severely curtailed or eliminated altogether. ***Loans held for sale have been written down to estimated market prices***, and in certain cases, moved to portfolio. Higher loan loss provisions were taken on portfolio mortgage loans, reflecting recent delinquency and loss trends, and continued deterioration in the housing markets. The results of these actions contributed to a third quarter loss in our mortgage banking business. At the same time, our retail, commercial banking and asset management businesses performed well. Deposit inflows were strong, and credit quality in the core consumer and commercial portfolios remains sound. Nonetheless, ***the environment continues to be quite challenging***, requiring close attention to costs and relentless focus on day-to-day execution. Based on the difficult conditions in the financial markets, which we expect to persist into 2008, we have undertaken an aggressive review of our cost structure across the company. That review, coupled with our 2008 budget process, has resulted in the elimination of approximately 2,500 positions representing approximately \$125 million of personnel expense."

59. In the wake of this devastating disclosure and subsequent disclosures concerning the sub-prime fiasco, National City's value declined from over \$38 per share to less than \$15 per

share, closing at a 52-week low of \$14.22 on January 8, 2008 – an \$11.3 billion market capitalization loss. The Plan itself lost more than \$500 million in assets as a direct result of the Company's steep decline.

60. On March 17, 2008, the Company fell the most in 24 years in New York trading, declining as much as 47% and sold for \$7.52 as of 4:15 p.m., down \$5.63 in New York Stock Exchange composite trading. The announced buyout of Bear Stearns Cos. by JPMorgan Chase caused increased fears in the banking sector including National City in particular.

61. National City's statements failed to disclose and misrepresented the following material adverse facts, which the Individual Defendants knew, consciously disregarded, were reckless and grossly negligent in not knowing or should have known: (a) National City was more exposed to the subprime market crisis than it had disclosed; (b) National City's sale of First Franklin would not shield the Company from mortgage related losses; and (c) As a result of the foregoing, National City's reported earnings and business prospects were inaccurate, making National City Stock an imprudent retirement investment option.

THE LAW UNDER ERISA

62. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

63. ERISA § 409(a), 29 U.S.C. § 1109(a), "Liability for Breach of Fiduciary Duty," provides, in pertinent part, that any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through

use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

64. ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), provides, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

65. These fiduciary duties under ERISA § 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence, and are the “highest known to the law.” They entail, among other things:

(a) The duty to conduct an independent and thorough investigation into, and continually to monitor, the merits of all the investment alternatives of a plan, including in this instance the Plan, which invested in National City Stock, to ensure that each investment is a suitable option for the Plan;

(b) The duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an “eye single” to the interests of the Participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan’s sponsor; and

(c) A duty to disclose and inform, which encompasses: (i) a negative duty not to misinform; (ii) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (iii) a duty to convey complete and accurate information material to the circumstances of Participants and beneficiaries.

66. ERISA § 405(a), 29 U.S.C. § 1105(a), “Liability for breach by co-fiduciary,” provides, in pertinent part, that “. . . [i]n addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”

67. Plaintiff therefore brings this action under the authority of ERISA § 502(a)(2) for relief of the Plan under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

DEFENDANTS’ FIDUCIARY STATUS

68. ERISA requires every plan to provide for one or more named fiduciaries who will have “authority to control and manage the operation and administration of the plan.” § 402(a)(1), 29 U.S.C. § 1102(a)(1).

69. During the Class Period, all of defendants acted as fiduciaries of the Plan pursuant to § 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A) and the law interpreting that section. As outlined herein, defendants all had discretionary authority and control with respect to the management of the Plan and/or the management or disposition of the Plan’s investments and assets, and/or had discretionary authority or responsibility for the administration of the Plan.

70. During the Class Period, defendants' direct and indirect communications with the Plan's Participants included statements regarding investments in Company Stock. Upon information and belief, these communications included, but were not limited to, SEC filings, annual reports, press releases, Company presentations made available to the Plan's Participants via the Company's website and documents related to the Plan which incorporated and/or reiterated these statements. Defendants also acted as fiduciaries to the extent of this activity.

71. In addition, under ERISA, in various circumstances, non-fiduciaries who knowingly participate in fiduciary breaches may themselves be liable. To the extent any of the defendants are held not to be fiduciaries, they remain liable as non-fiduciaries who knowingly participated in the breaches of fiduciary duty described below.

CAUSES OF ACTION

COUNT I – Breach of Fiduciary Duty of Care

72. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

73. At all relevant times, as alleged above, defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

74. As alleged above, defendants were responsible, in different ways and to differing extents, for the selection and monitoring of the Plan's investment options, including the option of Company Stock.

75. Under ERISA, fiduciaries who exercise discretionary authority or control over management of a plan or disposition of a Plan's assets are responsible for ensuring that investment options made available to participants under a plan are prudent. Furthermore, such fiduciaries are responsible for ensuring that assets within the plan are prudently invested. Defendants were responsible for ensuring that all investments in National City Stock in the Plan

were prudent and that such investment was consistent with the purpose of the Plan. Defendants are therefore liable for losses incurred as a result of such investments being imprudent.

76. A fiduciary's duty of loyalty and prudence requires it to disregard plan documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor may it allow others, including those whom they direct or who are directed by the plan, including plan trustees, to do so.

77. Moreover, during the Class Period, despite their knowledge of the imprudence of the investment, defendants failed to take any meaningful steps to prevent the Plan, and indirectly the Plan's Participants and beneficiaries, from suffering losses as a result of the Plan's investment in National City Stock. Further, given that such a high concentration of the assets of the Plan were invested in the stock of a single company (National City), defendants were obliged to have in place some financial strategy to address the extreme volatility of single equity investments. All categories of defendants failed to implement any such strategy.

78. The fiduciary duty of loyalty also entails a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor.

79. Defendants breached their co-fiduciary obligations by, among their other failures: knowingly participating in, or knowingly undertaking to conceal, the failure to prudently and loyally manage the Plan's assets with respect to offering Company Stock as an investment option

in the Plan; enabling defendants' failure to prudently manage the Plan's assets with respect to the Plan's investments; and, having knowledge of the failure to prudently manage the Plan's assets, yet not making any effort to remedy the breach.

80. Specifically, at least some of the defendants had actual knowledge of National City's corporate malfeasance and questionable reporting and business. In addition, in light of their high-ranking positions as high ranking officers at the Company, each had/should have had constructive knowledge of these activities.

81. Despite this knowledge, defendants participated in each other's failures to prudently manage the Plan's assets and knowingly concealed such failures by not informing Participants that the Plan's holdings of National City Stock were not being prudently managed. They also failed to remedy their mutual breaches of the duty to prudently manage the Plan's investment in National City Stock, despite inarguably having knowledge of such breaches.

82. Furthermore, through their own failure to prudently and loyally manage the Plan's investment in National City Stock, or to undertake any genuine effort to investigate the merits of such investment, or to ensure that other fiduciaries were doing so, defendants named in this Count enabled their co-fiduciaries to breach their own independent duty to prudently and loyally manage the Plan's investment in National City Stock.

83. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiff and the Plan's other Participants and beneficiaries, lost a significant portion of their investments meant to help Participants save for retirement. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C. § 1109(a), defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

COUNT II – Breach of Fiduciary Duty to Provide Complete and Accurate Information

84. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

85. At all relevant times, as alleged above, defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

86. As alleged above, the scope of defendants' fiduciary duties and responsibilities included disseminating documents to the Plan and information to Participants regarding the Plan and assets of the Plan. In addition, defendants had a duty to provide Participants with information they possessed that they knew or should have known, would have an extreme impact on the Plan.

87. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to Participants, not to mislead them regarding the Plan or the Plan's assets, and to disclose information that Participants need in order to exercise their rights and interests under the Plan. This duty to inform Participants includes an obligation to provide Participants and beneficiaries of the Plan with complete and accurate information, and to refrain from providing false information or concealing material information regarding the Plan's investment options such that Participants can make informed decisions with regard to investment options available under the Plan, this duty applies to all of the Plan's investment options, including investment in National City Stock.

88. Because a substantial percentage of the Plan's assets were invested in National City Stock, and defendants chose to invest overwhelmingly in National City Stock, such investment carried with it an inherently high degree of risk. This inherent risk made defendants'

duty to provide complete and accurate information particularly important with respect to Company Stock.

89. Specifically, National City, through its officers and directors issued a multitude of false and misleading statements through SEC filings and press releases regarding value of National City Stock and the financial health of the Company.

90. Upon information and belief, such communications were disseminated directly to all Participants, which incorporated by reference the Company's materially misleading and inaccurate SEC filings and reports furnished by National City, through its officers and Director defendants. In addition, upon information and belief, the Company communicated directly with all Participants regarding the merits of investing in National City Stock in company-wide and uniform communications, and, yet, in the context of such communications failed to provide complete and accurate information regarding National City Stock as required by ERISA.

91. In addition, defendants were responsible for providing Participants in the Plan with investment education and communication. Defendants, however, failed to disclose any information to the Plan's Participants regarding National City's deceitful business practices and how these activities adversely affected Company Stock as a prudent investment option under the Plan. Defendants thus breached their duty to provide Participants with complete and accurate information necessary for making informed investment decisions with regard to investment options under the Plan.

92. Defendants named in this Count breached their duty to inform Participants by failing to provide complete and accurate information regarding National City Stock, making material misrepresentations about the Company's financial condition, and, generally, by

conveying inaccurate information regarding the soundness of National City Stock and the prudence of investing retirement contributions in Company Stock.

93. These failures were particularly devastating to the Plan and the Participants, as a significant percentage of the Plan's assets were invested in National City Stock during the Class Period and, thus, the stock's precipitous decline had an enormous impact on the value of Participants' retirement assets.

94. In addition, National City and the other defendants named in this Count knew or should have known that information they possessed regarding the true condition of National City would have an extreme impact on the Plan. Yet, in violation of their fiduciary duties, these defendants failed to provide Participants with this crucial information.

95. As a consequence of the failure of defendants named in this Count to satisfy their disclosure obligations under ERISA, Participants lacked sufficient information to make informed choices regarding investment of their retirement savings in National City Stock, or to appreciate that under the circumstances known to the fiduciaries, but not known by Participants, National City Stock was an inherently unsuitable and inappropriate investment option for their Plan's accounts. Had accurate information been provided, Participants could have protected themselves against losses accordingly, and consequently, Participants relied to their detriment on the incomplete and inaccurate information provided by defendants in their fiduciary communications and failures thereof.

96. As a consequence of defendants' breaches of fiduciary duty alleged in this Count, the Plan suffered tremendous losses. If these defendants had discharged their fiduciary duties to prudently invest the Plan's assets, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary and co-fiduciary

duties alleged herein, the Plan, and indirectly plaintiff and the other Class members, lost millions of dollars of retirement savings.

97. Pursuant to ERISA §§ 409 and 502(a), 29 U.S.C. §§ 1109(a) and 1132(a), defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

COUNT III – Breach of Fiduciary Duty to Monitor

98. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

99. At all relevant times, as alleged above, National City and the Director Defendants named in this Count were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, as alleged above, the scope of the fiduciary responsibilities of National City and the Director Defendants named in this Count included the responsibility to appoint, evaluate, and monitor other fiduciaries. The duty to monitor entails both giving information to and reviewing the actions of the monitored fiduciaries. The monitoring fiduciaries, National City and the Director Defendants named in this Count, had the duty to:

(a) Ensure that the appointed fiduciaries of the Plan possess the needed credentials and experience, or use qualified advisors and service providers to fulfill their duties. They must be knowledgeable about the operations of the Plan, the goals of the Plan, as noted above, and the behavior of the Plan's Participants;

(b) Ensure that the appointed fiduciaries of the Plan are provided with adequate financial resources to do their job;

(c) Ensure that the appointed fiduciaries of the Plan have adequate information to do their job of overseeing the Plan's investments;

(d) Ensure that the appointed fiduciaries of the Plan have ready access to outside, impartial advisors when needed;

(e) Ensure that the appointed fiduciaries of the Plan maintain adequate records of the information on which they base their decisions and analysis with respect to the Plan's investment options; and

(f) Ensure that the appointed fiduciaries of the Plan report regularly to the Company, the Company must then review, understand, and approve the conduct of the hands-on fiduciaries.

100. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment of plan assets, and must take prompt and effective action to protect the plan and participants when they are not. In addition, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan assets.

101. National City and the Director Defendants named in this Count breached their fiduciary monitoring duties by, among other things, (a) failing to ensure that the appointed Plan's fiduciaries were given adequate information about the Company's business problems alleged above, which made Company Stock an imprudent investment, which was necessary for them to perform their duties of overseeing the Plan's investments, and (b) failing to ensure that the monitored fiduciaries completely appreciated the huge risk of significant investment by rank and file employees in an undiversified employer stock fund which was made up primarily of Company Stock, an investment that was imprudent and inherently subject to significant

downward movements, especially here where the stock was artificially inflated by non-public corporate malfeasance and illicit activities.

102. National City and Director Defendants also breached this duty by not properly disclosing information that they knew or should have known, about the Company's improper business practices to the trustee. The trustee is responsible for investing and managing assets of the Plan. However, in doing so, the Trustee shall be subject to the direction and guidance of National City

103. National City and the other defendants named in this Count, knew or should have known that the fiduciaries they were responsible for monitoring were (a) imprudently allowing the Plan to continue offering National City Stock as an investment alternative for the Plan, and (b) continuing to invest the assets of the Plan in National City Stock when it no longer was prudent to do so. Despite this knowledge, National City and the Director Defendants named in this Count failed to take action to protect the Plan, and concomitantly the Plan's Participants, from the consequences of these fiduciaries' failures.

104. National City and the Director Defendants named in this Count are liable as co-fiduciaries because they knowingly participated in each other's fiduciary breaches as well as those by the appointed fiduciaries of the Plan, they enabled the breaches by these defendants, and failed to make any effort to remedy these breaches, despite having knowledge of them.

105. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly the Plaintiff and the Plan's other Participants and beneficiaries, lost a significant portion of their investments meant to help Participants save for retirement.

106. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C., § 1109(a), defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

COUNT IV – Breach of Fiduciary Duty of Loyalty

107. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

108. At all relevant times, as alleged above, all defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

109. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), imposes on a plan fiduciary a duty of loyalty, that is, a duty to discharge his/her duties with respect to a plan solely in the interest of the Participants and beneficiaries and for the exclusive purpose of providing benefits to Participants and beneficiaries.

110. Given the allegations listed above, defendants clearly placed the interests of themselves and the Company, as evidenced by the longstanding artificial inflation of Company Stock, before the interests of the Plan and its Participants and beneficiaries. These conflicts of interest put defendants in the inherently problematic position of having to choose between their own interests as directors, officers, executives (and National City stockholders), and the interests of the Plan's Participants and beneficiaries, in whose interests defendants were obligated to loyally serve with an "eye single."

111. Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, *inter alia*: failing to engage independent fiduciaries who could make independent judgments concerning the Plan's investment in National City Stock; failing to notify appropriate federal agencies, including the SEC of the facts and transactions which made

National City Stock an unsuitable investment for the Plan; failing to take such other steps as were necessary to ensure that Participants' interests were loyally and prudently served; with respect to each of these above failures, doing so in order to prevent drawing attention to the Company's inappropriate practices; and by otherwise placing the interests of the Company and themselves above the interests of the Participants with respect to the Plan's investment in Company Stock.

112. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA § 409, 29 U.S.C. § 1109(a), defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

COUNT V – Co-Fiduciary Liability

113. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

114. ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if (a) he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (b) he fails to comply with § 1104(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, by enabling such other fiduciary to commit a breach; or (c) he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

115. As alleged herein, National City, through its officers and employees withheld material information from the Plan's Participants and provided misleading disclosures, by the conduct set forth above, and profited from such practices, and, thus, knowledge of such practices

is imputed to these defendants as a matter of law. In addition, as alleged herein on information and belief, National City and the other defendants named in this Count participated in and/or knew about the Company's misrepresentations regarding the Company's financial condition. Thus, these defendants as well had knowledge at all relevant times of the factual matters pertaining to the imprudence of National City Stock as an investment for the Participants' retirement assets.

116. Despite this knowledge, defendants named in this Count knowingly participated in their co-fiduciaries' failures to prudently and loyally manage the Plan's investment and holding of National City Stock during the Class Period. They did so by themselves making imprudent and disloyal decisions respecting the Plan's investment in National City Stock in the manner alleged herein in violation of ERISA § 405(a)(1)(A). In addition, these same defendants failed to undertake any effort to remedy their co-fiduciaries' and one-another's failures to prudently and loyally manage the Plan's investment in National City Stock despite knowing such failures were breaches of fiduciary duty under ERISA. Instead, they allowed the harm to continue and contributed to it throughout the Class Period in violation of ERISA § 405(a)(1)(C).

117. In further violation of ERISA § 405(a)(1)(C), defendants named in this Count also knew that inaccurate and incomplete information had been provided to Participants, yet, they failed to undertake any effort to remedy this breach by ensuring that accurate disclosures were made to Participants and the market as a whole. Instead, they compounded the problem by downplaying the significance of National City's problems and further concealing such practices from Participants and the market as a whole.

118. In addition, defendants named in this Count enabled the imprudent asset management decisions of any and all other defendants -- including any appointed fiduciaries of

the Plan -- who lacked knowledge of the circumstances rendering the stock imprudent, by failing to provide such persons with complete and accurate information regarding the stock, or to the extent all such persons possessed the information, by failing to ensure that they appreciated the true risks to the Plan caused by the Company's improper practices, so that these other defendants could effectively discharge their obligation to prudently and loyally manage the Plan's investment in National City Stock. In so doing, these defendants breached ERISA § 405(a)(1)(B).

119. Further, through their failure to properly and effectively monitor and remove those fiduciaries whose performance was inadequate as alleged above, defendants named in this Count enabled these appointed fiduciaries of the Plan to imprudently manage the National City Stock in the Plan.

120. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiff and the Plan's other Participants and beneficiaries, lost a significant portion of their retirement investment.

121. Pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a) and ERISA § 409, 29 U.S.C. § 1109(a), defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

COUNT VI

122. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein.

123. To the extent that National City is found not to have been a fiduciary or to have acted in a fiduciary capacity with respect to the conduct alleged to have violated ERISA, National City knowingly participated in the breaches of those defendants who were fiduciaries

and acted in a fiduciary capacity and as such is liable for equitable relief as a result of participating in such breaches.

124. National City benefited from the breaches by discharging its obligations to make contributions to the Plan in amounts specified by contributing National City Stock to the Plan while the value of the stock was inflated as the result of the breaches of fiduciary duty alleged herein and as a result of National City providing the market with materially misleading statements and omissions. Accordingly, National City may be required to disgorge this benefit or a constructive trust should be imposed on treasury shares of National City Stock which would have been contributed to the Plan, but for National City's participation in the foregoing breaches of fiduciary duty.

CAUSATION

125. The Plan suffered millions of dollars in losses in plan benefits because substantial assets of the Plan were imprudently invested or allowed to be invested by defendants in National City Stock during the Class Period, in breach of defendants' fiduciary duties. These losses to the Plan were reflected in the diminished account balances of the Plan's Participants.

126. Defendants are responsible for losses in the Plan's benefits caused by the Participants' direction of investment in National City Stock, because defendants failed to take the necessary and required steps to ensure effective and informed independent participant control over the investment decision-making process, as required by ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations promulgated thereunder. Defendants concealed material, non-public facts from Participants, and provided inaccurate, incomplete and materially misleading information to them regarding the true health and ongoing profitability of the Company, thereby misrepresenting the Company's soundness as an investment vehicle. As a consequence,

Participants could not exercise independent control over their investments in National City Stock, and defendants remain liable under ERISA for losses caused by such investment.

127. Defendants are also responsible for all losses in the Plan's benefits caused by the investment of the Plan's company contributions in National City Stock during the Class Period, as defendants controlled the investment, and the investment was imprudent.

128. Had defendants properly discharged their fiduciary and/or co-fiduciary duties, including the provision of full and accurate disclosure of material facts concerning investment in National City Stock, eliminating such Company Stock as an investment alternative when it became imprudent, and divesting the Plan from its holdings of National City Stock when maintaining such an investment became imprudent, the Plan would have avoided a substantial portion of the losses that it suffered.

129. Also, reliance is presumed in an ERISA breach of fiduciary duty case. Nevertheless, to the extent that reliance is an element of the claim, Plaintiff relied to their detriment on the misstatements and omissions that defendants made to the Plan's Participants.

REMEDY FOR BREACHES OF FIDUCIARY DUTY

130. Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plan's assets should not have been invested in National City Stock during the Class Period. As a consequence of defendants' breaches, the Plan suffered significant losses.

131. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires "any person who is a fiduciary. . . who breaches any of the . . . duties imposed upon fiduciaries . .

. to make good to such plan any losses to the plan” Section 409 also authorizes such other equitable or remedial relief as the court may deem appropriate”

132. With respect to calculation of the losses to a plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Participants and beneficiaries in the plan would not have made or maintained their investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable alternative investment available. In this way, the remedy restores the values of the Plan’s assets to what they would have been if the Plan had been properly administered.

133. Plaintiff and the Class are therefore entitled to relief from defendants in the form of: (a) a monetary payment to the Plan to make good to the Plan for the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a)(2-3), 29 U.S.C. §§ 1109(a) and 1132(a)(2-3); (c) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (d) taxable costs; (e) interest on these amounts, as provided by law; and (f) such other legal or equitable relief as may be just and proper.

134. Under ERISA, each defendant is jointly and severally liable for the losses suffered by the Plan in this case.

ERISA SECTION 404(c) DEFENSE INAPPLICABLE

135. ERISA § 404(c) is an affirmative defense that provides a limited exception to fiduciary liability for losses that result from Participants’ exercise of control over investment

decisions. In order for § 404(c) to apply, Participants must in fact exercise “independent control” over investment decisions, and the fiduciaries must otherwise satisfy the procedural and substantive requirements of ERISA § 404(c), 29 U.S.C. § 1104(c) and the regulations promulgated under it.

136. Those provisions were not complied with here as, among other reasons, instead of taking the necessary steps to ensure effective participant control by complete and accurate material information disclosure, defendants did exactly the opposite. As a consequence, Participants in the Plan did not have informed control over the portion of the Plan’s assets that were invested in National City Stock as a result of their investment directions, and defendants remained entirely responsible for losses that result from such investment.

137. Because ERISA § 404(c) does not apply here, defendants’ liability to the Plan, the Plaintiff and the Class for relief stemming from Participants’ decisions to invest contributions in National City Stock is established upon proof that such investments were or became imprudent and resulted in losses in the value of the assets in the Plan during the Class Period.

138. Furthermore, under ERISA, fiduciaries -- not Participants -- exercise control over the selection of investment options made available to Participants. Thus, whether or not Participants are provided with the ability to select among different investment options, and whether or not Participants exercised effective control over their investment decisions (which was not the case here), liability attaches to the fiduciaries if an imprudent investment is selected by the fiduciaries and presented as an option to Participants, and as a result of such action the Plan suffer a loss. Because this is precisely what occurred in this case, defendants are liable for the losses incurred by the Plan.

139. Finally, defendants remain liable for the Plan losses that pertain to National City Stock acquired by the Plan with employer contributions, as Participants did not exercise any control.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

A. A Declaration that defendants, and each of them, have breached their ERISA fiduciary duties to the Participants;

B. A Declaration that defendants, and each of them, are not entitled to the protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);

C. An Order compelling defendants to make good to the Plan all losses to the Plan resulting from defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits defendants made through use of the Plan's assets, and to restore to the Plan all profits which the Participants would have made if defendants had fulfilled their fiduciary obligations;

D. Imposition of a Constructive Trust on any amounts by which any defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

E. An Order enjoining defendants, and each of them, from any further violations of their ERISA fiduciary obligations;

F. An Order requiring defendants to appoint one or more independent fiduciaries to participate in the management of the Plan's investment in National City Stock;

G. Actual damages in the amount of any losses the Plan suffered, to be allocated among the Participants' individual accounts as benefits due in proportion to the accounts' diminution in value;

H. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

I. An Order awarding attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine; and

J. An Order for equitable restitution and other appropriate equitable monetary relief against defendants.

Dated: March 24, 2008

By: 
Daniel R. Karon (OH #0069403)
GOLDMAN, SCARLATO & KARON, P.C.
55 Public Square, Suite 1500
Cleveland, OH 44113
Tel: (216) 622-1851
Fax: (216) 622-1852
Email: karon@gsk-law.com

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**
Mark C. Rifkin
Matthew M. Guiney
270 Madison Avenue
New York, NY 10016
Tel: (212) 545-4600
Fax: (212) 545-4657
Email: rifkin@whafh.com
guiney@whafh.com

MEHRI & SKALET, PLLC
Cyrus Mehri
Janelle Carter
1250 Connecticut Avenue NW
Suite 300
Washington, DC 20036

Tel: (202) 822-5100
Fax: (202) 822-4997
Email: Cyrus@findjustice.com
JCarter@findjustice.com

MAJOR KHAN LLC
Major Khan
20 Bellevue Street
Weehawken, NJ 07086
Tel: (646) 546-5664
Fax: (646) 546-5755
Email: mk@mk-llc.com

GAINEY & McKENNA
Thomas J. McKenna
295 Madison Avenue
New York, NY 10017
Tel: (212) 983-1300
Fax: (212) 983-0383

Attorneys for Plaintiff