

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

	X	
DEBRA GRIFFIN, on Behalf of Herself and:	:	Case No.
a Class of Persons Similarly Situated,	:	
	:	
Plaintiff,	:	Hon.
v.	:	Mag. Judge
	:	
FLAGSTAR BANCORP, INC.; REBECCA:	:	
A. LUCCI; ERIN ENGLAND and JOHN:	:	
DOES 1-10,	:	
	:	
Defendants.	:	
	X	

**CLASS ACTION COMPLAINT FOR BREACH OF FIDUCIARY DUTY AND
VIOLATION OF ERISA DISCLOSURE REQUIREMENTS**

JURY TRIAL DEMANDED

Plaintiff Debra Griffin (“Plaintiff”), on behalf of herself and on behalf of a class consisting of similarly situated participants and beneficiaries (the “Participants”) of the Flagstar Bank 401(k) Plan (the “Plan”), by her attorneys, alleges the following for her Complaint (the “Complaint”). The allegations contained herein are based on the investigation of counsel, except for those allegations pertaining to the Plaintiff, which are based upon personal knowledge. Plaintiff may, after discovery and/or disclosure proceedings in this case, seek leave to amend this Complaint to add new parties or claims.

NATURE OF ACTION

1. Plaintiff, who was a Participant in the Plan during time periods relevant to this Complaint, brings this civil enforcement action under Section 502(a) of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1132(a), for plan-wide relief on behalf

of a class consisting of all current and former Participants in the Plan for whose individual accounts the Plan held shares of common stock of Flagstar Bancorp, Inc. (“Flagstar” or the “Company”) at any time from December 31, 2006 to the present (the period from December 31, 2006 to the present being hereinafter referred to as the “Class Period”). Plaintiff brings this action on behalf of the Plan and the Class pursuant to § 502(a)(2) and (3) of ERISA, 29 U.S.C. § 1132(a)(2) and (3). As more fully set forth below, Defendants breached their fiduciary duties to the Participants, including those fiduciary duties set forth in ERISA Section 404, 29 U.S.C. § 1104, and Department of Labor Regulations, including 29 C.F.R. § 2550.

2. Specifically, Plaintiff alleges in Count I that certain Defendants, each having certain responsibilities regarding the management and investment of Plan assets, breached their fiduciary duties to them, the Plan and proposed Class by failing to prudently and loyally manage the Plan’s investment in Company securities by (1) continuing to invest Plan assets in Company Stock when it was imprudent to do so; (2) failing to provide complete and accurate information to Plan participants regarding the Company’ financial condition and the prudence of investing in Company Stock; and (3) maintaining the Plan’s pre-existing heavy investment in Flagstar equity when Company Stock was no longer a prudent investment for the Plan. These actions/inactions run directly counter (1) to the express purpose of ERISA pension plans, which are designed to help provide funds for participants’ retirement (see ERISA § 2, 29 U.S.C. § 1001 (“CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY”)).

3. Count II alleges that certain Defendants failed to avoid or ameliorate inherent conflicts of interests which crippled their ability to function as independent, “single-minded” fiduciaries with only the Plan’s and their participants’ best interests in mind.

4. Count III alleges that certain Defendants breached their fiduciary duties by failing to adequately monitor other persons to whom management/administration of Plan assets was delegated, despite the fact that such Defendants knew or should have known that such other fiduciaries were imprudently allowing the Plan to continue offering Flagstar Stock as an investment option and investing Plan assets in Flagstar Stock when it was no longer prudent to do so.

5. Plaintiff alleges that Defendants allowed the imprudent investment of the Plan's assets in Flagstar equity throughout the Class Period despite the fact that they clearly knew or should have known that such investment was imprudent because, as explained in detail below, significant credit risks, along with the uncertainty as to how the Company would handle them and how deep the recession would get, made Flagstar stock a particularly risky and imprudent investment for the Plan's participants' retirement savings. Among other things, (a) the Company was exposed to significant concentrations of credit risk in geographic areas that were some of the most negatively affected areas in the country, including Michigan, California and Florida; (b) Flagstar was not a profitable business and its credit costs and loan losses continually increased during the Class Period; (b) there were serious concerns about the Company's capital levels even as ever-increasing capital infusions were sunk into the Company, by both private parties and the government, to avoid bankruptcy diluting the shareholders' ownership in the Company and the Company's book value; (c) the Company was not able to pay dividends and lacked a reasonable basis for any positive prospects; (d) the company's debt and equity were downgraded repeatedly during the Class Period (e) the above-described serious problems faced by the Company which led to, inter alia, the artificial inflation of Flagstar Stock and created dire financial circumstances for the Company, which was at risk of bankruptcy multiple times during the Class Period; and (f)

heavy investment of retirement savings in Company Stock put Plan participants retirement savings at intolerable risk levels which were likely to inevitably result in significant losses to the Plan, and consequently, to its participants. Nevertheless, Plan fiduciaries continued to allow the Plan and the Plan's participants to hold and purchase Flagstar stock in their individual accounts – and it in fact appears that the Plan's fiduciaries did little, if anything, to protect their wards—as the Company's problems snowballed and as the Company's stock price plummeted.

6. This action is brought on behalf of the Plan and seeks losses to the Plan for which Defendants are liable pursuant to ERISA §§ 409 and 502, 29 U.S.C. §§ 1109 and 1132. Because Plaintiff's claims apply to the Plan, inclusive of all participants with accounts invested in Company Stock during the Class Period, and because ERISA specifically authorizes participants such as Plaintiff to sue for relief to the Plan from breaches of fiduciary duty such as those alleged herein, Plaintiff brings this as a class action on behalf of the Plan and all participants and beneficiaries of the Plan during the proposed Class Period.

JURISDICTION AND VENUE

7. Plaintiff's claims arise under and pursuant to ERISA Section 502, 29 U.S.C. § 1132.

8. This Court has jurisdiction over this action pursuant to ERISA Section 502(e)(1), 29 U.S.C. § 1132(e)(1).

9. Venue is proper in this District pursuant to ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2), because this is a District where the Plan was administered, where breaches of fiduciary duty took place and/or where one or more Defendants reside or may be found.

THE PARTIES

10. Plaintiff Debra Griffin is a resident of the State of Georgia. Plaintiff was employed by Flagstar (or a subsidiary or division of Flagstar) for several years, and maintained an investment in Flagstar common stock in her individual account in the Plan during the Class Period.

11. Defendant Flagstar Bancorp, Inc. is a Michigan-based savings and loan holding company. The Company conducts its business through its subsidiary, Flagstar Bank, FSB (the “Bank”), a federally chartered stock savings bank. During the year ended December 31, 2008, the Company operated 175 banking centers (of which 42 are located in retail stores, such as Wal-Mart) located in Michigan, Indiana and Georgia. It also operates 104 home loan centers located in 27 states. During 2008, the Company opened 12 banking centers, including six in Georgia, five in Michigan and one in Indiana. The Company is incorporated in Michigan and maintains its principal place of business at 5151 Corporate Drive Troy, MI 48098.

12. At all times relevant to this Complaint, the Company managed and administered the Plan and the assets of the Plan and acted as a fiduciary with respect to the Plan, or appointed a committee to do so. The Plan’s governing Plan document, as filed with the SEC as an attachment to a Form S-8 on April 30, 1999, as incorporated by reference in the Company’s 2008 Form 10-K (the “Plan Document”)¹ states, at Section 9.01 that “The Employer may appoint one or more persons as Administrator, who may also be removed by the Employer[,]” but it does not appear that the Company did so. The Form S-8 filed on April 30, 1999 was executed by

¹ Exhibit 10.7 to the Company’s March 13, 2009 Form 10-K references “Flagstar Bank 401(k) Plan (previously filed as Exhibit 4.1 to the Company’s Form S-8 Registration Statement (No. 333-77501), dated April 30, 1999, and incorporated herein by reference). Plaintiffs’ references to the “Plan Document” are to Exhibit 4.1 to the Form S-8 Registration Statement dated April 30, 1999.

“FLAGSTAR BANK, as Plan Administrator” and executed by Mary Kay McGuire in her capacity as Secretary of the Company.

13. Defendant Rebecca A. Lucci (“Lucci”), First Vice President Director Human Resources at the Company, signed the Plan’s Form 11-K Annual Report for the fiscal year ended December 31, 2008, which was filed with the SEC on June 29, 2009 (the “2009 Form 11-K”); Plan’s Form 11-K Annual Report for the fiscal year ended December 31, 2007, which was filed with the SEC on June 30, 2008 (the “2008 Form 11-K”), and; Plan’s Form 11-K Annual Report for the fiscal year ended December 31, 2006, which was filed with the SEC on June 25, 2007 (the “2007 Form 11-K”), all on behalf of the Company as “Plan Administrator.” Defendant Lucci also signed the Plan’s Form 5500 Annual Return/Report of Employee Benefit Plan for fiscal year 2006 (the “2006 5500”) on July 17, 2007 and the Plan’s Form 5500 Annual Return/Report of Employee Benefit Plan for fiscal year 2007 (the “2007 5500”) on August 4, 2008, both on behalf of the Company. Lucci was a Plan fiduciary during the Class Period.

14. Defendant Erin England served as first vice president, human resources, employee benefits manager of the Company as of July 10, 2006. Defendant England signed the 2006 5500 on July 17, 2007 and the 2007 5500 on August 1, 2008, both as “plan administrator.” England was a Plan fiduciary during the Class Period.

15. John Does 1-20 were the committee(s) which administered the Plan and all members thereof. The identity of the committee(s) and the members of the committee(s) which was or were responsible for carrying out the provisions of the Plan is currently not known.

CLASS ACTION ALLEGATIONS

16. Plaintiff brings this action on her own behalf and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class consisting of all current and

former Participants in the Plan for whose individual accounts the Plan held shares of Flagstar common stock (including in the form of Flagstar common stock or units of the Flagstar Stock Fund (the “Fund”)) at any time from December 31, 2006 to the present (the “Class”).

17. 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 that there are, at minimum, thousands of members of the Class. The 2007 5500 lists 3,613 Plan participants at the start of calendar year 2007 and 3,283 Plan participants at the end of calendar year 2007.

18. Common questions of law and fact exist as to all members of the Class which 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 were fiduciaries;
- (b) Whether Defendants breached their fiduciary duties;
- (c) Whether the Plan and the Participants were injured by such breaches; and
- (d) Whether the Class is entitled to damages and injunctive relief.

19. Plaintiff’s claims are typical of the claims of the other members of the Class, as the Plaintiff and all members of the Class sustained injury arising out of Defendants’ wrongful conduct in breaching their fiduciary duties and violating ERISA as complained of herein.

20. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained able counsel with extensive experience in class action ERISA litigation. The interests of Plaintiff are coincident with and not antagonistic to the interests of the other class members.

21. Prosecution of separate actions by members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

22. The claims herein are under ERISA and related principles of federal common law cannot be asserted by the Plaintiff in derivative actions against the company or in class actions under securities law.

23. Under and as required by ERISA, Defendants carry insurance for claims asserted herein that may not be available to the defendants in any other actions.

DESCRIPTION OF THE PLAN

24. At all times relevant to this Complaint, the Plan was an employee benefit plan within the meaning of ERISA Section§ 3(3) and 3(2)(A), 29 U.S.C. §§ 1002(3) and 1002(2)(A).

25. At all times relevant to this Complaint, the Plan was a “defined contribution” or “individual account” plans within the meaning of ERISA Section 3(34), 29 U.S.C. § 1002(34), in that the Plan provided for individual accounts for each Participant and for benefits based solely upon the amount contributed to the Participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other Participants which could be allocated to such Participant’s accounts.

26. At all times relevant to this Complaint the Plan provided a number of different options for investment of the Plan’s assets, including the Fund.

27. At all times relevant to this Complaint, Participants were allowed to direct the Plan to purchase investments from among the investment options available under the Plan and allocate them to their individual accounts. The options were provided solely at the discretion of the Plan's fiduciaries. No Plan investment option was compelled, or even suggested, by the governing plan documents. Section 10.04(c) of the Plan Document, for example, states, in relevant part, that "In its sole discretion, the Investment Committee, or Trustee if there is no Investment Committee: (i) *may* permit the investment of up to 10% of the Trust Fund in Qualifying Employer Securities or 'qualifying employer real property' (as that term is defined in ERISA Section 407(d)), to the extent such investment is compatible with the Sponsor's administrative and operational requirements and framework; and (ii) *may* determine, subject to Section 10.04(b), that a percentage of assets in excess of 10% of the Trust Fund may be invested in Qualifying Employer Securities or 'qualifying employer real property' by a profit-sharing plan." (emphasis added). The Plan Document thus gives the Plan's fiduciaries unfettered discretion in deciding whether or not to allow Company stock to be among the Plan's investment funds.

28. The 2009 Form 11-K states, among other things:

Note A — Description of Plan

The following description of the Flagstar Bank 401(k) Plan (the "Plan") provides only general information. Participants should refer to the Plan document for a more complete description of the Plan's provisions.

General

The Plan is a defined contribution plan covering all employees of Flagstar Bancorp, Inc. (the "Company") who have met the eligibility service requirements. An employee is eligible to participate in the Plan after three months of service and is age 21 or older. The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

Contributions

Eligible employees may contribute up to 60% in 2008 up to the statutory limits (\$15,500 in 2008) per annum, of their eligible compensation to the Plan. Participants that meet certain criteria may make additional “catch-up” contributions of up to \$5,000 in 2008. Participants may also contribute amounts representing rollover contributions from other qualified defined benefit or defined contribution plans. The Company matches employee contributions up to 3% per annum of the employee’s compensation, up to a maximum contribution of \$6,900, excluding the catch-up contributions. The Company may make discretionary contributions to the Plan. No discretionary contributions were made in 2008. All contributions are invested in accordance with the participant’s directive.

Vesting

Participants are immediately vested in their voluntary contributions. Vesting in the Company contributions and related earnings is based on years of service. A participant becomes 100% vested in Company contributions after five years of credited service.

Participants Accounts

Each participant’s account is credited with the participant’s contribution, the Company contribution made on the employee’s behalf and an allocation of Plan earnings based on the employee’s account balance. The benefit to which a participant is entitled is the benefit that can be provided from the participant’s vested account.

* * *

Investment Options

Upon enrollment in the Plan, a participant may direct contributions in 1% increments in any of the available investment options. Participants may change their designation daily.

29. The 2007 and 2008 Forms 11-Ks represent that as of December 31, 2006, the Plan held net assets of \$89,252,658, which consisted of 868,565 shares of Company Common Stock then valued at \$ 12,889,505 (or about 14.5% of total Plan assets); as of December 31, 2007, the Plan held net assets of \$93,806,720, which consisted of 1,551,694 shares of Company Common

Stock then valued at \$ 10,815,307 (or about 11.5% of total Plan assets), and; as of December 31, 2008, the Plan held net assets of \$62,270,174, which consisted of 4,283,809 shares of Company Common Stock then valued at \$ 3,041,504 (or about 5% of total Plan assets).

30. During the Class Period the market price of Flagstar common stock was artificially inflated due to the concealment of Flagstar's true financial and operating condition as described herein. Throughout the Class Period, Flagstar common stock was not a prudent investment for the Participants' individual retirement accounts under the Plan. If Defendants had made full disclosure to the Participants of Flagstar's true financial and operating condition, as described herein, the Participants would not have chosen Flagstar common stock as an investment option under the Plan to the extent that they did. Indeed, had the truth been disclosed to the Participants, Flagstar common stock would not have been chosen by many Participants as an investment option at all.

ADMINISTRATION OF THE PLAN

31. Defendants, as fiduciaries of the Plan, were required by ERISA to furnish certain information to Participants. For example, ERISA Section 101, 29 U.S.C. § 1021, requires a plan's administrator to furnish a Summary Plan Description ("SPD") to the plan's participants. ERISA Section 102, 29 U.S.C. § 1022, provides that an SPD must apprise participants of their rights and obligations under the plan. In addition, every person who held Flagstar stock in a Plan account received annually a Proxy Statement which purported to describe (including through the incorporation of other company documents) the business and operations of Flagstar. A form of the SPD for the Plan was attached as Exhibit 4.2 to the S-8 filed by the Company on April 30, 1999.

32. At all times relevant to this Complaint, Defendants had the discretion to establish and change the investment alternatives among which Participants could direct the investment of the Plan's assets allocated to their accounts.

33. At all times relevant to this Complaint, Defendants had a duty to review the Plan's investment policies and the selection and the performance of investment alternatives offered under the Plan. There was no requirement that any assets of the Plan be invested in Company stock or that Company stock be continued as an investment alternative.

34. At all times relevant to this Complaint, Defendants had a duty to obtain from the Company information necessary for the proper administration of the Plan.

35. At all times relevant to this Complaint, Defendants were fiduciaries of the Plan as defined by ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because they exercised discretionary authority or control respecting management of the Plan or exercised discretionary authority or control respecting management or disposition of assets and had discretionary authority or responsibility in the administration of the Plan.

36. Each Defendant is liable for the breaches of fiduciary duty of the other Defendants under ERISA Section 405, 29 U.S.C. § 1105.

FLAGSTAR STOCK WAS AN IMPRUDENT INVESTMENT FOR THE PLAN

37. As the recession struck the nation and the housing market early in the Class Period, Flagstar found itself particularly exposed to significant concentrations of credit risk in geographic areas that were some of the most negatively affected areas in the country, including Michigan, California and Florida. These significant credit risks, along with the uncertainty as to how the Company would handle them and how deep the recession would get, made Flagstar stock a particularly risky and imprudent investment for the Plan's participants' retirement

savings. The Plan's fiduciaries, consistent with ERISA and the Plan, had a duty not to offer the Fund, and/or not to allow the Fund to purchase and hold shares of Flagstar stock during the Class Period.

38. Shortly after the beginning of the Class Period, on January 30, 2007, the Company issued a Form 8-K which contained a press release announcing Flagstar's results for the fourth quarter and full year of 2006: It announced that the Company's fourth-quarter net income fell sharply to \$6.9 million, or 11 cents a share, from \$22.8 million, or 36 cents a share, a year earlier and that total 2006 profits for the Company were \$75.2 million, down from \$79.9 million a year earlier, with lower interest income, slower loan sales and a one-time charge in the fourth-quarter contributed to the decline.

39. On February 28, 2007, the Company announced that it would cut its dividend by 33% to ten cents per share, applicable to the March 30, 2007 distribution, because of declining profits.

40. On April 27, 2007, the Company issued a Form 8-K which contained a press release from the prior day announcing Flagstar's results for the first quarter of 2007. The Company reported earnings of \$7.8 million, down 59% from the year earlier. Diluted earnings per share were down 59%, to 12cents, 7 cents below the average of analysts' expectations in a Thomson Financial survey. For the first quarter of 2007 the Company's net interest income fell 20%, to \$43.7 million, and net interest expense was up 27%, to \$168.6 million. Flagstar's provision for loan losses rose 104%, to \$8.3 million, prompted by a 29% increase in nonperforming loans, to \$74.6 million.

41. On July 31, 2007, the Company issued a Form 8-K which contained a press release from the prior day announcing Flagstar's results for the second quarter of 2007. The

Company reported earnings of \$15.1 million, or \$0.25 per share (diluted). Company stock fell over 5%, from \$11.24 per share to \$10.70 per share, on the news.

42. On October 31, 2007, the Company issued a Form 8-K which contained a press release from the prior day announcing Flagstar's results for the third quarter of 2007. The company reported a loss of \$32.1 million, or 53 cents, compared with net income of \$20.8 million, or 32 cents a share, a year earlier. The Company blamed weakness in the real estate market and attributing the loss to a decrease in gains on sale of mortgage servicing rights, an increase in the provision for loan loss and an increase in losses on loan sales.

43. Shares of Company stock plummeted over 16%, from \$8.09 per share to \$6.95 per share on November 1, and continued to fall to \$6.07 per share the next day (a two day drop of almost 19%).

44. As a result of the Company's October 30, 2007 announcement, Terry J. McEvoy, an analyst with Oppenheimer & Co. Inc. in New York, said he does not recommend Flagstar's shares, which have dropped 42% this year, since the company "continues to struggle with economic conditions in Michigan and operating conditions in the mortgage market" in general.

45. On December 10, 2007, analysts at Friedman Billings Ramsey lowered their price target on Flagstar because Flagstar faced higher credit costs. FBR also lowered its price target on Flagstar to \$8 from a previous target of \$11. "We believe that the weakening house prices and the weak Michigan labor market will continue to impact FBC's earnings over the next few quarters," FBR said in a report. FBR noted that the bank's third-quarter loss exceeded Wall Street expectations. The wider-than-expected loss primarily reflected higher credit provisions, a decrease in gain-on-loan sales and write-downs of residual assets.

46. On January 29, 2008, the Company issued a Form 8-K which contained a press release announcing Flagstar's results for the full year and fourth quarter of 2007. The Company reported a net loss for 2007 of \$39.2 million, or \$(0.64) per share (diluted) and a 2007 fourth quarter net loss of \$30.1 million, or \$(0.50) per share (diluted). Full year 2006 earnings were \$75.2 million, or \$1.17 per share (diluted) and 2006 fourth quarter net earnings were \$6.9 million, or \$0.11 per share (diluted). The Company attributed the 2007 loss to a decrease in gains on sales of mortgage servicing rights, an increase in credit costs and an impairment in securities values. Additionally, the Company announced that it may suspend dividend payment to preserve cash until the credit crisis alleviates. The Company also announced that until a clearer picture emerges on the credit front, it would only originate mortgage loans saleable to the government-sponsored enterprises or FHA.

47. On July 29, 2008 Flagstar shares fell 66 cents, or 7.4%, to \$8.31 in regular trading. Company stock fell an additional 15% on January 30, 2008, to close at \$7.23 per share.

48. On January 31, 2008, in response to the Company's problems, Moody's Investors Service downgraded the ratings of Flagstar Bank, FSB, the Company's subsidiary. The thrift's long-term deposits were lowered to Baa3 from Baa2, short-term deposits were lowered to Prime-3 from Prime-2, and the bank's financial strength rating was lowered to D+ from C-. Following the rating action, the outlook on Flagstar was declared negative.

49. On February 19, 2008 the Company said it would not pay a shareholder dividend for the first quarter to preserve capital.

"It is prudent to preserve capital by suspending the dividend until the capital markets normalize and residential real estate shows signs of improvement," Mark Hammond, Flagstar's chief executive and vice chairman, said in a press release late Tuesday. "The board will reassess the dividend in the second quarter based

upon first-quarter results and the state of the capital and residential real estate markets.”

50. As a result, by the end of the day on February 20, 2008, Flagstar’s shares had dropped 4.1% from Tuesday’s close, to \$7.67. The shares had dropped roughly 46% in the last year.

51. On April 23, 2008, the Company issued a Form 8-K which contained a press release announcing Flagstar’s results for the first quarter of 2008. The Company reported a \$17 million loss on loan administration activities after using fair value accounting rather than amortization. The Company’s net interest income excluding loan loss provision increased to \$54.8 million from \$52.9 million. Non-interest income rose to \$52.7 million from \$39.5 million. Flagstar boosted its loan loss provision to \$34.3 million from \$8.3 million in the year-prior period. Flagstar reported \$15.9 billion in assets as of March 31, 2008, compared with \$15.4 billion on March 31, 2007.

52. On May 16, 2008, the Company issued a Form 8-K which contained a press release announcing that the Company hoped to strengthen its capital position by raising \$100 million by selling equity stakes at a discount. The Company said it would sell about 11.4 million common shares to seven institutional investors at \$4.25 each -- a discount of about 29 percent to the stock’s recent close. In addition to the common stock, the thrift said it will sell these investors about \$48 million of preferred stock convertible into common stock at \$4.25 per share.

53. On May 16, 2008, Flagstar shares fell as much as 22 percent to \$4.65, before recouping some losses to trade down \$1.06 at \$4.89. The Company was the biggest decliner in the S&P SmallCap 600 that day.

54. “It’s (the capital raise) diluting existing shareholders and existing book value to the tune of 18 percent,” said Terry McEvoy, an analyst at Oppenheimer & Co. “That’s putting

pressure on the stock.” The Company is issuing 23.3 million shares, increasing its share count by more than a third to 84.1 million, McEvoy said.

55. On July 18, 2008, the Company issued a Form 8-K which contained a press release announcing Flagstar’s results for the second quarter of 2008. The Company reported net earnings of \$15.7 million, or \$0.22 per share (diluted), benefiting from gains on its mortgage servicing portfolio.

56. As a response, the Company’s stock fell almost ten percent to \$3.49 per share. The stock continued to decline for three more days, falling to \$2.78 per share on June 24, 2008.

57. Analysts at Friedman Billings Ramsey lowered their price target on Flagstar, calling the results “noisy” and noting that credit conditions continue to deteriorate for Flagstar.

58. On October 1, 2008, the Company was downgraded to Underperform from Buy at Merrill Lynch, with a price target of \$2 for the stock.

59. On October 31, 2008, the Company issued a Form 8-K which contained a press release announcing Flagstar’s results for the third quarter of 2008. The Company reported a 2008 third quarter net loss of \$62.1 million, or \$(0.79) per share (diluted) blaming “several significant credit and asset disposition charges.” For the nine months ended September 30, 2008, Flagstar’s net loss was \$56.9 million, or \$(0.83) per share (diluted), as compared to a net loss of \$9.2 million, or \$(0.15) per share (diluted) for the same period 2007. The Company also said that it has applied for money from the Treasury Department’s Capital Purchase Program, part of the government’s \$700-billion, financial-rescue plan. If granted approval, the maximum Flagstar could receive is \$260 million.

60. In response, Company stock cratered, falling 21.6% on October 31, 2008 and 16% on November 3 (the next trading day), closing after two days down 41% at \$1.64 per share.

61. The stock continued to decline on the Company's poor prospects, closing below \$1 per share on November 11.

62. Early in December of 2008, the New York Stock Exchange notified Flagstar that its stock price was in violation of listing requirements, having been below \$1 for more than 30 consecutive days. In May of 2009 the Company regained good standing with the NYSE.

63. On December 17, 2008, the Company issued a Form 8-K which contained a press release announcing that Matlin Patterson, a distressed debt specialist, had agreed to pay \$250 million for a 70 percent stake in Flagstar as long as the US federal government injected \$250 million in the bank. The New York-based private equity firm said it would buy its stake without approval from the bank's shareholders, exploiting an exception to New York Stock Exchange regulations. The rules require shareholder approval prior to the issuance of securities representing 20 percent of the outstanding shares of a listed company. The exception triggers in cases in which the delay involved in getting shareholder approval would seriously jeopardize the financial viability of the listed company.

64. Jason Ren, an analyst with Morningstar, said the Flagstar had about \$3 billion worth of first-time mortgages located in areas hard-hit by the real estate downturn, including California, Florida and Michigan. He said he expects the Company to take more losses once it publishes updated numbers on its write-offs of 90-day delinquent loans.

65. Investor skepticism piqued over whether the Company would be eligible for TARP funds. Bose George, an analyst at KBW Inc.'s Keefe, Bruyette & Woods Inc., said that several companies have been waiting as long or longer for word from the Treasury and that Flagstar may be facing extra scrutiny because its loan portfolio is dominated by mortgages. Though George said he does not believe that Matlin Patterson regrets its investment in the

embattled company, he said Flagstar's performance has been sobering. "It is a safe assumption that when the investment was first made, they were expecting more income from Flagstar that would have strengthened the capital levels by now," George said. "That is not what has happened."

66. On December 31, 2008, the Company issued a Form 8-K which contained a press release announcing that it has received preliminary approval from the United States Department of the Treasury of its application to participate in Treasury's Capital Purchase Program. Under the preliminary agreement, the Company would sell \$266 million of newly issued preferred Flagstar stock to the U.S. Treasury Department and the government would also receive warrants to purchase Flagstar common stock.

67. On January 2, 2009, Company shares soared on news that the Company would bypass shareholder approval for a placement of private capital that hinged on its ability to get money from the Treasury. The Company had announced late Wednesday that the New York Stock Exchange had accepted its application to skip a shareholder vote on a \$250 million investment by an affiliate of Matlin Patterson. "The delay necessary in securing shareholder approval for the consummation of the stock issuance would seriously jeopardize the financial viability of Flagstar," the Company said in a press release. The Company also said in its release that the Matlin Patterson investment was needed to obtain the \$266 million it has requested from the Treasury's Troubled Asset Relief Program.

68. By February of 2009, the Company had arranged for \$522 million in new capital, including \$266.6 million from TARP, \$250 million in an equity investment and \$5.3 million from management. It had also entered an agreement with its investor, an affiliate of Matlin Patterson, for an additional \$100 million of equity during the first quarter.

69. But the same day that Flagstar finalized more than \$500 million in capital and announced another \$100 million in capital was coming, the Company posted a \$200.2 million quarterly loss. The quarterly loss was increased to \$218.4 million in an SEC filing of March 13, 2009 that attributed the extra \$18.1 million hit to an other-than-temporary impairment charge on a collateralized mortgage obligation and a writedown on the value of its deferred tax asset. The Company also said in filing its results that nonperforming assets had increased to 5.33% of the total, from 1.91% a year earlier.

70. On April 22, 2009, the Company issued a Form 8-K which contained a press release announcing Flagstar's results for the first quarter of 2009. The Company reported a net loss applicable to common stockholders of \$67.41 million, or \$0.76 per share, as compared to a net loss of \$10.6 million, or \$0.18 per share, for the first quarter ended March 31, 2008. Net interest income for the first quarter of 2009 was \$56.73 million, compared to \$54.8 million for the same period of 2008.

71. After the close of trading on May 26, 2009, Bank of the Ozarks (OZRK) replaced Flagstar Bancorp (FBC) in the S&P SmallCap 600.

72. On July 30, 2009, the Company issued a Form 8-K which contained a press release announcing Flagstar's results for the second quarter of 2009. The Company reported a net loss of \$76.6 million, or (32 cents) per share (diluted), as compared to a net loss of \$67.4 million, or (76 cents) per share (diluted) on a linked quarter basis. For the six months of this year that ended June 30, Flagstar's net *loss* applicable to common stockholders was \$144.0 million, or (88 cents) per share (diluted), as compared to net *earnings* of \$5.1 million, or eight cents per share (diluted) for the same period 2008.

73. On August 14, 2009, Bloomberg News published an article entitled “Toxic Loans Topping 5% May Push 150 Banks to Point of No Return” which reported that

More than 150 publicly traded U.S. lenders own nonperforming loans that equal 5 percent or more of their holdings, a level that former regulators say can wipe out a bank’s equity and threaten its survival.

The number of banks exceeding the threshold more than doubled in the year through June, according to data compiled by Bloomberg, as real estate and credit card defaults surged. Almost 300 reported 3 percent or more of their loans were nonperforming, a term for commercial and consumer debt that has stopped collecting interest or will no longer be paid in full.

The biggest banks with nonperforming loans of at least 5 percent include Wisconsin’s Marshall & Ilsley Corp. and Georgia’s Synovus Financial Corp., according to Bloomberg data. *Among those exceeding 10 percent, the biggest in the 50 U.S. states was Michigan’s Flagstar Bancorp.* All said in second- quarter filings they’re “well-capitalized” by regulatory standards, which means they’re considered financially sound.

“At a 3 percent level, I’d be concerned that there’s some underlying issue, and if they’re at 5 percent, chances are regulators have them classified as being in unsafe and unsound condition,” said Walter Mix, former commissioner of the California Department of Financial Institutions, and now a managing director of consulting firm LECG in Los Angeles. He wasn’t commenting on any specific banks.

* * *

Michigan Home

Flagstar is based in Troy, Michigan, the state with the nation’s highest unemployment rate. Flagstar has \$16.4 billion in assets and reported last month that 11.2 percent of its loans were nonperforming; about two-thirds were home mortgages. Flagstar CFO Paul Borja didn’t return repeated calls for comment.

The bank’s allowance for loan losses was 5.4 percent of total loans at the end of the second quarter, compared with 3.3 percent at Synovus and 2.8 percent at Marshall & Ilsley, according to company filings. All three reported at least three straight quarterly deficits.

The FDIC doesn't comment on lenders that are open and operating and doesn't disclose which banks are on its problem list. The agency will probably impose an emergency fee on the more than 8,200 banks it insures in the fourth quarter to replenish the insurance fund, the second special assessment this year, Chairman Sheila Bair said last week. The FDIC attempts to sell deposits and assets of seized banks to healthier firms to avoid eroding the fund, said agency spokesman David Barr.

Capital Levels

To determine which banks are most troubled, regulators compare the ratio of nonperforming loans to the percentage of equity a firm has relative to its assets, said Barth, the former OTS economist. A company with 5 percent nonperforming loans and equity of 8 percent is better positioned than one with the same amount of troubled loans and equity of 4 percent, he said.

Flagstar's equity-to-assets ratio in the second quarter was 5.4 percent, Synovus's was 8.9 percent and Marshall & Ilsley, which raised \$552 million through a stock sale in June, was at 11 percent, according to the banks.

The three lenders that failed last week -- Florida's First State Bank and Community National Bank and Oregon's Community First Bank -- all had nonperforming loans above 6 percent and equity ratios below 4.5 percent.

"The nonperforming ratio, in and of itself, should be a great concern," said Barth, a professor of finance at Auburn University in Alabama and senior finance fellow at the Milken Institute in Santa Monica, California. "It becomes even more troublesome when it goes above 3 percent and the equity-to-asset ratio is quite low."

Toast Time

While 5 percent can be "fatal" for home lenders, commercial real estate lenders may be able to withstand higher rates, said William K. Black, former lawyer at the Federal Home Loan Bank of San Francisco and the OTS. Commercial loans carry higher interest rates because they're riskier, he said.

"At the 5 percent range, you're probably hurting," said Black, an associate professor of economics and law at the University of Missouri-Kansas City. "Once it gets around 10 percent, you're likely toast."

74. On the news, Company stock fell over 15% on August 14th and 17th, 2009.

75. On November 3, 2009, the Company issued a Form 8-K which contained a press release announcing Flagstar's results for the third quarter of 2009. The Company reported a wider-than-expected quarterly loss of \$298.2 million, or 64 cents per share, compared with a loss of \$62.1 million, or 79 cents per share, a year ago., hurt by higher non-performing assets and tax expenses, and filed for a mixed shelf of up to \$2 billion, sending its shares down 13 percent.

76. This was the Company's fifth consecutive quarterly loss, and its biggest one yet by far. The Company also filed a shelf registration to raise up to \$1.83 billion and a proxy statement that asked shareholders to increase the number of shares outstanding from 750 million to 3 billion.

77. In November 2009 analysts at FBR Capital Markets expressed serious concerns about capital adequacy at Flagstar Bancorp Inc., Troy, Mich., as the Company's tangible common equity ratio decreased to 2.75% from 4.01% at the end of the third quarter. "We would encourage FBC to boost capital levels, as we expect credit headwinds to persist and remain elevated for some time. We are lowering our fiscal-year 2009 and fiscal-year 2010 earnings-per-share estimates to \$1.85 and \$0.30 from \$1.25 and \$0.20, respectively," said the report, written by Paul Miller, William Wallace and Jessica Halenda. FBR cut its price target by half to \$0.50 per share from \$1.

78. On December 14, 2009, the Company announced that it was short on funds and it intended to commence a rights offering for up to approximately 704 million shares of its common stock. Despite raising nearly \$620 million in capital this year, the Company announced that it would be turning to shareholders for as much as \$500 million through a rights offering. The fresh capital was likely needed to satisfy regulators, who have limited the Troy, Mich.,

company's ability to grow and imposed other restrictions. On December 14, 2009, American Banker reported that

"This week's announcement represents a stark contrast from Flagstar's posture just last month. The company then said it was positioning itself for a common stock offering, with an eye to the proceeds financing future acquisitions.

"It is clear that they need to get this done, since the regulators won't lift those constraints until they are better capitalized," said Bose George, an analyst with KBW Inc.'s Keefe, Bruyette & Woods Inc. "The rights offering, I think, is the route they had to take, because they saw underwriting an offering as too difficult to do."

* * *

. . . Flagstar has lost \$442 million this year, including a \$298.2 million loss booked in the third quarter. That loss stemmed from a \$183.9 million valuation allowance on its deferred tax asset as well as a \$125.5 million provision for loan losses.

Flagstar's nonperforming assets totaled \$1.25 billion at the end of the third quarter, or 8.41% of total assets.

The company's thrift unit remained well capitalized, however, with a leverage ratio of 6.39% and a total risk-based capital ratio of 12.06%. Yet George said the company's tangible common equity ratio has dwindled to 4.5%.

Although that ratio is not an official regulatory ratio, it has become an increasingly important measure of a bank company's ability to withstand losses. Analysts typically consider anything below 5% as worrisome. An additional \$500 million in equity would double the company's tangible common equity ratio, George said.

George said that in coming quarters he is not expecting another credit hit similar to the one Flagstar took in the third quarter. He is expecting the company to lose 8 cents per share in the fourth quarter, a fraction of the 64 cents it lost in the third quarter. He is forecasting a loss of 14 cents for all of next year.

Still, he said, the possible presence of a regulatory order signals that bank regulators do not consider the company's existing capital base strong enough to withstand future credit costs.

George said he does not have a good read on how the shareholder base might react to the offering, since most of the institutional investors exited the company when Matlin Patterson built its 80% stake this year. “Honestly, I am not sure if the current shareholders will want to step up or not,” George said.

Rebel A. Cole, a finance and real estate professor at DePaul University in Chicago and a former Federal Reserve Board economist, was decidedly more pessimistic about Flagstar’s future as well as its prospects for raising more capital: *“I can’t imagine why anybody would be putting more money into a black hole like that.”*

The thrift unit had \$902.9 million of noncurrent loans at Sept. 30, and only \$928.9 million of total equity, according to Federal Deposit Insurance Corp. data.

“When your nonperforming loans exceed your capital, you are pretty much a dead soldier,” Cole said. Just to ensure capital stays at the same level it is now, “they need \$1 billion,” he said.

Without clarifying whether it has received a formal order, the company said regulators imposed restrictions on growth, accepting brokered deposits, making capital distributions and appointing directors or senior executives, among other things. It said that the restrictions could have an adverse impact on its thrift unit and that it intends to ask for a waiver on some or all of them.

Kevin Jacques, a finance professor at Baldwin-Wallace College in Berea, Ohio, and a former Treasury Department official, said he thinks getting one could be tough, even if Flagstar succeeds in adding capital through the rights offering.

“The regulators aren’t going to put restrictions on these kinds of activities unless they view this thrift as in trouble and moving in the wrong direction,” he said. “They are going to be very reluctant to waive anything.”

However, Cole said, Flagstar’s size and its commitment from private equity could sway regulators, despite its poor shape. “The last thing the FDIC needs is a \$15 billion-asset institution to resolve when they can’t even handle the \$500 million-asset ones they have now,” Cole said.

(emphasis added).

79. Similarly, on January 9, 2010, the Detroit Free Press reported that:

A year after a New York private equity firm took control of Troy-based Flagstar Bancorp, the fate of Michigan's sixth-largest bank hinges on whether its owner will inject millions of additional dollars into the ailing company.

With mounting losses from real estate loans gone bad, Flagstar has warned that it expects regulators will force it to raise more capital. The bank's earnings are not covering its quarterly losses, according to analysts. Regulators have already placed restrictions on some of Flagstar's operations.

To solve its cash crunch, Flagstar hopes to obtain up to \$500 million by selling up to 704 million shares of its common stock to existing shareholders, chief among them Matlin Patterson Global Advisers, which owns 80% of the bank. Last week, Flagstar expressed optimism that it will be able to raise at least \$300 million.

For Michigan and U.S. taxpayers, much is at stake. At the end of September, Flagstar had 3,656 employees. It operates 176 bank branches and 42 home lending centers, primarily in Michigan but also in Indiana and Georgia.

The bank has \$8.5 billion in deposits and received \$267 million in bailout money from the U.S. Treasury Department.

Matlin Patterson, which has invested \$350 million in Flagstar, and other shareholders have until Jan. 25 to accept Flagstar's offer to purchase more shares. But shareholders can get a better deal on the open market. Flagstar is selling its new shares for 71 cents each, a penny higher than the stock's closing price Friday.

Terry McEvoy, an analyst at Oppenheimer, said he believes that Matlin Patterson will funnel more money into Flagstar to avoid jeopardizing its existing investment.

He said it's "anyone's guess" whether Flagstar will be able to absorb future loan losses and return to profitability.

(Emphasis added).

80. On February 9, 2010, Flagstar announced that it came up nearly \$200 million shy of its capital-raising goal in a rights offering that had expired the previous day. American Banker reported in an article entitled that "Flagstar Raises \$300M, 60% of Its Goal":

Nearly all the money — \$300 million — came from a capital injection by the company's controlling shareholder, MatlinPatterson Global Advisors LLC, a New York private-equity firm.

Terry McEvoy, an analyst at Oppenheimer & Co. in Washington, said Flagstar is the exception, that most financial services companies in the past six months — particularly those looking to repay Troubled Asset Relief Program funds — have been able to raise the needed capital through public offerings.

"I think with Flagstar, because a large percentage of the company is already owned by a private-equity firm, you have a small pool of institutional investors, and clearly there wasn't participation there," he said. The lack of interest "could reflect the continuing losses that the company has experienced and the regulatory issues that have popped up."

Flagstar has been rocked by credit-quality issues. At Dec. 31, its thrift was well-capitalized, with a total risk-based capital ratio of 11.68%, but nonperforming assets were \$1.3 billion, or 8.44% of total assets.

Last week the company reported it lost \$496.6 million in 2009, 80% more than a year earlier. Its fourth-quarter loss of \$71.6 million, however, was an improvement of 67% on the year-earlier quarter.

The company also reported last week that, along with its Flagstar Bank thrift unit, it has entered into supervisory agreements with the Office of Thrift Supervision. The agreements call for Flagstar Bank to submit plans for increasing core deposits, improving asset quality, strengthening loan administration and reducing certain concentrations. The order also prohibits the bank from expanding any more than the amount of net interest credited on deposits during any quarter.

81. As a result of the Company's poor prospects and continuous downgrades during the Class Period, the Company's stock, which had been trading at \$14.95 per share on January 3, 2007, steadily declined to a closing price of \$0.60 per share on February 9, 2010, a decrease of \$14.31 per share, or almost 96%, thereby greatly diminishing the retirement benefits of Plaintiff and the Plan. Meanwhile, the Plan's fiduciaries, despite having fiduciary duties and unfettered

discretion to protect the retirement savings of the proposed Class, did not act consistently with their duties under ERISA to protect Plaintiff or the Plan.

BREACHES OF FIDUCIARY DUTY

82. As required by ERISA, Defendants issued one or more SPDs, each of which either referred to or incorporated by reference the documents filed by Flagstar with the SEC under the federal securities laws. These filings, however, contained numerous material misrepresentations and omitted to state material facts which were necessary to make the statements which were made not misleading. The fiduciary communications sent to Plan participants did not adequately explain the risk and return profile of the Fund, including that (a) the Company was exposed to significant concentrations of credit risk in geographic areas that were some of the most negatively affected areas in the country, including Michigan, California and Florida; (b) Flagstar was not a profitable business and its credit costs and loan losses continually increased during the Class Period; (b) there were serious concerns about the Company's capital levels even as ever-increasing capital infusions were sunk into the Company, by both private parties and the government, to avoid bankruptcy diluting the shareholders' ownership in the Company and the Company's book value; (c) the Company was not able to pay dividends and lacked a reasonable basis for any positive prospects; (d) the company's debt and equity were downgraded repeatedly during the Class Period (e) the above-described serious problems faced by the Company which led to, inter alia, the artificial inflation of Flagstar Stock and created dire financial circumstances for the Company, which was at risk of bankruptcy multiple times during the Class Period; and (f) heavy investment of retirement savings in Company Stock put Plan participants retirement savings at intolerable risk levels which were likely to inevitably result in significant losses to the Plan, and consequently, to its participants.

83. Defendants were not obligated by ERISA or by the Plan to discharge their duty to provide information to Participants through the mechanism of incorporation of SEC filings. Defendants could have fulfilled this duty by setting forth sufficient and accurate information in the SPDs themselves, and updating such information as appropriate. Defendants chose, however, to adopt the mechanism of incorporation of SEC filings into the SPDs, and the SEC filings contained materially false and misleading information which caused loss to the Plan and the Participants as set forth above.

84. At all relevant times, Defendants should have known of the material misrepresentations and omissions, including those filed with the SEC and incorporated by reference in the SPDs.

85. Flagstar opened the class period trading at \$14.95 per share on January 3, 2007, and swiftly and steadily declined to a closing price of \$0.64 per share on January 25, 2010, a decrease of \$14.31 per share, or almost 96%, thereby greatly diminishing the retirement benefits of Plaintiff and the Plan.

MISMANAGEMENT OF PLAN ASSETS

86. Pursuant to ERISA Section 404(a), 29 U.S.C. § 1104(a), at all times relevant to this Complaint, Defendants had a duty to discharge their duties with respect to the Plan with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and of like aims, and to diversify investments in the Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

87. Defendants are not entitled to the protections of ERISA Section 404(c), 29 U.S.C. § 1104(c), because the Participants did not exercise independent control over their accounts,

because Defendants subjected them to improper influence with respect to the Plan's investments in Flagstar common stock, and because Defendants concealed material non-public information concerning Flagstar that they were not precluded from disclosing under applicable law.

88. Defendants breached their fiduciary duties in that they should have known the facts alleged above and should have known that the Plan should not have invested in Flagstar common stock during the Class Period.

COUNT I

Failure to Prudently and Loyalily Manage the Plan's Assets (Breaches of Fiduciary Duties in Violation of ERISA § 404 and § 405 by All Defendants)

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

90. 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) in that they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

91. 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 the Company's stock in the Plan were prudent and that such investment was consistent with the purpose of the Plan. Defendants are liable for losses incurred as a result of such investments being imprudent.

92. 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.

93. Defendants' duty of loyalty and prudence also obligates them to speak truthfully to participants, not to mislead them regarding the Plan or its 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 inaccurate or misleading information, or concealing material information, regarding Plan investments/investment options such that participants can make informed decisions with regard to the prudence of investing in such options made available under the Plan.

94. Defendants breached their duties to prudently and loyally manage the Plan's assets. During the Class Period these Defendants knew or should have known that, as described herein, the Flagstar Stock was not a suitable and appropriate investment for the Plan. Investment in Company Stock during the Class Period clearly did not serve the Plan's stated purpose, and was clearly too risky for retirement savings. Yet, during the Class Period, despite their knowledge of the imprudence of the investment, Defendants failed to take any meaningful steps to protect Plan participants from the inevitable losses that they knew or should have known would ensue as a result of the above-described problems.

95. Defendants also breached their duties of loyalty and prudence by failing to provide complete and accurate information regarding the Company's true financial condition and

the Company's concealment of the same and, generally, by conveying inaccurate information regarding the Company's future outlook. During the Class Period, upon information and belief, the Company fostered a positive attitude toward the Company's stock, and/or allowed participants in the Plan to follow their natural bias towards investment in the equities of their employer by not disclosing negative material information concerning investment in the Company's stock. As such, participants in the Plan could not appreciate the true risks presented by investments in the Company's stock and therefore could not make informed decisions regarding their investments in the Plan.

96. The Defendants also breached their co-fiduciary obligations by, among their other failures: knowingly participating in, or knowingly undertaking to conceal, the other Defendants failure to disclose crucial information regarding the Company's operations and artificial inflation of the price of the Company Stock. Defendants had or should have had knowledge of such breaches by other Plan fiduciaries, yet made no effort to remedy them.

97. 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.

98. 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 Duty to Avoid Conflicts of Interest (Breaches of Fiduciary Duties in Violation of ERISA §§ 404 and 405 by all Defendants)

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

100. At all relevant times, as alleged above, Defendants were fiduciaries within the Plan within meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Consequently, they were bound by the duties of loyalty, exclusive purpose and prudence.

101. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), imposes on Plan fiduciaries a duty of loyalty, that is, a duty to discharge his 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.

102. Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, inter alia: failing to timely engage independent fiduciaries who could make independent judgments concerning the Plan's investments in the Company's own securities; and by otherwise placing their own and/or the Company's interests above the interests of the participants with respect to the Plan's investment in the Company's securities.

103. As a consequence of Defendants' breaches of fiduciary duty, the Plan suffered millions of dollars in losses. If Defendants had discharged their fiduciary duties to prudently manage and 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 duties alleged herein, the Plan, and indirectly Plaintiff and the Plan's other participants and beneficiaries, lost a significant portion of their retirement investments.

104. 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 III

Failure to Adequately Monitor Other Fiduciaries and Provide Them with Accurate Information (Breaches of Fiduciary Duties in Violation of ERISA § 404 by Flagstar and the Monitoring Defendants)

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

106. At all relevant times, as alleged above, Flagstar and the Monitoring Defendants were fiduciaries, within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

107. At all relevant times, as alleged above, the scope of the fiduciary responsibility of Flagstar and the Monitoring Defendants included the responsibility to appoint, evaluate, and monitor other fiduciaries, including, without limitation, the appointed Plan Committee and all other Company officers, employees and agents to whom fiduciary responsibilities were delegated.

108. The duty to monitor entails both giving information to and reviewing the actions of the monitored fiduciaries. In this case, that means that the monitoring fiduciaries, Flagstar and the Monitoring Defendants, had the duty to:

- (1) Ensure that the monitored fiduciaries 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, and the behavior of the Plan's participants;
- (2) Ensure that the monitored fiduciaries are provided with adequate financial

resources to do their job;

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

(4) Ensure that the monitored fiduciaries have ready access to outside, impartial advisors when needed;

(5) Ensure that the monitored fiduciaries maintain adequate records of the information on which they base their decisions and analysis with respect to the Plan's investments; and

(6) Ensure that the monitored fiduciaries report regularly to Flagstar and the Monitoring Defendants. The Company and/or the Monitoring Defendants must then review, understand, and approve the conduct of the hands-on fiduciaries.

109. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment of a Plan's assets, and must take prompt and effective action to protect a Plan and its 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 a plan and a plan's assets.

110. Flagstar and the Monitoring Defendants breached their fiduciary monitoring duties by, among other things, (a) failing to ensure that the monitored fiduciaries had access to knowledge about the Company's business problems alleged above, which made Company stock an imprudent retirement investment, and (b) failing to ensure that the monitored fiduciaries completely appreciated the huge risk of significant investment of the retirement savings of rank

and file employees in Company Stock, an investment that was imprudent and subject to inevitable and significant depreciation. Flagstar and the Monitoring Defendants knew or should have known that the fiduciaries they were responsible for monitoring were (i) continuing to invest the assets of the Plan in Company Stock when it no longer was prudent to do so; and (ii) imprudently allowing the Plan to continue offering Company Stock as an investment alternative. Despite this knowledge, Flagstar and the Monitoring Defendants failed to take action to protect the Plan, and concomitantly the Plan's participants, from the consequences of these fiduciaries' failures.

111. In addition, Flagstar and the Monitoring Defendants, in connection with their monitoring and oversight duties, were required to disclose to the monitored fiduciaries accurate information about the financial condition of Flagstar that they knew or should have known that these Defendants needed to make sufficiently informed decisions. By remaining silent and continuing to conceal such information from the other fiduciaries, these Defendants breached their monitoring duties under the Plan and ERISA.

112. Flagstar and the Monitoring Defendants are liable as co-fiduciaries because they knowingly participated in the each other's fiduciary breaches as well as those by the monitored fiduciaries, they enabled the breaches by these Defendants, and they failed to make any effort to remedy these breaches, despite having knowledge of them.

113. 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 retirement investments.

114. 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.

CAUSATION

115. The Plan suffered millions of dollars in losses because substantial assets of the Plan were imprudently invested, or allowed to be invested by Defendants, in Company Stock during the Class Period, in breach of Defendants' fiduciary duties. These losses were reflected in the diminished account balances of the Plan's participants.

116. Defendants are responsible for losses caused by participants' failure to exercise voluntary diversification options. By failing to apprise participants of the problems within the Company and of the fact that the Company stock price was artificially inflated, as further described infra, Defendants misrepresented the soundness of Company Stock as an investment vehicle. As a consequence, regardless of any ability to divest, participants did not exercise independent control over their investments in the Company Stock, and Defendants remain liable under ERISA for losses caused by such investment.

117. Had the Defendants properly discharged their fiduciary and/or co-fiduciary duties, the Plan and participants would have avoided a substantial portion of the losses that they suffered through their continued investment in the Company stock.

118. Plaintiff believes that the monies invested in the Flagstar Stock Fund should, absent participant direction otherwise, have been invested in a money market fund (See the SPD for the Plan was attached as Exhibit 4.2 to the S-8 filed by the Company on April 30, 1999, noting that "IF [participants] FAIL TO MAKE AN ELECTION, [their] CONTRIBUTIONS

WILL BE FULLY INVESTED IN THE ML RETIREMENT PRESERVATION TRUST.”)
(capitalization in original).

REMEDY FOR BREACHES OF FIDUCIARY DUTY

119. As noted above, as a consequence of the Defendants’ breaches, the Plan suffered significant losses.

120. ERISA § 502(a), 29 U.S.C. § 1132(a), 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 . . .”

121. 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 its 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.

122. Plaintiff, the Plan, and the Class are therefore entitled to relief from the Defendants in the form of: (1) a monetary payment to the Plan to make good to the Plan 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); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a), 29 U.S.C. §§ 1109(a) and 1132(a);

(3) 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; (4) taxable costs and (5) interests on these amounts, as provided by law; and (6) such other legal or equitable relief as may be just and proper.

123. Each Defendant is jointly liable for the acts of the other Defendants as a co-fiduciary.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for:

A. Actual monetary damages in the amount of any losses the Plan suffered, with such losses to be allocated among the Participants' individual accounts in proportion to the accounts' losses;

B. Costs pursuant to 29 U.S.C. § 1132(g);

C. Attorneys' fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine;
and,

D. Such other relief as the Court may deem just and proper.

JURY TRIAL DEMAND

Plaintiff demands trial by jury of all issues so triable.

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Dated: February 11, 2010