

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

	X	
ANN I. TAYLOR, on Behalf of Herself and	:	
a Class of Persons Similarly Situated,	:	<b>CLASS ACTION</b>
	:	
Plaintiff,	:	<b>COMPLAINT FOR BREACH OF</b>
v.	:	<b>FIDUCIARY DUTY AND</b>
	:	<b>VIOLATION OF ERISA</b>
	:	<b>DISCLOSURE REQUIREMENTS</b>
KEYCORP; CATHLEEN M. FYFFE; THE	:	
COMPENSATION AND ORGANIZATION	:	
COMMITTEE OF THE BOARD OF	:	
DIRECTORS; CAROL A. CARTWRIGHT;	:	
ALEXANDER M. CUTLER; EDWARD P.	:	
CAMPBELL H. JAMES DALLAS;	:	
LAURALEE E. MARTIN; BILL R.	:	
SANFORD; RALPH ALVAREZ;	:	
WILLIAM G. BARES; THOMAS C.	:	
STEVENS; EDUARDO R. MENASCÉ;	:	
HENRY L. MEYER, III; PETER G. TEN	:	
EYCK, II, AND JOHN DOES 1-20	:	
	:	
Defendants.	:	
	X	

Plaintiff Ann I. Taylor (“Plaintiff”), on behalf of herself and on behalf of a class consisting of similarly situated participants and beneficiaries (the “Participants”) of the Keycorp 401(k) Savings Plan (hereinafter 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.

## INTRODUCTION

1. This is a class action brought pursuant to §§ 409, 502 of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1109, 1132, against Defendants, fiduciaries of the Plan.

2. Plaintiff was a participant in the Plan during the Class Periods, during which time the Plan held interests in KeyCorp (hereinafter “KeyCorp” or the “Company”) common stock. Further, Plaintiff’s retirement investment portfolios in the Plan during the Class Periods included KeyCorp stock.

3. 401(k) plans confer tax benefits on participating employees to incentivize saving for retirement and/or other long-term goals. An employee participating in a 401(k) plan may have the option of purchasing the common stock of his or her employer, often the sponsor of the plan, for part of his or her retirement investment portfolio. Common stock of KeyCorp was one of the investment alternatives of the Plan throughout the Class Period.

4. Plaintiff alleges that Defendants, as “fiduciaries” of the Plan as that term is defined under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), breached their duties to them and to the other participants and beneficiaries of the Plan in violation of ERISA §§ 404(a), 405, 29 U.S.C. §§ 1104(a), 1105, particularly with regard to the Plan’s heavy holdings of KeyCorp stock.

5. Specifically, Plaintiff alleges in Count I that 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 offer KeyCorp common stock as a Plan investment option when it was imprudent to do so; and (2) maintaining the Plan’s pre-existing heavy investment in KeyCorp equity when Company stock was no longer a prudent investment for the Plan. These actions/inactions run directly counter 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").

6. Plaintiff's Count II alleges that Defendants failed to adequately inform the Plan's Participants about the true risk and return characteristics of KeyCorp's stock, including by failing to adequately inform the Participants about the true state of affairs with respect to KeyCorp's subprime mortgage operations and originations and KeyCorp's other highly-risky lending practices and KeyCorp's exposure to massive losses in connection with those practices.

7. Plaintiff's 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 KeyCorp stock as an investment option and investing Plan assets in KeyCorp stock when it was no longer prudent to do so.

8. Plaintiff's Count IV 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.

9. Plaintiff's Count V alleges that the Committee Defendants (defined herein breached their fiduciary duties by authorizing or causing the Plan to invest in Victory Funds and to purchase products and services from KeyCorp's subsidiaries and affiliates on terms, and under circumstances, prohibited by ERISA.

10. Plaintiff's Count VI alleges that the Committee Defendants knew or should have known that the Plan was engaged in transactions which constituted sales or exchanges of

property between the Plan and parties-in-interest in violation of Sections 406(a) and (b) of ERISA.

11. Plaintiff alleges that Defendants allowed the heavy imprudent investment of the Plan's assets in KeyCorp equity throughout the Class Period despite the fact that they clearly knew or should have known that such investment was imprudent because, among other things, the fact that: (a) the Company remained exposed to substantial subprime mortgage-related losses and other high-risk loans including construction loans to residential real estate developers and; (b) the Company's enormous market expansion in the States of California and Florida left it overexposed to losses, as the mortgage and housing markets suffered extreme downturns; (c) the Company had failed to adequately and timely record accruals for losses from its exposure to delinquent mortgages and for its exposure to future taxes; (d) KeyCorp engaged in highly risky lending practices, such as Construction Loans with no money down and indirect consumer loans extended to customers who reside outside its core regional banking franchise, which practices were not limited to subprime borrowers and which predictably led to massive loan losses for the Company, and (e) as a consequence of the above, the Company's stock price was artificially inflated; and (f) heavy investment of retirement savings in Company stock would inevitably result in significant losses to the Plan, and consequently, to its participants.

12. This action is brought on behalf of the Plan and seeks losses to the Plan for which Defendants are liable pursuant to ERISA §§ 409, 502, 29 U.S.C. §§ 1109, 1132. Because Plaintiff's claims apply to the Plan, inclusive of all participants with accounts invested in Company stock during the Class Periods, 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 Periods.

### **JURISDICTION AND VENUE**

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

14. 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 places of business in this district.

15. More specifically, this district is an appropriate venue for this action because, on a recent Form 5500 annual filings with the Internal Revenue Service (“IRS”) and Department of Labor (“DOL”) (“Form 5500”), the address listed for the sponsor of the Plan is in this district. In addition, the corporate headquarters of Defendant KeyCorp is located in this district. Accordingly, it is likely that many of the parties and potential witnesses, including corporate executives and many of the Plan’s participants, are located in or within close proximity to this district.

16. Also, this district is an appropriate venue for this action because Defendant KeyCorp, which is both the Plan Sponsor and a Plan fiduciary under ERISA, has its headquarters in this District.

### **PARTIES**

#### **Plaintiff**

17. Plaintiff Ann I. Taylor was a “participant” in the Plan within the meaning of §3(7) of ERISA, 29 U.S.C. §1102(7). Plaintiff is a resident of the State of New York. Plaintiff was

employed by KeyCorp (or a subsidiary or division of KeyCorp) and held Company stock and Victory Funds in her Plan account at times relevant to this Complaint. Plaintiff Taylor is a “participant” in the Plan within the meaning of §3(7) of ERISA, 29 U.S.C. §1102(7).

### **Defendants**

18. Defendant KeyCorp is an Ohio corporation with its principal place of business located at 127 Public Square, Cleveland OH 44114-1306. KeyCorp is a bank-based financial services company. KeyCorp is the parent holding company for KeyBank National Association (KeyBank), its principal subsidiary, through which its banking services are provided. KeyCorp provides a range of retail and commercial banking, commercial leasing, investment management, consumer finance and investment banking products and services to individual, corporate and institutional clients through two business groups: Community Banking and National Banking. As of December 31, 2007, these services were provided across the country through KeyBank’s 955 full-service retail banking branches in 13 states, a telephone banking call center services group and 1,443 automated teller machines in 15 states. On January 2, 2008, KeyBank acquired U.S.B. Holding Co., Inc., the holding company for Union State Bank. On October 1, 2007, the Company acquired Tuition Management Systems, Inc.

19. KeyCorp is the named Plan Sponsor for the Plan. The Company exercised discretionary authority with respect to management and administration of the Plan and/or management and disposition of the Plan’s assets.

20. KeyCorp had, at all applicable times, effective control over the activities of its directors, officers and employees, including over their Plan-related activities. Through its Board of Directors or otherwise, KeyCorp had the authority and discretion to hire and terminate said officers and employees. In addition, the Company and/or its Board of Directors also had the

authority and discretion to appoint, monitor, and remove individual directors, officers and employees from their individual fiduciary roles with respect to the Plan. By failing to properly discharge their fiduciary duties under ERISA, the director, officer and employee fiduciaries breached duties they owed to the Plan, its participants and their beneficiaries. Accordingly, the actions of the Board of Directors, the Committee and/or any other employee fiduciaries are imputed to the Company under the doctrine of *respondeat superior*, and the Company is liable for these actions.

21. Defendant Cathleen M. Fyffe (“Fyffe”) signed the 2008 11-K in her capacity as a Plan Fiduciary. Defendant Fyffe is a vice president of the Company and was a Plan fiduciary during the relevant time period.

22. At all times relevant to this Complaint, Defendant Compensation and Organization Committee of the Board of Directors (the “Committee”) managed and administered the Plan and the assets of the Plan and acted as a fiduciary with respect to the Plan. The Report Of Independent Registered Public Accounting Firm (Meaden & Moore, Ltd.) attached to the Plan’s Form 11-K Annual Report for the fiscal year ended December 31, 2007, which was filed with the SEC on or about June 26, 2008 (the “2008 11-K”) was addressed to the Committee.

23. Defendants Carol A. Cartwright, Alexander M. Cutler (Chair), and Edward P. Campbell (Chair elect) (the “Committee Defendants”) are members of the Committee according to the Company’s May 15, 2008 Proxy Statement.

24. The Committee’s charter notes that its mission is:

The Committee acts on behalf of the KeyCorp Board of Directors in the best interests of the Corporation and its shareholders with regard to executive compensation programs (including incentive compensation and employment and change of control contracts, and executive equity compensation), executive performance, employee benefit and compensation matters, and organizational and talent issues. The Committee also prepares its report required to be included in the

Corporation's annual proxy statement in accordance with the Securities Exchange Act of 1934, as amended, and reviews compensation-related materials that appear in the Corporation's annual proxy statement.

Members of the Committee are appointed by the Board of Directors based on the recommendation of the Nominating and Corporate Governance Committee and shall serve at the pleasure of the Board. The Board of Directors shall appoint the Committee Chair. Members of the Committee shall meet the independence requirements of the New York Stock Exchange.

The Committee shall conduct and review with the Board of Directors annually an evaluation of the Committee's performance with respect to the requirements of this Charter.

The Committee shall make regular reports of its meetings to the Board of Directors.

The Charter further mandates that the Committee shall

as to employee benefit plans (a) with respect to all KeyCorp employee qualified retirement plans, including 401(k) plan (the "qualified plans") in conjunction with the Corporation's role as a Plan settlor :

(i) approve and amend qualified plans and related trust agreements, provided, however, that management has the authority to approve any such amendments as may be required by law or regulation, and

(ii) perform the duties, if any, of the Board of Directors or any committee thereof under the provisions of the qualified plans,

25. Defendants Edward P. Campbell; H. James Dallas; Lauralee E. Martin; Bill R. Sanford; Ralph Alvarez; William G. Bares; Carol A. Cartwright; Thomas C. Stevens; Alexander M. Cutler; Eduardo R. Menascé; Henry L. Meyer, III;<sup>1</sup> and Peter G. Ten Eyck, II (the "Director Defendants") were members of the Board of Directors of KeyCorp and had the duty and responsibility to properly appoint, monitor and inform the members of the Committee (as defined herein) and/or other persons who exercised day-to-day responsibility for the management and administration of the Plan and its assets. The Director Defendants failed to properly appoint,

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<sup>1</sup> Meyer is also a fiduciary because as the Chairman, President, and Chief Executive Officer of KeyCorp he exercised discretion over plan assets.

monitor and inform such persons in that the Director Defendants failed to adequately inform such persons about the true financial and operating condition of the Company or, alternatively, the Director Defendants did adequately inform such persons of the true financial and operating condition of the Company (including the financial and operating problems being experienced by KeyCorp the Class Period identified herein) but nonetheless continued to allow such persons to offer KeyCorp common stock as investment options under the Plan when the market prices of KeyCorp common stock was artificially inflated and when KeyCorp common stock was not prudent investments for Participants' retirement accounts under the Plan. Liability is only asserted against each of the Director Defendants for such periods of time as the Director Defendant was a member of the Board of Directors of KeyCorp or otherwise acted as a fiduciary with respect to the Plan.

26. John Does 1-20 were the individual members of the Committee and members of any other committee(s) which administered the KeyCorp Plan. The identity of the members of the Committee, and of any other committee(s) which was or were responsible for carrying out the provisions of the Plan, is currently not known.

### **CLASS ACTION ALLEGATIONS**

27. Plaintiff brings this action on her own behalf and as a class action pursuant to Rules 23(a), (b)(1) and/or (b)(2) of the Federal Rules of Civil Procedure, on behalf of:

(a) All persons who were participants in or beneficiaries of the Plan, at any time between December 31, 2006 and the present (the "Class Period") and whose Plan accounts included investments in KeyCorp common stock ("Stock Class"); and

(b) All persons who were participants in or beneficiaries of the Plan, excluding the Defendants, whose accounts in the Plan were invested in Victory Funds from

December 31, 2002, to the present (the “Victory Period” or “Victory Fund Period”) (“Victory Fund Class”).

28. The members of the classes 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. In fact, the Form 5500 Annual Return/Report of Employee Benefit Plan for the Plan states that there were 37,138 Participants in that plan as of December 31, 2006.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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**

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

36. At all times relevant to this Complaint, the Plan was a “defined contribution” or “individual account” plan within the meaning of ERISA § 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.

37. At all times relevant to this Complaint the Plan provided a number of different options for investment of the Plan’s assets, including KeyCorp common stock.

38. 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. Plaintiff was only able to direct portions of the Company matching contributions, the rest of which were frozen in the Fund for a period of time.

39. The 2008 11-K states, among other things:

#### **1 Description of Plan**

The following description of The KeyCorp 401(k) Savings Plan (Plan) provides only general information. Participants should refer to the Summary Plan Description or Plan document for a more complete description of the Plan's provisions.

##### ***General:***

The Plan is comprised of a profit sharing plan with a cash or deferred arrangement, as authorized under Section 401(k) of the Internal Revenue Code of 1986, as amended (Code) and an employee stock ownership plan (ESOP), as authorized under the provisions of Section 4975(e)(7) of the Code.

The portion of the Plan that is attributable to participant contributions invested in the Plan's various investment funds (other than the Plan's KeyCorp Common Stock Fund) constitutes a profit sharing plan. The portion of the Plan that is attributable to participant contributions, employer contributions, profit sharing contributions, after-tax contributions and rollover contributions invested primarily in KeyCorp common shares constitutes an ESOP. The Plan is intended to be qualified under Section 401(a) of the Code and the provisions of Titles I, II and III of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Dividends paid on those KeyCorp common shares maintained in the ESOP, at the participant's election, automatically may be reinvested in the Plan's Common Stock Fund or paid directly to the participant. In 2007 and 2006, \$6,713,432 and \$7,112,872, respectively, of dividends were paid directly to Participants in connection with this election and are reflected in the Statement of Changes in Net Assets Available for Benefits as participant withdrawals.

##### ***Eligibility:***

All regular full-time and part-time employees of KeyCorp and its participating subsidiaries (Employer) are eligible to participate in the Plan as of their first day of employment with an Employer for purposes of making pre-tax contributions, Plan transfer contributions and rollover contributions. Employees are eligible to participate in receiving employer contributions and profit sharing contributions in accordance with the following eligibility requirements: for employees whose employment commencement date is earlier than July 1, 2006, participation is immediate; for employees whose employment commencement date is July 1, 2006 or after, participants can receive these contributions after completing one year of service. Seasonal and on-call employees are required to complete 1,000 hours of service prior to becoming eligible to participate in the Plan.

##### ***Contributions:***

Contributions are subject to limitations on annual additions and other limitations imposed by the Internal Revenue Code as defined in the Plan agreement.

\* \* \*

**Employer Matching Contributions:**

After satisfying the eligibility requirements, the Company matches up to the first 6% of the participant's contributions to the Plan. The matching contributions are invested in the KeyCorp Common Stock Fund. Effective January 1, 2005, participants may diversify one-third of those matching contributions and profit sharing contributions allocated to the participant's December 31, 2004 account as of each January 1st for the next three (3) succeeding January 1st commencing January 1, 2005.

In addition, for Plan years beginning on and after January 1, 2005, matching contributions and profit sharing contributions that are allocated to the participant's plan account and invested in the KeyCorp Common Stock Fund and that are held in that account for a period of three (3) full calendar years following their allocation to that participant's plan account may be diversified at the election of the participant. Effective January 1, 2007, participants may diversify 100% of those matching contributions and profit sharing contributions that are allocated to the participant's plan account after he or she has completed 3 years of service or after age 55.

**Employer Discretionary Contributions:**

The Company may also make additional contributions as approved by the Board of Directors.

40. The 2007 11-K also represents, in relevant part:

(a)	(b) Identity of Issue, Borrower, Lessor, or Similar Party	(c) Description of Investment Including Maturity Date, Rate of Interest, Collateral, Par or Maturity Value	(d) Cost **	(e) Current Value
	KeyCorp Common Stock Fund			
	KeyCorp Common Stock	Common Stock	\$ 362,550,031	\$ 517,563,895
	Wilmington Prime Money Market Fund	Money Market Fund	21,881,704	21,881,704
	Total KeyCorp Common Stock Fund		384,431,735	539,445,599
		* * *		
	Total assets held for investment purposes			<u>\$ 1,775,456,480</u>

41. The 2008 11-K thus represents that approximately \$517,563,895 of the Plan's total investments of \$1,775,456,480, or approximately 29.2% of the assets of the Plan, were invested in KeyCorp common stock as of December 31, 2007.

42. The 2008 11-K also represents that as of December 31, 2006, the Plan held \$930,015,283 of KeyCorp common stock and that the Fund depreciated by \$(324,000,782) during calendar year 2007.

43. The 2008 11-K also represents that “The closing market price of Key Corp’s Common Stock at June 20, 2008, December 31, 2007, and December 31, 2006 was \$11.53, \$23.45, and \$38.03, respectively.”

44. During the Class Period the market price of KeyCorp common stock was artificially inflated due to the concealment of KeyCorp’s true financial and operating condition as described herein. Throughout the Class Period, KeyCorp 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 KeyCorp’s true financial and operating condition, as described herein, the Participants would not have chosen KeyCorp common stock as an investment option under the Plan to the extent that they did. Indeed, had the truth been disclosed to the Participants, KeyCorp common stock would not have been chosen by many Participants as an investment option at all.

#### **ADMINISTRATION OF THE PLAN**

45. 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 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 KeyCorp 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 KeyCorp.

46. 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.

47. 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.

48. 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.

49. At all times relevant to this Complaint, Defendants were fiduciaries of the Plan as defined by ERISA § 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.

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

#### **BREACHES OF FIDUCIARY DUTY**

51. During the Class Period, KeyCorp heavily invested in subprime mortgages which generated short-term high yields, ignoring the devastating effect the subprime mortgages had on the Companies as the real estate market softened. These risky loans led to massive losses.

52. As required by ERISA, Defendants issued one or more SPDs, each of which either referred to or incorporated by reference the documents filed by KeyCorp 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.

53. In particular, KeyCorp's stock was an imprudent retirement investment during the Class Period because:

- a. the Company remained exposed to substantial subprime mortgage-related losses and other high-risk loans including construction loans to residential real estate developers;
- b. the Company's enormous market expansion in the States of California and Florida left it overexposed to losses, as the mortgage and housing markets suffered extreme downturns;
- c. the Company had failed to adequately and timely record accruals for losses from its exposure to delinquent mortgages and for its exposure to future taxes;
- d. KeyCorp engaged in highly risky lending practices, such as Construction Loans with no money down and indirect consumer loans extended to customers who reside outside its core regional banking franchise, which practices were not limited to subprime borrowers and which predictably led to massive loan losses for the Company;
- e. as a consequence of the above, the Company's stock price was artificially inflated; and
- f. heavy investment of retirement savings in Company stock would inevitably result in significant losses to the Plan, and consequently, to its participants.

54. 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.

55. KeyCorp aggressively entered the subprime lending market no later than the start of the Class Period. Defendants as fiduciaries of the Plan still allowed the Class to invest their retirement assets in KeyCorp common stock although the risk profile of KeyCorp had been markedly changed to the extent that it became an imprudent investment option. Defendants either did not sufficiently investigate the propriety of the investment option or did so investigate but did not inform Plan participants of the increased risk of the KeyCorp investment option.

56. As the housing market deteriorated, KeyCorp heavily concentrated on subprime mortgage lending, extended credit to consumers outside of its core area, and construction loans to home builders—including troubled loans to builders in Southern California.

57. The Company's residential construction book had hundreds of millions of dollars of bad loans that were under-reserved and showing downward migration by the middle of 2008.

58. Defendant Meyer has since admitted that he should have cut back on housing loans.

59. The Company also under-reserved for tax liabilities, which forced it to halve its dividend, take a \$1.1 billion charge, and raise \$1.5 billion in capital because the IRS found that the Company had tied deferred taxes to an invalid leveraged leasing arrangement.

60. Plan participants were neither informed of the risks inherent in maintaining their retirement investments in KeyCorp stock nor of the degree to which their retirement savings hinged on the risky subprime lending market and other high-risk loans.

61. A series of articles published by American Banker reveal the true nature of the problems at KeyCorp during the Class Period that 1) made the Fund an imprudent investment under ERISA and 2) were not communicated to the Stock Class. Among other things:

A. On May 16, 2008, American Banker reported in an article entitled “KeyCorp’s Chief Admits Mistakes in Home Lending” that:

Henry L. Meyer 3rd, the chief executive officer of KeyCorp, extolled the moves he has made this year and last year to guard against the downturn in the credit cycle, including exiting subprime mortgage lending, curtailing loans to home builders, and bolstering loan-loss reserves.

But after a blunt question from a shareholder at the Cleveland company’s annual meeting Thursday, *Mr. Meyer conceded that serious mistakes were made, particularly in residential real estate lending.*

Before the housing bubble burst, “*I didn’t do what I should have done, which was cut back on housing,*” he said. “At the time we thought housing was the bedrock.”

In particular, Mr. Meyer cited troubled loans to builders in Southern California, where KeyCorp’s commercial real estate lending deteriorated in the fourth quarter of last year and the first quarter of this year. It cut more than 700 jobs late last year, citing the weak performance of its commercial real estate portfolio.

His concession was a response to a comment from a shareholder, who did not identify himself but said he fears KeyCorp is riddled with credit problems. “What I see here is large cracks developing, like I did at National City Bank. ... And I don’t have to tell you what happened at National City Bank.”

B. On May 29, 2008, American Banker reported in an article entitled “KeyCorp Shares Tumble After Credit Cost Update” that

KeyCorp’s shares took a beating Wednesday, a day after it warned that credit costs this year will be significantly higher than it previously forecast.

Several analysts raised questions about the Cleveland banking company’s earnings outlook. Its shares, which were off more than 12% at one point, closed down more than 10%.

In a research note issued Wednesday, Brian Foran, an analyst at Goldman Sachs Group Inc., said that Key may have to cut its dividend in half and that it could eventually be forced to seek fresh capital.

Kathleen Shanley, an analyst at the bond research firm Gimme Credit LLC, downgraded Key's credit score to "deteriorating" from "stable," and wrote in an accompanying note that she expects credit-quality deterioration to weigh on Key's earnings.

***"Problem exposures include construction loans to residential real estate developers and indirect consumer loans extended to customers who reside outside its core regional banking franchise," Ms. Shanley wrote.***

In a regulatory filing late Tuesday the \$101 billion-asset Key said it expects net chargeoffs this year to be 1% to 1.3% of average loans, or \$727 million to \$945 million. It had said in the first quarter that it expected a range of 0.65% to 0.9%.

***It said it revised the guidance because it had taken an aggressive stance on "reducing exposure" to home builders and because it expects "elevated" chargeoffs in its education and home equity portfolios.***

Jeff Davis, an analyst at First Horizon National Corp.'s FTN Midwest Securities Corp., said the timing of the ***update was "peculiar,"*** since Key had just affirmed its loss ratios in its May 6 quarterly filing with the Securities and Exchange Commission.

***"Apparently updated appraisals had a role to do with it ... but there is no way that could be a surprise to Key," Mr. Davis said in an interview Wednesday.***

Mr. Foran, who slashed 40 cents from his 2008 earnings estimate on Key and now expects it to earn \$1.55 a share, said it is likely to have a hard time meeting "a 100% dividend payout ratio" this year.

He stopped short of saying Key needs to raise capital immediately, but "things have very recently changed for the worse" at the company, he wrote.

Mr. Foran said Key's capital levels could face additional pressure from roughly \$450 million of exposure tied its accounting for leveraged-lease transactions, which "would wipe out any excess capital and could trigger a need for additional capital," he wrote. Wachovia Corp. of Charlotte has already announced it plans to take a large second-quarter charge to address exposure to such leases.

C. On June 13, 2008, American Banker reported in an article entitled "Dividend Cutting and Capital Plan Punish Key Stock" that:

KeyCorp's shares took a beating Thursday after it said it would slash its dividend and raise capital.

While the Cleveland banking company warned investors to brace for higher chargeoffs, it said its capital raising plan is largely driven by the fact that its future tax liabilities would be higher after a recent federal court ruling. Beginning in the

third quarter the \$101 billion-asset KeyCorp will save about \$200 million a year by halving its annual dividend, to 75 cents a share. It also will raise \$1.5 billion in capital via a combination of newly issued common shares and convertible preferred stock.

KeyCorp said it would take a second-quarter charge of \$1.1 billion to \$1.2 billion related to the court ruling against it two weeks ago in a case involving a transaction with AWG Leasing of Wilmington, Del. It had sought a claim for a refund of about \$16 million deposited with the Internal Revenue Service for tax years 1999 to 2003.

\* \* \*

KeyCorp's shares sank nearly 24% Thursday.

Anthony Davis, an analyst with Stifel, Nicolaus & Co. Inc., said in an interview Thursday, "***It's hard to make a case to own this stock right now.***" KeyCorp executives "knew about this possible problem well before the court ruling, and there was no reserve set up for this. So I candidly fault the company for that."

It is not the first regional banking company to face a legal battle over leveraged lease strategies. Last year BB&T Corp. agreed to pay \$1.2 billion in deferred taxes tied to an invalid leveraged lease arrangement. And Fifth Third Bancorp has pending litigation against the IRS over its company's treatment of \$900 million of leveraged leases.

KeyCorp also joins a growing number of financial companies to tap the markets to replenish capital levels depleted by losses tied to the mortgage meltdown. KeyCorp's net first-quarter income fell 38% from a year earlier, to \$218 million, and conditions are not improving.

The company said Thursday that it would take a \$600 million credit-loss provision this quarter to cover \$500 million of chargeoffs and a \$100 million reserve build to cover losses in its residential construction book. Key said it expects losses to peak during the second quarter, though analysts said earnings would take a big hit this year.

Several analysts slashed estimates Thursday or were poised to do so.

Terry McEvoy, an analyst at Oppenheimer & Co. Inc., lowered his estimate from a gain of \$1.05 a share to a \$2.99 loss for the year. Key's situation is "unfortunate," he said. "But they had to respond quickly to the court's ruling."

(emphasis added).

D. On June 16, 2008, American Banker reported in an article entitled "Reserve Worries Continue to Hamper Bank Stocks" that:

Shares of KeyCorp plunged nearly 24% Thursday and shed another 2.1% Friday. The Cleveland company said it would halve its dividend in the third quarter and raise capital. It also said it would take second-quarter charge of up to \$1.2 billion, citing a court ruling two weeks ago that could force it to adjust its tax liabilities on leveraged-lease transactions. Some analysts noted that KeyCorp, which has exposure to California's weak housing market, also plans a \$100 million second-quarter addition to reserves to cover losses in its residential construction book. *And even though KeyCorp said it expects these losses to peak during this quarter, it said in a regulatory filing that other loan books are showing "downward migration."*

(emphasis added).

62. In total, between December 31, 2006 and July 22, 2008, KeyCorp common stock decreased from \$38.03 per share to \$11.99 per share, or \$26.04 per share, or roughly 68.5%, thereby depriving the Class of a substantial amount of their retirement savings.

#### **MISMANAGEMENT OF PLAN ASSETS**

63. Pursuant to ERISA § 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.

64. Defendants are not entitled to the protections of ERISA § 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 KeyCorp common stock, and because Defendants concealed material non-public information concerning KeyCorp that they were not precluded from disclosing under applicable law.

65. 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 KeyCorp common stock during the Class Period.

**DEFENDANTS CAUSED THE PLAN TO  
ENGAGE IN PROHIBITED TRANSACTIONS**

66. Throughout the Fund Period, Defendants caused the Plan to invest in Victory Funds when Defendants knew or should have known that less costly, better-performing comparable funds were available from unaffiliated financial services companies.

67. The Committee Defendants are responsible for selecting investment and service providers for the Plan, which selections must be made prudently and solely in the interest of the Plan's participants and beneficiaries.

68. The Committee Defendants had the sole discretion to select the investments available under the Plan. Over many years, the Committee Defendants used that discretion to direct hundreds of millions of dollars of Plan assets into Victory Funds.

69. KeyCorp subsidiaries and affiliates received millions of dollars in annual fees from the Plan.

70. The Committee Defendants knew or should have known that comparable investment funds and retirement trustee services were available from unaffiliated entities.

71. The Plan's investments in Victory Funds were prohibited transactions under ERISA, as were payments of fees to other KeyCorp subsidiaries and affiliates.

72. The Plan has suffered millions of dollars in losses because the Committee Defendants forced the Plan to invest in Victory Funds, resulting in millions of dollars of revenue for KeyCorp while delivering poor investment returns for the Plan. ERISA prohibits a plan from investing in the plan sponsor's investment products or paying the plan sponsor fees for services

provided to the plan unless the fiduciary or sponsor can prove that the transactions are exempt. Even if the Committee Defendants can prove the transactions are exempt from ERISA § 406, 29 U.S.C. § 1106, ERISA does not permit such arrangements when they are not solely in the interest of the plan or when a prudent, unconflicted fiduciary would choose differently.

73. As a plan sponsor, KeyCorp was a party-in-interest and as a plan administrator, it was a fiduciary. Through its Board, KeyCorp also appointed and monitored the members of the Committee. KeyCorp knew or should have known that the Committee Defendants were breaching their duties under ERISA and engaging in prohibited transactions by causing the Plan to do business with KeyCorp subsidiaries and affiliates. KeyCorp participated in the Committee's ERISA violations and must disgorge all monies received from the Plan and profits earned by KeyCorp thereon.

## **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)**

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

75. 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 they exercised discretionary authority or control over the administration and/or management of the Plan or disposition of the Plan's assets.

76. 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 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.

77. 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.

78. 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 the Company stock was not a suitable and appropriate investment for the Plan as described herein. Investment in the Company stock during the Class Period clearly did not serve the Plan's purpose of helping participants save for retirement, and in fact caused significant losses/depreciation to participants' retirement savings.

79. 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 would ensue as the non-disclosed material problems, concerns and business slowdowns took hold and became public.

80. 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 knowledge of such breaches by other Plan fiduciaries, yet made no effort to remedy the same.

81. 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.

82. 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**

### **Failure to Adequately Inform the Plan's Participants About the True Risk and Return Characteristics of KeyCorp Stock (Against All Defendants)**

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

84. During the Class Period Defendants failed to adequately inform the Plan's Participants about the true risk and return characteristics of KeyCorp stock as required by ERISA.

85. During the Class Period, Defendants issued to Participants Summary Plan Descriptions and other written communications, including SEC filings, which failed to disclose, among other things, the facts that;

(a) KeyCorp was exposed to massive losses in connection with its subprime mortgage lending, construction loans, and consumer loans outside of its core areas;

(c) KeyCorp under-reserved for its risky loans, and for taxes due on lease transactions;

(d) KeyCorp failed to properly account for and disclose its loan losses in violation of Generally Accepted Accounting Principles and SEC requirements; and

(e) The foregoing practices caused the market price of KeyCorp common stock to be artificially inflated, and caused massive losses to the Plan and the Plan accounts holding KeyCorp stock, as the market price of KeyCorp stock has declined substantially during the Class Period as a result thereof.

### **COUNT III**

#### **Failure to Adequately Monitor Other Fiduciaries and Provide Them with Accurate Information (Breaches of Fiduciary Duties in Violation of ERISA § 404 by KeyCorp & Director Defendants)**

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

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

88. At all relevant times, as alleged above, the scope of the fiduciary responsibility of KeyCorp and the Director Defendants included the responsibility to appoint, evaluate, and monitor other fiduciaries, including the members of the Committee.

89. 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, KeyCorp and the Director 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 investment options; and
- (6) Ensure that the monitored fiduciaries report regularly to the Company and/or the Director Defendants. The Company and/or Director Defendants must then review, understand, and approve the conduct of the hands-on fiduciaries.

90. 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.

91. KeyCorp and the Director 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. KeyCorp and the Director Defendants knew or should have known that the fiduciaries they were responsible for monitoring were (i) imprudently allowing the Plan to continue offering KeyCorp stock as an investment alternative for the Plan, and (ii) continuing to invest the assets of the Plan in KeyCorp stock when it no longer was prudent to do so. Despite this knowledge, KeyCorp and the Director Defendants failed to take action to protect the Plan, and concomitantly the Plan's participants, from the consequences of these fiduciaries' failures.

92. In addition, KeyCorp and the Director Defendants, in connection with their monitoring and oversight duties, were required to disclose to the monitored fiduciaries accurate information about the financial condition of KeyCorp 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.

93. KeyCorp and the Director 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.

94. 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.

95. 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 Duty to Avoid Conflicts of Interest (Breaches of Fiduciary Duties in Violation of ERISA §§ 404 and 405 by the Director Defendants and Committee Defendants)**

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

97. At all relevant times, as alleged above, the Director Defendants and Committee Defendants were fiduciaries within the 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.

98. 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 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.

99. 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.

100. As a consequence of Defendants' breaches of fiduciary duty, the Plan suffered tens of 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.

101. 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.

Breach Of Fiduciary Duty By The Committee Defendants Causing The Plan To Invest In  
Victory Funds

#### **COUNT V**

#### **Breach Of Fiduciary Duty By The Committee Defendants Causing The Plan To Invest In Victory Funds (ERISA § 404, 29 U.S.C. § 1104)**

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

103. At all relevant times, the Committee Defendants acted as fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), by exercising authority and control with respect to the management of the Plan and the Plan's assets.

104. The Committee Defendants, by their actions and omissions in authorizing or causing the Plan to invest in Victory Funds and purchase products and services from KeyCorp subsidiaries and affiliates, and to pay investment management and other fees in connection therewith, to KeyCorp subsidiaries and affiliates, put KeyCorp's financial interests ahead of the Plan's interests. Thus, the Committee Defendants breached their duties of prudence and loyalty to the Plan under ERISA § 404(a)(1)(A), (B), 29 U.S.C. § 1104(a)(1)(A), (B).

105. As a direct and proximate result of these breaches of duty, the Plan, and indirectly Plaintiff and the Plan's other participants and beneficiaries, lost millions of dollars to KeyCorp fees and inferior returns.

106. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA § 409(a), 29 U.S.C. § 1109(a), the Committee Defendants are liable to restore all losses suffered by the Plan caused by their breaches of fiduciary duty.

## COUNT VI

### **Prohibited Transaction Violations (ERISA § 406, 29 U.S.C. § 1106)**

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

108. At all relevant times, the Committee Defendants acted as a fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), by exercising authority and control with respect to the management of the Plan and Plan's assets.

109. The Committee Defendants, by their actions and omissions in authorizing or causing the Plan to invest in Victory Funds and purchase KeyCorp-affiliated products and services, and pay, directly or indirectly, investment management and other fees in connection therewith, caused the Plan to engage in transactions that the Committee Defendants knew or should have known constituted sales or exchanges of property between the Plan and parties-in-interest, the furnishing of services by parties in interest to the Plan, the transactions with fiduciaries in violation of ERISA §§ 406(a), 406(b), 29 U.S.C. §§ 1106(a), 1106(b).

110. As a direct and proximate result of these prohibited transaction violations, the Plan, directly or indirectly, paid millions of dollars in investment management and other fees that were prohibited by ERISA and suffered millions of dollars in losses annually.

111. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109(a), Committee Defendants are liable to restore all losses suffered by the Plans as a result of the prohibited transactions and all profits earned by KeyCorp on the fees paid by the Plan to KeyCorp and its subsidiaries and affiliates.

### **CAUSATION**

112. The Plan suffered at least tens of 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.

113. Defendants are responsible for losses caused by participants' failure to exercise voluntary diversification options 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. 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, 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.

114. 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.

### **REMEDY FOR BREACHES OF FIDUCIARY DUTY**

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

116. 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 . . ."

117. 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.

118. 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.

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

**SECTION 404(c) DEFENSE INAPPLICABLE**

120. The Plan suffered losses, and the Plaintiff and the other Class members suffered losses, because substantial assets in the Plan were invested in KeyCorp stock during the Class Period in violation of the Defendants' fiduciary duties.

121. As to contributions invested in Company stock, Defendants were responsible for the prudence of investments provided under the Plan during the Class Period, unless the Plan satisfied the procedural and substantive requires of ERISA § 404(c), 29 U.S.C. § 1104(c) and the regulations promulgated under it.

122. Section 404(c) provides a limited exception to fiduciary liability for losses that result from participants' exercise of control over investment decisions, but not for liability for the selection of imprudent investment options for the Plan. In order for § 404(c) to apply, participants must in fact exercise "independent control" over investment decisions. In addition, § 404(c) only applies if participants are informed that "the Plan is intended to constitute a plan described in § 404(c) and [the regulations], and that fiduciaries of the plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participants or Beneficiary." 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(i)

123. As alleged above, Defendants failed to provide participants with complete and accurate information regarding the true financial condition of KeyCorp and the prudence of such

heavy investment of Plan assets in the Company Stock Fund. Accordingly, participants failed to exercise the requisite independent control over their investment in KeyCorp stock in the Plan.

124. In addition, § 404(c) does not apply to any portion of the Plan (1) derived from Company matching or profit-sharing contributions as those investments/investment vehicles were made/invested by/through the sole discretion of the Company or (2) deemed an ESOP in that the Secretary of Labor has interpreted the provision to apply only to plan that provide plan participants with a full range of investment options, which an ESOP by its very nature does not. *See* 29 C.F.R. § 2550.404c-1 (1996); *Herman v. Nationsbank Trust Co.*, 126 F.3d 1354, 1361 (11th Cir. 1997). Under the terms of the Plan, Company contributions were automatically initially invested in the Company Stock Fund; thus, participant control was restricted.

125. The Defendants' liability to the Plan, Plaintiff and the Class for relief stemming from the Plan's imprudent investments in KeyCorp 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, without regard to whether or not the participants relied upon statements, acts, or omissions of Defendants.

### **JURY DEMAND**

126. Plaintiff demands trial by jury of all issues so triable.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for:

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

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

C. An Order compelling the 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 the Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if the 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. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

F. An Order that Defendants allocate the Plan's recoveries to the accounts of all participants who had any portion of their account balances invested in the common stock of KeyCorp maintained by the Plan in proportion to the accounts' losses attributable to the decline in the stock price of KeyCorp;

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

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

I. An Order for equitable restitution and other appropriate equitable monetary relief against the Defendants.

Dated: August 11, 2008

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