UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

GREGORY GODFREY, et. al., Plaintiffs, v. GREATBANC TRUST COMPANY, et al., Defendants.	Case Number 18-cv-07918 Judge Matthew F. Kennelly Magistrate Judge Michael T. Mason

McBRIDE DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT

Defendants McBride & Son Capital, Inc. ("MS Capital"), McBride & Son Management Company, LLC ("MS Management"), John F. Eilermann, Jr., and Michael D. Arri (collectively, the "McBride Defendants"), by and through their undersigned counsel, answer the claims that they have not moved to dismiss in the Second Amended Complaint filed by Plaintiffs Gregory Godfrey, Jeffrey Sheldon, and Debra Ann Kopinski ("Plaintiffs") on February 26, 2020 (Dkt. No. 127) (the "SAC"), as follows:

1. The allegations in the SAC demonstrate plainly that Defendants are "guilty of reprehensible self-dealing" and "not the kind of divided but honest loyalty that Congress intended."[1] Their conduct plainly violated ERISA fiduciary duties.

ANSWER: The McBride Defendants deny the allegations in paragraph 1.

2. The largest home builder in Saint Louis, MO, the McBride & Son Homes enterprise ("McBride Enterprise")[2], was once 100% owned by all of its employees through the ESOP. However, when Eilermann and Arri assumed leadership positions in the McBride Enterprise, and thereby became fiduciaries to the ESOP[3], they began taking the value of the

[1] *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992).

[2] McBride Enterprise generally refers to the McBride & Son conglomerate of subsidiaries and assets that for the relevant time period of the allegations herein were owned by McBride & Sons Enterprises, Inc., and then McBride & Sons Companies, Inc., and then finally through a combination of ownership by MS Capital and McBride & Son Companies, LLC which was referred to by Defendants in their communications as an "enterprise."

[3] Eilermann and Arri were not only fiduciaries as the only members of the Board of Directors of MS Management, which was the named fiduciary of the ESOP prior to December 31, 2013 and the only members of

McBride Enterprise from the ESOP, for their own benefit, in violation of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

ANSWER: The McBride Defendants deny the allegations in the first sentence of paragraph 2. Further answering, the McBride Defendants deny that Plaintiffs' description of the McBride & Son corporate family and use of the term "McBride Enterprise" in the first sentence and footnote 2 of paragraph 2 hereafter is appropriate. The allegations in the second sentence and footnote 3 of paragraph 2 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that Eilermann and Arri served in executive positions at certain times. The McBride Defendants otherwise deny the allegations in the second sentence and footnote 3 of paragraph 2.

3. Beginning in 2006, Eilermann and Arri paid themselves, and other corporate insiders, synthetic equity in the McBride Enterprise in the form of phantom stock and stock appreciation rights.[4] The synthetic equity represented a claim on the equity of the McBride Enterprise and therefore reduced, or diluted, the value of the assets held by the ESOP.

ANSWER: The McBride Defendants have moved to dismiss all claims against the McBride Defendants related to the payment of compensation; therefore, no response to paragraph 3 is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 3 and footnote 4.

4. When Eilermann and Arri ran up against of rules put in place by the Internal Revenue Service ("IRS") to limit how much equity and synthetic equity could be given to insiders, known as "disqualified persons" under the Internal Revenue Code (the "Code"), Eilermann and Arri searched for another way to continue to take from the ESOP the value of the McBride Enterprise. By December 31, 2013, Eilermann and Arri had given themselves, and other insiders, the equivalent of 30% of the economic interests of the McBride Enterprise.

ANSWER: The McBride Defendants have moved to dismiss all claims against the

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the Board of Directors of MS Capital, which was the named fiduciary of the ESOP after December 31, 2013, they repeatedly met the definition of an ERISA fiduciary under 29 U.S.C. § 1002(21) through their actions and authority as demonstrated in the SAC.

[4] Phantom stock and stock appreciation rights are intended to mimic the actual ownership vehicles of direct share ownership and stock options. *See infra* at ¶ 114 through 117 for further description.

McBride Defendants related to the payment of compensation and the 2013 reorganization; therefore, no response to paragraph 4 is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 4.

5. On December 31, 2013, Eilermann and Arri caused the ESOP to engage in a complex corporate reorganization for their sole benefit where the ESOP would no longer own the entity that directly owned the subsidiaries and assets of the McBride Enterprise, McBride & Sons Companies, Inc. ("MS Companies, Inc."), but the ESOP would instead own the stock of a holding company, MS Capital, whose sole asset would be the Class A Units of MS Companies, Inc. after it was converted to a limited liability company, McBride & Sons Companies, LLC ("MS Companies, LLC"). As a consequence of the reorganization directed by Eilermann and Arri, the ESOP was no longer the 100% owner of the McBride Enterprise as Eilermann and Arri issued to themselves Class B Units of MS Companies, LLC. The ESOP received no consideration for this reorganization and the ESOP participants were never informed that they no longer owned 100% of the McBride Enterprise. *See infra* Counts I through VI at ¶ 337 through 430.

ANSWER: The McBride Defendants have moved to dismiss all claims against the McBride Defendants related to the 2013 reorganization; therefore, no response to paragraph 5 is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 5.

6. From 2013 to 2017, Eilermann and Arri paid themselves, and other insiders, at least [redacted] in various forms of compensation in addition to also awarding themselves further equity in the McBride Enterprise in the form of Class B Units and awarding other corporate insiders Class C Units of MS Companies, LLC. This had the effect of diluting the ESOP's ownership of the McBride Enterprise and suppressed the stock price of MS Capital. As owners of the Class B Units, Eilermann and Arri also received more favorable distributions than the ESOP. By November 30, 2017, Eilermann, Arri, and other insiders owned approximately 43% of the McBride Enterprise through their ownership of the Class B and Class C Units. The ESOP was harmed by the excessive payment of compensation and received no consideration for the dilution of their ownership of the McBride Enterprise. The ESOP participants were never informed about the excessive payment of compensation nor the dilution of their ownership of the McBride Enterprise. *See infra* Counts VII through X at ¶¶ 431 through 491.

ANSWER: The McBride Defendants have moved to dismiss all claims against the McBride Defendants related to the payment of compensation; therefore, no response to paragraph 6 is required. To the extent a response is required, the McBride Defendants deny the

allegations in paragraph 6.

7. Finally, on November 30, 2017, Eilermann and Arri completed their taking of the McBride Enterprise from the ESOP when they caused MS Capital to purchase all of the shares of MS Capital stock held by the ESOP, which at this point only represented approximately 57% of the McBride Enterprise. The ESOP received consideration well below fair market value. Eilermann and Arri immediately transferred to themselves control and ownership of MS Capital. *See* Counts XI through XVI at ¶¶ 492 through 584.

ANSWER: The McBride Defendants deny the allegations in paragraph 7.

8. GreatBanc, who was supposed to be the independent discretionary trustee of the ESOP, was nothing but a rubber stamp for Eilermann and Arri, and failed to protect the ESOP participants every time it had the opportunity to act.

ANSWER: The McBride Defendants deny the allegations in paragraph 8.

9. Eilermann and Arri failed to properly monitor GreatBanc as the ESOP's trustee at all relevant times herein. Specifically, Eilermann and Arri failed to terminate GreatBanc as trustee even after GreatBanc repeatedly breached its fiduciary duties with respect to the ESOP and was sued repeatedly by the Department of Labor ("DOL") and other ESOP participants for breaches of ERISA and GreatBanc was forced into a remedial settlement agreement that governed its role with all plans it serviced. Prudent and loyal fiduciaries acting on behalf of the ESOP would have removed GreatBanc and appointed an actual independent trustee who would protect the ESOP participants. *See* Count XVII at ¶¶ 585 through 597.

ANSWER: The McBride Defendants deny the allegations in paragraph 9.

10. This lawsuit seeks to recover for the ESOP, and therefore the employees of the McBride Enterprise, the ESOP's losses, and thus its participants hard earned retirement assets, which were stolen from them by Eilermann and Arri.

ANSWER: Paragraph 10 states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that Plaintiffs filed the SAC, but the McBride Defendants rely on the SAC to speak for itself, rather than on Plaintiffs' characterization thereof. The McBride Defendants otherwise deny the allegations in paragraph 10.

11. Defendants at all pertinent times owed to the ESOP and its participants and beneficiaries fiduciary obligations as set forth in ERISA. These obligations are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); *see also George v. Kraft Foods Glob., Inc.*, 814 F. Supp. 2d 832, 852 (N.D. Ill. 2011). As Justice

Cardozo famously put it,

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). Among the duties required of fiduciaries is the duty of loyalty to plan participants and beneficiaries. This duty requires that the fiduciary's decisions "must be made with an eye single to the interest of the participants and beneficiaries." *Donovan,* 680 F.2d at 271 *(citing, among other authorities,* Restatement (Second) of Trusts § 170 (1959)).

ANSWER: Paragraph 11 states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that Plaintiffs purport to paraphrase, quote, and/or cite to certain caselaw, but the McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. The McBride Defendants otherwise deny the allegations in paragraph 11.

12. Plaintiffs are participants in the ESOP, as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), who held vested shares of MS Capital in their accounts in the ESOP until the shares were sold on or about November 30, 2017.

ANSWER: Paragraph 12 states a legal conclusion, to which no response is required. To the extent a response is required, the McBride Defendants admit that each Plaintiff was, at certain times, a participant in the McBride & Son Employee Stock Ownership Plan (the "Plan") and was vested in his/her account. The McBride Defendants otherwise deny the allegations in paragraph 12.

13. This action is brought under Sections 404, 405, 406, 409, and 502(a) of ERISA, 29 U.S.C. §§ 1104, 1105, 1106, 1109, and 1132(a), for losses suffered by the ESOP and for restoration to the ESOP of improper profits received by the ESOP's fiduciaries and parties in interest to the detriment of the ESOP's participants and beneficiaries and in violation of ERISA.

ANSWER: The McBride Defendants admit that Plaintiffs purport to bring this action under certain sections of the Employee Retirement Income Security Act of 1974, as amended

("ERISA"). The McBride Defendants deny that Plaintiffs are entitled to the relief requested and otherwise deny all allegations in paragraph 13.

JURISDICTION AND VENUE

14. This action arises under Title I of ERISA, 29 U.S.C. §§ 1001-1191c, and is brought by Plaintiffs under ERISA § 502(a), 29 U.S.C. § 1132(a), to require the Defendants to make good to the Plan losses resulting from their violations of ERISA, to restore to the Plan any profits that have been made by the breaching fiduciaries and parties in interest through the use of Plan assets, and to obtain other appropriate equitable and legal remedies in order to redress violations and enforce the provisions of ERISA.

ANSWER: The McBride Defendants admit that Plaintiffs purport to bring this action under Title I of ERISA and under ERISA § 502(a), 29 U.S.C. § 1132(a). The McBride Defendants deny that Plaintiffs are entitled to the relief requested and otherwise deny all allegations in paragraph 14.

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

ANSWER: Paragraph 15 states a legal conclusion, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 15.

16. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because some or all of the breaches and violations giving rise to the claims occurred in this District and the Plan's trustee, Defendant GreatBanc, is found in this District.

ANSWER: Paragraph 16 states a legal conclusion, to which no response is required. To the extent a response is required, the McBride Defendants deny any breaches or violations occurred. The McBride Defendants lack knowledge or information sufficient to form a belief as to whether GreatBanc resides in this District and therefore deny this allegation. The McBride Defendants deny the remaining allegations in paragraph 16.

PARTIES

McBride & Son Employee Stock Ownership Plan

17. The ESOP has been sponsored since its inception in 1987 by entities affiliated

with the McBride Enterprise. Prior to and including December 31, 2013, the ESOP was sponsored by MS Management. After and including December 31, 2013, the ESOP was sponsored by MS Capital.

ANSWER: The McBride Defendants deny the allegations in paragraph 17. The McBride Defendants state that the Plan was sponsored by McBride & Son Management Co. prior to January 1, 2014 and by McBride & Son Capital, Inc. as of January 1, 2014.

18. While ESOP sponsorship has changed in name, at all relevant times herein, control of the ESOP was vested in the Board of the Directors of MS Management and the Board of Directors of MS Capital.

ANSWER: Paragraph 18 states a legal conclusion, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 18.

19. From December 1, 1987, until November 30, 2017, the Plan was intended to be an employee stock ownership plan, or ESOP, under 29 U.S.C. § 1107(d)(6) that was intended to meet the requirements of Sections 401(a) and 4975(e)(7) of the Code and related regulations. Specifically, the Plan is an "individual account plan" or "defined contribution plan" within the meaning of 29 U.S.C. § 1002(34) and an "employee pension benefit plan" within the meaning of 29 U.S.C. § 1002(2).

ANSWER: The McBride Defendants admit that, at certain times, the Plan was intended to be an ESOP under 29 U.S.C. § 1107(d)(6) that was intended to meet the requirements of Sections 401(a) and 4975(e)(7) of the Internal Revenue Code and related regulations. The McBride Defendants deny the remaining allegations in sentence 1. The allegations in sentence 2 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that the Plan was an individual account plan or defined contribution plan, but deny that the Plan currently exists.

20. The Plan has been periodically amended through resolutions by the Board of Directors of MS Capital and the Board of Directors of MS Management. For purposes of the allegations herein, the Plan was amended and restated as of January 1, 2013 (hereafter the "2013 Plan Document") and as of January 1, 2017 (hereafter the ("2017 Plan Document").

ANSWER: The McBride Defendants admit the allegations in paragraph 20.

21. Prior to these amendments, the Plan was amended and restated as of January 1, 2007 (hereafter the "2007 Plan Document").

ANSWER: The McBride Defendants admit that the Plan was amended and restated as of January 1, 2007.

22. For the benefit of Plan participants and beneficiaries from December 31, 2013 through November 30, 2017 the Plan held shares of stock of MS Capital. From January 8, 2010 through December 31, 2013 the Plan held shares of stock of MS Companies, Inc. Prior to January 8, 2010, the Plan held shares of stock of McBride & Sons Enterprises, Inc.

ANSWER: The McBride Defendants admit the allegations in paragraph 22.

23. Under the Plan's eligibility requirements nearly all employees of the McBride Enterprise, with limited exceptions, were eligible to be participants in the Plan.

ANSWER: The allegations in paragraph 23 purport to paraphrase certain Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the Plan provisions, the McBride Defendants deny the allegations in paragraph 23.

24. The 2017 Plan Document, the 2013 Plan Document, and the 2007 Plan Document required the Plan to be operated for the exclusive benefit of participants and beneficiaries, consistent with ERISA.

ANSWER: The allegations in paragraph 24 purport to paraphrase certain Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the Plan provisions, the McBride Defendants deny the allegations in paragraph 24.

25. The McBride & Son Employee Stock Ownership Trust ("ESOP Trust") was formed as part of the Plan and was amended and restated in its entirety effective December 27, 2013, as documented in the McBride & Son Employee Stock Ownership Trust Agreement ("2013 ESOP Trust Agreement").

ANSWER: The McBride Defendants admit that the McBride & Son Employee Stock Ownership Trust ("ESOP Trust") was formed in connection with the Plan and was amended and

restated in its entirety effective December 27, 2013, as documented in the McBride & Son Employee Stock Ownership Trust Agreement ("2013 ESOP Trust Agreement"). The McBride Defendants otherwise deny the allegations in paragraph 25.

26. The 2013 ESOP Trust Agreement was executed by Patrick J. De Craene ("De Craene") on behalf of GreatBanc and by Eilermann on behalf of MS Management.

ANSWER: The McBride Defendants admit that the McBride & Son Employee Stock Ownership Trust (as amended and restated effective December 27, 2013) was signed by Patrick J. De Craene on behalf of GreatBanc Trust Company and John F. Eilermann, Jr. on behalf of McBride & Son Management Co. The McBride Defendants deny the remaining allegations in paragraph 26.

27. The 2013 ESOP Trust Agreement was amended via Amendment Number One to recognize that effective January 1, 2014, MS Capital was to replace MS Management in all respects as signatory to the 2013 ESOP Trust Agreement.

ANSWER: The McBride Defendants admit that the McBride & Son Employee Stock Ownership Trust (as amended and restated effective December 27, 2013) was amended via Amendment Number One effective January 1, 2014. The remaining allegations in paragraph 27 purport to summarize the terms of the trust agreement and/or amendment. The McBride Defendants rely on the terms of those documents to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the terms of the trust agreement and/or amendment, the McBride Defendants deny such allegations.

28. Amendment Number One to the 2013 ESOP Trust Agreement was executed by Eilermann and Arri on behalf of MS Capital.

ANSWER: The McBride Defendants admit that Amendment Number One to the McBride & Son Employee Stock Ownership Trust (as amended and restated effective December 27, 2013) was executed by Michael D. Arri on behalf of McBride & Son Capital, Inc. The

McBride Defendants otherwise deny the allegations of paragraph 28.

29. The 2013 ESOP Trust Agreement required that no part of the corpus or income of the ESOP Trust shall revert to MS Management, and later MS Capital, or be used for or diverted to purposes other than for the exclusive benefit of Plan participants and beneficiaries.

ANSWER: The allegations in paragraph 29 purport to summarize certain trust provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the terms of the Trust agreement, the McBride Defendants deny the allegations of paragraph 29.

30. Effective November 30, 2017, GreatBanc, MS Capital, Eilermann, and Arri caused the Plan to sell its shares of MS Capital at below fair market value.

ANSWER: The McBride Defendants deny the allegations in paragraph 30.

31. Amendment Two to the 2017 Plan Document was intended to amend the Plan to convert it from an ESOP to a profit sharing plan under Code Section 401(a) and to change the Plan name to the McBride & Son Profit Sharing Plan.

ANSWER: The allegations in paragraph 31 purport to summarize the Plan Document. The McBride Defendants rely on the terms of the amendment to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the terms of the Plan Document, the McBride Defendants deny the allegations of paragraph 31.

32. Effective December 15, 2017, and pursuant to the Second Amendment to the McBride & Son 401(k) Savings Plan, Amended and Restated as of January 1, 2013 (hereafter the "401(k) Plan"), the Plan was merged into the 401(k) Plan, thus effectively terminating it.

ANSWER: The McBride Defendants admit that, effective December 15, 2017, the Plan was merged into the McBride & Son 401(k) Savings Plan (as amended and restated as of January 1, 2013). The allegations in paragraph 32 purport to characterize the Second Amendment to the McBride & Son 401(k) Savings Plan. The McBride Defendants rely on the

terms of the amendment to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 32 further states a legal conclusion regarding the effect of the plan merger, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations of paragraph 32.

Plaintiffs

33. Plaintiff Gregory Godfrey is a participant, as defined in 29 U.S.C. § 1002(7), in the Plan at all relevant times. Plaintiff Godfrey resides in Wildwood, Missouri. He was vested in his account in the Plan. He was previously employed as Chief Information Officer. He was employed by the McBride Enterprise from 2001 to 2008.

ANSWER: The allegations in the first and third sentences of paragraph 33 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that Gregory Godfrey was, at one time, a participant in the Plan and was vested in his account. The McBride Defendants otherwise deny the allegations in the first and third sentences. The McBride Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation in the second sentence of paragraph 33, and therefore deny such allegation. The McBride Defendants admit that Gregory Godfrey was previously employed from 2001 to 2008. The McBride Defendants admit that Gregory Godfrey served as the Chief Information Officer performing services on behalf of McBride & Son Contracting Co., Inc. The McBride Defendants deny the remaining allegations in paragraph 33.

34. Plaintiff Jeffrey Sheldon is a participant, as defined in 29 U.S.C. § 1002(7), in the Plan at all relevant times. Plaintiff Sheldon resides in St. Louis, Missouri. He was vested in his account in the Plan. He was previously employed as an Information Systems Director. He was employed by the McBride Enterprise from 1998 until 2008.

ANSWER: The allegations in the first and third sentences of paragraph 34 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that Jeffrey Sheldon was, at one time, a participant in the Plan and was vested

in his account. The McBride Defendants otherwise deny the allegations in the first and third sentences. The McBride Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation in the second sentence of paragraph 34, and therefore deny such allegation. The McBride Defendants deny the allegations in the fourth sentence. The McBride Defendants admit that Jeffrey Sheldon was employed from 1998 to 2008. The McBride Defendants deny the remaining allegations in paragraph 34.

35. Plaintiff Debra Ann Kopinski is a participant, as defined in 29 U.S.C. § 1002(7), in the Plan at all relevant times. Plaintiff Kopinski resides in Cottleville, Missouri. She was vested in her account in the Plan. She was previously employed in an accounts payable capacity. She was employed by the McBride Enterprise from 2000 until 2017.

ANSWER: The allegations in the first and third sentences of paragraph 35 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that Debra Ann Kopinski was, at one time, a participant in the Plan and was vested in her account. The McBride Defendants otherwise deny the allegations in the first and third sentences. The McBride Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation in the second sentence of paragraph 35, and therefore deny such allegation. The McBride Defendants admit that Debra Ann Kopinski was previously employed in an accounts payable capacity. The McBride Defendants admit that Debra Ann Kopinski was employed from 2000 to 2017. The McBride Defendants deny the remaining allegations in paragraph 35.

Defendant GreatBanc

36. GreatBanc was engaged to act as discretionary trustee to the Plan, including with respect to the Plan's purchase or sale of MS Companies, Inc. stock and MS Capital stock, with the sole mission to act at all times in the best interests of the Plan's participants and beneficiaries in carrying out ERISA's strict fiduciary duties. GreatBanc, as described further below, failed to do so.

ANSWER: The McBride Defendants admit that GreatBanc Trust Company

("GreatBanc") was engaged to serve as a Trustee to the Plan, in accordance with the terms of certain engagement agreements, but rely on the terms of those agreements to speak for themselves, rather than on Plaintiffs' characterizations thereof. The McBride Defendants deny all remaining allegations in paragraph 36.

37. Pursuant to the 2013 ESOP Trust Agreement, GreatBanc was granted, inter alia, the following powers (i) to make payments from the ESOP Trust to participants as directed by the Administrative Committee; (ii) to begin, maintain, or defend any litigation necessary in connection with the investment, reinvestment, and the holding of the assets of the ESOP Trust and the administration of the ESOP Trust; (iii) to provide written reports to the Administrative Committee concerning the ESOP Trust's financial records and net worth of the ESOP Trust, (iv) to retain agents, attorneys, actuaries, accountants, appraisers, valuation firms, and independent financial advisors for any purpose at the trustee's, (v) to invest in [McBride Enterprise stock] and to select an independent appraiser to assist the trustee in determining the fair market value of the ESOP Trust (vi) to attend shareholder meetings of the [company whose stock is held by the ESOP] and act as the shareholder of record for the benefit of the ESOP Trust; and (vii) to perform any and all other acts in its judgment are considered necessary and appropriate for the ESOP Trust.

ANSWER: The McBride Defendants admit that GreatBanc was engaged to serve as a Trustee to the Plan pursuant to certain trust agreements, but rely on the terms of those agreements to speak for themselves, rather than on Plaintiffs' characterizations thereof. The McBride Defendants deny all remaining allegations in paragraph 37.

38. Because of these responsibilities and its position as trustee of the Plan, GreatBanc was at all relevant times a fiduciary of the Plan within the meaning of 29 U.S.C. § 1002(21)(A) because it was the Plan's "discretionary trustee" within the meaning of 29 U.S.C. § 1103(a) and because it exercised discretionary authority or discretionary control respecting management of the Plan, and/or exercised authority or control respecting management or distribution of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

ANSWER: The allegations in paragraph 38 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that GreatBanc previously served as Trustee to the Plan, but otherwise deny the allegations in paragraph 38.

39. GreatBanc was required by the 2013 ESOP Trust Agreement, and earlier versions of the trust agreement, to discharge its duties solely in the interest of Plan participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the reasonable expenses of administering the ESOP Trust. GreatBanc was also required to discharge its duties 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 like character and with like aims. GreatBanc was also required to discharge its duties in accordance with the documents and instruments governing the ESOP Trust and the Plan insofar as those documents and instruments are consistent with the provisions of ERISA. GreatBanc was also required to not cause the Trust to engage in any prohibited transactions prohibited by either the 2013 ESOP Trust Agreement, ERISA, or the Code.

ANSWER: The McBride Defendants admit that GreatBanc was engaged to serve as a Trustee to the Plan pursuant to certain trust agreements, but rely on the terms of those agreements to speak for themselves, rather than on Plaintiffs' characterizations thereof. Furthermore, paragraph 39 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny such allegations.

40. GreatBanc was at all relevant times a person providing services to the Plan.

ANSWER: Paragraph 40 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that GreatBanc previously served as Trustee to the Plan, but otherwise deny the allegations in paragraph 40.

41. GreatBanc was at all relevant times a party in interest to the Plan under 29 U.S.C. § 1002(14)(A).

ANSWER: Paragraph 41 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that GreatBanc previously served as Trustee to the Plan, but otherwise deny the allegations in paragraph 41.

42. GreatBanc's headquarters is located at 801 Warrenville Road, Suite 500, Lisle, Illinois 60532.

ANSWER: The McBride Defendants lack sufficient knowledge or information sufficient to form a belief as to the allegation in paragraph 42, and therefore deny it.

43. GreatBanc is a subsidiary of U.S. Fiduciary Services, Inc., which is also headquartered at 801 Warrenville Road, Suite 500, Lisle, Illinois 60532.

ANSWER: The McBride Defendants lack sufficient knowledge or information sufficient to form a belief as to the allegations in paragraph 43, and therefore deny them.

Defendant MS Management

44. Prior to and including December 31, 2013, McBride & Son Management Company, LLC ("MS Management") was the "plan sponsor" to the Plan under 29 U.S.C. § 1002(16)(B) according to the terms of the 2007 Plan Document and the 2013 Plan Document.

ANSWER: Paragraph 44 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 44.

45. MS Management was also the "named fiduciary" and "plan administrator" as those terms are defined in 29 U.S.C. § 1102(a) and 29 U.S.C. § 1002(16)(A), respectively, according to the terms of the 2007 Plan Document and the 2013 Plan Document.

ANSWER: Paragraph 45 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 45.

46. MS Management was a fiduciary to the Plan under 29 U.S.C. § 1002(21)(A) when it exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

ANSWER: Paragraph 46 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 46.

47. MS Management was at all relevant times a party in interest to the Plan under 29 U.S.C. § 1002(14)(A) and (C).

ANSWER: Paragraph 47 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 47.

48. MS Management, as a corporate entity, cannot act on its own without any human counterpart. In this regard, MS Management could only act through its Board of Directors.

ANSWER: The McBride Defendants admit that MS Management is a corporate entity.

The remaining allegations in paragraph 48 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 48.

49. Article 17.12 of the 2007 Plan Document and the 2013 Plan Document authorized the MS Management Board of Directors to act on behalf of MS Management as the named fiduciary and plan administrator of the Plan.

ANSWER: The allegations in paragraph 49 purport to paraphrase certain Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the Plan provisions, the McBride Defendants deny the allegations in paragraph 49.

50. Eilermann and Arri were the only members of the MS Management Board of Directors for the relevant time period for the SAC prior to and including December 31, 2013.

ANSWER: The McBride Defendants admit that Eilermann and Arri, at relevant times prior to January 1, 2014, were the only members of the board of directors of McBride & Son Management Co. The McBride Defendants deny the remaining allegations in paragraph 50.

51. Eilermann and Arri, as Directors, carried out all acts of MS Management in its role as named fiduciary and plan administrator to the Plan prior to and including December 31, 2013.

ANSWER: The allegations in paragraph 51 state legal conclusions to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 51.

52. MS Management, before converting to a limited liability company from a corporation, was called McBride & Son Management Co.

ANSWER: The McBride Defendants admit that McBride & Son Management Co. converted to a limited liability company and renamed McBride & Son Management Company, LLC. The McBride Defendants deny the remaining allegations in paragraph 52.

Defendant MS Capital

53. Effective December 31, 2013, MS Capital, a Delaware corporation was the "plan sponsor" to the Plan under 29 U.S.C. § 1002(16)(B) to the Plan under 29 U.S.C. § 1002(16)(B) according to the terms of the 2013 Plan Document, as amended by Amendment Number Two to the 2013 Plan Document as executed December 31, 2013, and according to the terms of the 2017 Plan Document.

ANSWER: The McBride Defendants admit that MS Capital was incorporated in Delaware. The remaining allegations in paragraph 53 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny such allegations.

54. MS Capital was also the "named fiduciary" and "plan administrator" as those terms are defined in 29 U.S.C. § 1102(a) and 29 U.S.C. § 1002(16)(A), respectively, according to the terms of the 2013 Plan Document, as amended by Amendment Number Two, and the 2017 Plan Document.

ANSWER: Paragraph 54 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 54.

55. MS Capital was a fiduciary to the Plan under 29 U.S.C. § 1002(21)(A) when it exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

ANSWER: Paragraph 55 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 55.

56. MS Capital was at all relevant times a party in interest to the Plan under 29 U.S.C. § 1002(14)(A) and (C).

ANSWER: Paragraph 56 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 56.

57. MS Capital, as a corporate entity, cannot act on its own without any human counterpart. In this regard, MS Capital could only act through its Board of Directors.

ANSWER: The McBride Defendants admit that MS Capital is a corporate entity. The

remaining allegations in paragraph 57 state legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny such allegations.

58. Article 17.12 of the 2013 Plan Document and the 2017 Plan Document authorized the MS Capital Board of Directors to act on behalf of MS Capital as the named fiduciary and plan administrator of the Plan.

ANSWER: The allegations in paragraph 58 purport to paraphrase certain Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the Plan provisions, the McBride Defendants deny the allegations in paragraph 58.

59. Eilermann and Arri were the only members of the MS Capital Board of Directors from December 31, 2013 through the time period the Plan was effectively terminated.

ANSWER: The McBride Defendants admit that Eilermann and Arri were the only members of the board of directors of McBride & Son Capital, Inc. Paragraph 59 further states legal conclusions regarding the effect of the plan merger, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations of paragraph 59.

60. Eilermann and Arri, as Directors, carried out all acts of MS Capital in its role as named fiduciary and plan administrator to the Plan from December 31, 2013 through the time period the Plan was effectively terminated.

ANSWER: The allegations in paragraph 60 state legal conclusions to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 60.

61. MS Capital, as the successor named fiduciary and plan administrator of MS Management, had a duty under ERISA to investigate and remedy breaches by previous fiduciaries of the Plan.

ANSWER: Paragraph 61 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 61.

Defendant Eilermann

62. Defendant John F. Eilermann, Jr. ("Eilermann") is Chief Executive Officer and President of MS Capital.

ANSWER: The McBride Defendants admit that Eilermann currently is the Chief Executive Officer of McBride & Son Capital, Inc.

63. Eilermann was also an officer to all of the corporate and/or limited liability company entities forming the McBride Enterprise for the time period relevant to the SAC.

ANSWER: The McBride Defendants admit that Eilermann currently serves as an officer to one or more of McBride & Son Capital, Inc.'s subsidiaries. The McBride Defendants deny the remaining allegations in paragraph 63.

64. Eilermann was one of two members of the MS Management Board of Directors prior to and including December 31, 2013.

ANSWER: The McBride Defendants admit that Eilermann was, at relevant times prior to January 1, 2014, one of two members of the board of directors of McBride & Son Management Co. The McBride Defendants deny the remaining allegations in paragraph 64.

65. Eilermann, as a Director, carried out all acts of MS Management in its role as named fiduciary and plan administrator to the Plan prior to and including December 31, 2013.

ANSWER: Paragraph 65 states legal conclusions to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 65.

66. Eilermann, as a Director of MS Management, was therefore a fiduciary to the Plan prior to and including December 31, 2013 as a named fiduciary under 29 U.S.C. § 1102(a), as the plan administrator under 29 U.S.C. § 1002(16)(A), and also as a fiduciary under 29 U.S.C. § 1002(21).

ANSWER: Paragraph 66 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 66.

67. Eilermann was one of two members of the MS Capital Board of Directors from December 31, 2013 through the time period the Plan was effectively terminated.

ANSWER: The McBride Defendants admit that Eilermann was one of two members of the board of directors of McBride & Son Capital, Inc. Paragraph 67 further states legal conclusions regarding the effect of the plan merger, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 67.

68. Eilermann, as a Director, carried out all acts of MS Capital in its role as named fiduciary and plan administrator to the Plan from December 31, 2013 through the time period the Plan was effectively terminated.

ANSWER: Paragraph 68 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 68.

69. Eilermann, as a Director of MS Capital, was therefore a fiduciary to the Plan from December 31, 2013 through the time period the Plan was effectively terminated as a named fiduciary under 29 U.S.C. § 1102(a), as the plan administrator under 29 U.S.C. § 1002(16)(A), and also as a fiduciary under 29 U.S.C. § 1002(21).

ANSWER: Paragraph 69 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 69.

70. As further described in the SAC, including as described in Counts II, IV, VIII, XII, XIV, and XVII, Eilermann was a fiduciary to the Plan under 29 U.S.C. § 1002(21)(A) when he exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

ANSWER: Paragraph 70 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 70.

71. Eilermann was also a party in interest to the Plan under 29 U.S.C. §§ 1002(14)(A), (H), and/or (I).

ANSWER: Paragraph 71 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 71.

Defendant Arri

72. Defendant Michael D. Arri ("Arri") was Chief Financial Officer and Treasurer of MS Capital.

ANSWER: The McBride Defendants admit that Arri previously served as the Chief Financial Officer and Treasurer of McBride & Son Capital, Inc.

73. Arri was also an officer to all of the corporate and/or limited liability company entities forming the McBride Enterprise for the time period relevant to the SAC.

ANSWER: The McBride Defendants admit that Arri currently serves as an officer to one or more of McBride & Son Capital, Inc.'s subsidiaries. The McBride Defendants deny the remaining allegations in paragraph 73.

74. Arri was one of two members of the MS Management Board of Directors prior to and including December 31, 2013.

ANSWER: The McBride Defendants admit that Arri was, at relevant times prior to January 1, 2014, one of two members of the board of directors of McBride & Son Management Co. The McBride Defendants deny the remaining allegations in paragraph 74.

75. Arri, as a Director, carried out all acts of MS Management in its role as named fiduciary and plan administrator to the Plan prior to and including December 31, 2013.

ANSWER: Paragraph 75 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 75.

76. Arri, as a Director of MS Management, was therefore a fiduciary to the Plan prior to and including December 31, 2013 as a named fiduciary under 29 U.S.C. § 1102(a), as the plan administrator under 29 U.S.C. § 1002(16)(A), and also as a fiduciary under 29 U.S.C. § 1002(21).

ANSWER: Paragraph 76 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 76.

77. Arri was one of two members of the MS Capital Board of Directors from December 31, 2013 through the time period the Plan was effectively terminated.

ANSWER: The McBride Defendants admit that Arri was one of two members of the board of directors of McBride & Son Capital, Inc. during relevant times after December 31,

2013. Paragraph 77 further states legal conclusions regarding the effect of the plan merger, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 77.

78. Arri, as a Director, carried out all acts of MS Capital in its role as named fiduciary and plan administrator to the Plan from December 31, 2013 through the time period the Plan was effectively terminated.

ANSWER: Paragraph 78 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 78.

79. Arri, as a Director of MS Capital, was therefore a fiduciary to the Plan from December 31, 2013 through the time period the Plan was effectively terminated as a named fiduciary under 29 U.S.C. § 1102(a), as the plan administrator under 29 U.S.C. § 1002(16)(A), and also as a fiduciary under 29 U.S.C. § 1002(21).

ANSWER: Paragraph 79 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 79.

80. As further described in the SAC, including as described in Counts II, IV, VIII, XII, XIV, and XVII, Arri was a fiduciary to the Plan under 29 U.S.C. § 1002(21)(A) when he exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

ANSWER: Paragraph 80 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 80.

81. Arri was also a party in interest to the Plan under 29 U.S.C. §§ 1002(14)(A), (H), and/or (I).

ANSWER: Paragraph 81 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 81.

Relevant Non-Parties

82. Jeffrey Schindler ("Schindler") served as President to one or more of the corporate and/or limited liability company entities forming the McBride Enterprise including those that are defined as employers in the Plan's governing documents.

ANSWER: The McBride Defendants admit that Jeffrey Schindler previously served as the President of McBride & Son Properties, LLC, but deny that he is currently employed by any McBride entity. The McBride Defendants deny all remaining allegations in paragraph 82.

83. Schindler is a party in interest to the Plan under 29 U.S.C. §§ 1002(14)(H) for all relevant times of the SAC.

ANSWER: Paragraph 83 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 83.

84. Jeffrey Todt ("Todt") serves as the current Chief Financial Officer of MS Capital and also served as an officer to one or more of the corporate and/or limited liability company entities forming the McBride Enterprise including those that are defined as employers in the Plan's governing documents. Todt previously served as Vice President of Accounting.

ANSWER: The McBride Defendants admit that Jeffrey Todt currently is the Chief Financial Officer of McBride & Son Capital, Inc., and serves as an officer to one or more of McBride & Son Capital Inc.'s subsidiaries. Paragraph 84 purports to paraphrase Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with the Plan provisions, the McBride Defendants deny the allegations in paragraph 84. The McBride Defendants deny all remaining allegations in paragraph 84.

85. Todt is a party in interest to the Plan under 29 U.S.C. §§ 1002(14)(H) for all relevant times of the SAC.

ANSWER: Paragraph 85 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 85.

86. Jeffrey Berger ("Berger") served as General Counsel of MS Capital and also served as an officer to one or more of the corporate and/or limited liability company entities forming the McBride Enterprise including those that are defined as employers in the Plan's governing documents.

ANSWER: The McBride Defendants admit that Jeffrey Berger served as General

Counsel of McBride & Son Capital, Inc. and also served as an officer to one or more of McBride & Son Capital, Inc.'s subsidiaries. Paragraph 86 purports to paraphrase Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the Plan provisions, the McBride Defendants deny the allegations in paragraph 86. The McBride Defendants deny the remaining allegations in paragraph 86.

87. Berger was a party in interest to the Plan under 29 U.S.C. §§ 1002(14)(H) for all relevant times of the SAC.

ANSWER: Paragraph 87 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 87.

88. Korschot & Company is a Missouri corporation, headquartered in Kansas City, Missouri that provides business valuation and financial advisory services under the fictitious name Stern Brothers Valuation Advisors (hereafter "Stern Brothers"). Opinions of value provided by Stern Brothers were provided to GreatBanc, MS Management, MS Capital, Eilermann, and Arri on an annual basis.

ANSWER: The McBride Defendants admit that Stern Brothers Valuations Advisors at relevant times provided annual valuations for the Plan which were provided to McBride Defendants. The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 88 and therefore deny them.

89. Butcher Joseph Hayes ("Butcher Joseph") is a Delaware limited liability company, headquartered in St. Louis, Missouri that provides investment banking services to its clients, including mergers and acquisition services, ESOP buyout services, recapitalization services and capital advisory services.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 89 and therefore deny them.

FACTUAL ALLEGATIONS

The Plan's Investment in McBride Enterprise Entities

90. The Plan originally held shares of McBride & Son Enterprises, Inc. stock ("MS

Enterprises").

ANSWER: The McBride Defendants admit the allegations in paragraph 90.

91. Effective January 8, 2010, the Plan's primary investment became shares of MS Companies, Inc. stock.

ANSWER: The McBride Defendants admit the allegations in paragraph 91.

92. Effective December 31, 2013, and through November 30, 2017, the Plan's primary investment was MS Capital stock.

ANSWER: The McBride Defendants admit the allegations in paragraph 92.

93. MS Enterprises stock, MS Companies, Inc. stock, and MS Capital stock are not, and were not at any time they were held by the Plan, readily tradable on an established securities market.

ANSWER: The McBride Defendants admit that McBride & Son Enterprises, Inc. stock, McBride & Son Companies, Inc. stock, and McBride & Son Capital, Inc. stock are not, and were not at the time held by the Plan, traded on an established securities market.

94. As of December 31, 2012, the Plan held 88,201 shares of MS Companies, Inc. stock.

ANSWER: The McBride Defendants admit that the Plan, as of December 31, 2012 held 88,201.56 shares of McBride & Son Companies, Inc.

95. At the start of December 31, 2013, the Plan held 88,201 shares of MS Companies, Inc. stock.

ANSWER: The McBride Defendants admit that the Plan, as of the open of December 31, 2013, held 88,201.4119 shares of McBride & Son Companies, Inc.

96. By the end of December 31, 2013, the Plan held 88,201 shares of MS Capital stock.

ANSWER: The McBride Defendants admit that the Plan, as of the close of December 31, 2013, held 88,201.4119 shares of McBride & Son Capital, Inc.

97. As of December 31, 2014, the Plan held 88,201 shares of MS Capital stock.

ANSWER: The McBride Defendants admit that the Plan, as of December 31, 2014, held 88,201.4119 shares of McBride & Son Capital, Inc.

98. As of December 31, 2015, the Plan held 73,536 shares of MS Capital stock.

ANSWER: The McBride Defendants admit that the Plan, as of December 31, 2015, held 73,535.9564 shares of McBride & Son Capital, Inc.

99. As of December 31, 2016, the Plan held 88,201 shares of MS Capital stock.

ANSWER: The McBride Defendants admit that the Plan, as of December 31, 2016, held 88,201.4119 shares of McBride & Son Capital, Inc.

100. As of December 31, 2012, the plan administrator reported the Plan's investment in MS Companies, Inc. stock as $10,742,941 on the Plan's 2012 Form 5500.

ANSWER: Paragraph 100 purports to characterize certain statements made in a Form 5500. The McBride Defendants rely on that document to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegations in paragraph 100.

101. As of December 31, 2013, the plan administrator reported the Plan's investment in MS Companies, LLC as $12,595,173 on the Plan's 2013 Form 5500. This information was false, as the Plan actually held MS Capital stock which held 88,201 Class A Units of MS Companies, LLC.

ANSWER: Paragraph 101 purports to characterize certain statements made in a Form 5500. The McBride Defendants rely on that document to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegations in paragraph 101.

102. As of December 31, 2014, the plan administrator reported the Plan's investment in MS Capital stock as $14,817,850 on the Plan's 2014 Form 5500.

ANSWER: Paragraph 102 purports to characterize certain statements made in a Form

5500. The McBride Defendants rely on that document to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegations in paragraph 102.

103. As of December 31, 2015, the plan administrator reported the Plan's investment in MS Capital stock as $12,354,054 on the Plan's 2015 Form 5500.

ANSWER: Paragraph 103 purports to characterize certain statements made in a Form 5500. The McBride Defendants rely on that document to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegations in paragraph 103.

104. As of December 31, 2016, the plan administrator reported the Plan's investment in MS Capital stock as $13,494,818 on the Plan's 2016 Form 5500.

ANSWER: Paragraph 104 purports to characterize certain statements made in a Form 5500. The McBride Defendants rely on that document to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegations in paragraph 104.

Valuation of Stock Held by the Plan

105. Stern Brothers was engaged by GreatBanc on May 25, 2010 to perform valuations for the stock held by the Plan. Arri also agreed to and accepted the engagement.

ANSWER: Paragraph 105 purports to characterize the terms of certain engagement agreements. The McBride Defendants rely on those agreements to speak for themselves rather than on Plaintiffs' characterization thereof. To the extent that characterization is inaccurate, the McBride Defendants deny the allegations in paragraph 105.

106. As a condition of engagement with Stern Brothers, the Plan's fiduciaries were required to provide all information relating to the McBride Enterprise necessary for purposes of providing an estimate of value and in providing the estimate, Stern Brothers would rely, without any independent verification on the accuracy, completeness, and fairness of all information furnished by the fiduciaries without any independent appraisals.

ANSWER: Paragraph 106 purports to characterize the terms of certain engagement agreements. The McBride Defendants rely on those agreements to speak for themselves rather than on Plaintiffs' characterization thereof. To the extent that characterization is inaccurate, the McBride Defendants deny the allegations in paragraph 106.

107. Consequently, MS Management, MS Capital, Eilermann, and Arri were fiduciaries in providing information to Stern Brothers.

ANSWER: Paragraph 107 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 107.

108. As of December 31, 2012, Stern Brothers reported a value of $121.80 per share of MS Companies, Inc. stock.

ANSWER: The McBride Defendants admit that Stern Brothers valued the shares of McBride & Son Companies, Inc., as of December 31, 2012, at $121.80. The McBride Defendants lack knowledge or information sufficient to form as belief as to what Plaintiffs' use of the phrase "Stern Brothers reported" refers to and therefore deny this allegation.

109. As of December 31, 2013, Stern Brothers reported a value of $142.80 per share of MS Capital stock.

ANSWER: The McBride Defendants admit that Stern Brothers valued the shares of McBride & Son Capital, Inc., as of December 31, 2013, at $142.80 per share. The McBride Defendants lack knowledge or information sufficient to form as belief as to what Plaintiffs' use of the phrase "Stern Brothers reported" refers to and therefore deny this allegation.

110. As of December 31, 2014, Stern Brothers reported a value of $168 per share of MS Capital stock.

ANSWER: The McBride Defendants admit that Stern Brothers valued the shares of McBride & Son Capital, Inc., as of December 31, 2014, at $168 per share. The McBride

Defendants lack knowledge or information sufficient to form as belief as to what Plaintiffs' use of the phrase "Stern Brothers reported" refers to and therefore deny this allegation.

111. As of December 31, 2015, Stern Brothers reported a value of $168 per share of MS Capital stock.

ANSWER: The McBride Defendants admit that Stern Brothers valued the shares of McBride & Son Capital, Inc., as of December 31, 2015, at $168 per share. The McBride Defendants lack knowledge or information sufficient to form as belief as to what Plaintiffs' use of the phrase "Stern Brothers reported" refers to and therefore deny this allegation.

112. As of December 31, 2016, Stern Brothers reported a value of $153 per share of MS Capital stock.

ANSWER: The McBride Defendants admit that Stern Brothers valued the shares of McBride & Son Capital, Inc., as of December 31, 2016, at $153 per share. The McBride Defendants lack knowledge or information sufficient to form as belief as to what Plaintiffs' use of the phrase "Stern Brothers reported" refers to and therefore deny this allegation.

113. From at least 2012 through 2016, when GreatBanc sent a copy of the valuation report created by Stern Brothers to the Plan's fiduciaries, GreatBanc acknowledged Arri's role as a fiduciary when it stated: "This report is being delivered to you in your capacity as a plan fiduciary."

ANSWER: Paragraph 113 purports to characterize and/or cite to certain reports created by Stern Brothers. The McBride Defendants rely on these documents to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the documents, the McBride Defendants deny the allegations of paragraph 113. Paragraph 113 further states a legal conclusion, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations of paragraph 113.

Eilermann, Arri, and Other Insiders Receive Synthetic Equity

114-128. The McBride Defendants have moved to dismiss all claims related to the

payment of compensation; therefore, no response to paragraphs 114-128 is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in paragraphs 114-128 as required by the Court and/or the Federal Rules of Civil Procedure.

The 2013 ESOP Transaction

129-148. The McBride Defendants have moved to dismiss all claims related to the 2013 Reorganization; therefore, no response to paragraphs 129-148 is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in paragraphs 129-148 as required by the Court and/or the Federal Rules of Civil Procedure.

Loss of Value from 2013 to 2017

149-205. The McBride Defendants have moved to dismiss all claims related to the "Loss of Value from 2013 to 2017"; therefore, no response to paragraphs 149-205 is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in paragraphs 149-205 as required by the Court and/or the Federal Rules of Civil Procedure.

The 2017 ESOP Transaction

206. After paying Eilermann, Arri, Schindler, Berger, and Todt approximately [redacted] in total compensation from 2013 to 2017 and awarding them 42.7% of the McBride Enterprise, Eilermann and Arri completed their takeover of the McBride Enterprise from the ESOP when they caused MS Capital engage in the 2017 ESOP Transaction, as described in this section of the SAC, to purchase all of its outstanding shares from the ESOP for a below fair market value. As a result of the 2017 ESOP Transaction, Eilermann, Arri, Schindler, and Todt became the sole owners of the McBride Enterprise at the direct loss of the ESOP.

ANSWER: The McBride Defendants deny the allegations in paragraph 206.

207. Stern Brothers was engaged by GreatBanc to provide services related to the 2017 ESOP Transaction. Arri agreed to and accepted the engagement on behalf of MS Capital who

was responsible for paying the cost for Stern Brothers.

ANSWER: Paragraph 207 purports to refer to a certain engagement agreement with Stern Brothers. The McBride Defendants rely on that document to speak for itself rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegation in paragraph 207.

208. As a condition of the engagement of Stern Brothers, MS Capital was required to provide all information relating to the McBride Enterprise necessary for purposes of providing an estimate of value and in providing the estimate, Stern Brothers would rely, without independent verification on the accuracy, completeness, and fairness of all information furnished by McBride Enterprises without an independent appraisal of any assets of the McBride Enterprise.

ANSWER: Paragraph 208 purports to paraphrase a certain engagement agreement with Stern Brothers. The McBride Defendants rely on that document to speak for itself rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegation in paragraph 208.

209. Consequently, MS Capital, Eilermann, and Arri were fiduciaries in providing information to GreatBanc and Stern Brothers to consider for the 2017 ESOP Transaction.

ANSWER: Paragraph 209 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 209.

210. Butcher Joseph, the investment bank, was retained to provide services related to the 2017 ESOP Transaction for the benefit of Eilermann, Arri, Schindler, and Todt and not for the benefit of the ESOP. No investment bank was hired for the benefit of the ESOP.

ANSWER: The McBride Defendants admit that ButcherJoseph & Co., LLC was engaged to provide services in connection with the 2017 ESOP Transaction pursuant to an engagement agreement, but rely on the terms of that agreement to speak for themselves, rather than on Plaintiffs' characterization thereof. The McBride Defendants deny all remaining

allegations in paragraph 210.

211. In fact, the Second Amendment to the Trustee Engagement Agreement with GreatBanc for services related to the 2017 ESOP Transaction, executed by Arri on behalf of Capital, Inc., only contemplated the hiring of Stern Brothers and a law firm to represent GreatBanc. It failed to contemplate the hiring of any additional providers such as an investment bank on behalf of the ESOP. This was by design.

ANSWER: The first and second sentences of paragraph 211 purport to characterize the terms of a certain engagement agreement. The McBride Defendants rely on that agreement to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inaccurate, the McBride Defendants deny such allegations. The McBride Defendants deny the allegations in the third sentence of paragraph 211.

212. Around late September 2017, Eilermann and Arri approached GreatBanc with a proposal to purchase all of the MS Capital stock held by the ESOP (hereafter "Early October Proposal").

ANSWER: The McBride Defendants deny the allegations in paragraph 212. Further answering, the McBride Defendants deny that Plaintiffs' use of the term "Early October Proposal" as used hereafter is accurate.

213. Eilermann and Arri flew to Chicago to meet with GreatBanc to discuss the Early October Proposal and made a presentation (hereafter "Early October Presentation").

ANSWER: The McBride Defendants deny the allegations in paragraph 213. Further answering, the McBride Defendants deny that Plaintiffs' use of the term "Early October Presentation" as used hereafter is accurate.

214. The Early October Proposal by Eilermann and Arri offered to buy the MS Capital stock at a 20% premium to the December 31, 2016 valuation. The December 31, 2016, valuation was $153 per share. The Early October Proposal was for $183.20 per share.

ANSWER: The McBride Defendants admit that the stock of McBride & Son Capital, Inc. was valued at $153 per share as of December 31, 2016, and that McBride & Son Capital,

Inc. offered to redeem McBride & Son Capital, Inc. stock at a per-share price of $183.60, which is a 20% premium over $153. The McBride Defendants deny the remaining allegations in paragraph 214.

215. The Early October Proposal and Early October Presentation by Eilermann and Arri did not include an updated valuation of MS Capital stock by an independent and qualified valuation expert.

ANSWER: The McBride Defendants admit that the "Early October Proposal" and "Early October Presentation" did not include a valuation.

216. The Early October Proposal and Early October Presentation by Eilermann and Arri did not include detailed financial statements or other appropriate updated relevant information about the performance of the McBride Enterprise that an independent and qualified valuation expert would rely on.

ANSWER: Paragraph 216 contains statements of opinion, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 216.

217. On or about October 23, 2017, De Craene, on behalf of GreatBanc, and without additional financial material from Eilermann and Arri, engaged in further negotiations with Eilermann and Arri over their proposal to purchase MS Capital stock from the Plan.

ANSWER: The McBride Defendants deny the allegations in paragraph 217.

218. No later than October 23, 2017, De Craene, Eilermann, and Arri arrived at a price of $187 per share (the "Below FMV Sale Price").

ANSWER: The McBride Defendants deny the allegations in paragraph 218.

219. A Subscription Agreement is a promise by a company to sell a given number of shares to an investor at a certain price, and an agreement by the investor to pay that price.

ANSWER: Paragraph 219 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 219.

220. On November 28, 2017, Eilermann entered into a subscription agreement with

MS Capital for [redacted] shares of MS Capital common stock at a subscription price of $187 per share. Arri executed the subscription agreement on behalf of MS Capital. The subscription agreement was approved by the consent of both Eilermann and Arri as Directors of MS Capital.

ANSWER: The McBride Defendants deny the allegations in paragraph 220. The McBride Defendants state that Eilermann entered into a subscription agreement with McBride & Son Capital, Inc. on November 30, 2017, the terms of which speak for themselves.

221. On November 28, 2017, Arri entered into a subscription agreement with MS Capital for [redacted] shares of MS Capital common stock at a subscription price of $187 per share. Arri executed the subscription agreement on behalf of MS Capital. The subscription agreement was approved by consent of both Eilermann and Arri as Directors of MS Capital

ANSWER: The McBride Defendants deny the allegations in paragraph 221. The McBride Defendants state that Arri entered into a subscription agreement with McBride & Son Capital, Inc. on November 30, 2017, the terms of which speak for themselves.

222. The purpose of the subscription agreements was that upon the execution of the sale of MS Capital stock to MS Capital from the ESOP, Eilermann and Arri would immediately be sold the shares described in the subscription agreements and would thus take control of MS Capital.

ANSWER: Paragraph 222 purports to characterize certain subscription agreements. The McBride Defendants rely on those subscription agreements to speak for themselves rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the subscription agreements, the McBride Defendants deny the allegations in paragraph 222.

223. On November 30, 2017 through the execution of the Redemption Agreement, GreatBanc, MS Capital, Eilermann, and Arri allowed MS Capital to purchase all the shares of MS Capital stock held by the Plan, which were transferred to MS Capital at the Below FMV Sale Price of $187 for a total of consideration of $16,493,664, which consisted of 80,094.3643 shares for $14,977,646 in cash and 8,107.0476 shares for loan forgiveness on a October 31, 2017 promissory note of $1,516,018 (discussed further below).

ANSWER: The McBride Defendants admit that McBride & Son Capital, Inc. redeemed 80,094.3643 shares of McBride & Son Capital, Inc. stock held by the Plan for a total

consideration of $14,977,646.12, which is approximately $187 per share, but deny that the redeemed stock includes the 8,107.0476 shares that the Plan tendered to McBride & Son Capital, Inc. in payment of the 2017 loan. The McBride Defendants deny the remaining allegations in paragraph 223.

224. Eilermann and Arri executed the Unanimous Written Consent of the Board of Directors of MS Capital dated November 30, 2017 on behalf of MS Capital authorizing MS Capital to enter into the Redemption Agreement.

ANSWER: The McBride Defendants admit that the November 30, 2017 Unanimous Written Consent of the Board of Directors of McBride & Son Capital, Inc. was signed by Eilermann and Arri on behalf of McBride & Son Capital, Inc. The McBride Defendants deny the remaining allegations in paragraph 224.

225. Eilermann executed the Redemption Agreement dated November 30, 2017 on behalf of MS Capital authorizing the 2017 ESOP Transaction.

ANSWER: The McBride Defendants admit that the November 30, 2017 Redemption Agreement was signed by Eilermann on behalf of McBride & Son Capital, Inc. The McBride Defendants deny the remaining allegations in paragraph 225.

226. Shortly after Eilermann and Arri were sold shares of MS Capital under the subscription agreements, Eilermann and Arri sold MS Capital stock to Schindler and Todt.

ANSWER: The McBride Defendants deny the allegations in paragraph 226.

227. Eilermann, Arri, Schindler, and Todt thus had 100% ownership and control of the McBride Enterprise through their ownership of MS Capital, which still owned the Class A Units of MS Companies, LLC, and through their direct ownership of Class B Units and Class C Units of MS Companies, LLC.

ANSWER: The McBride Defendants deny the allegations in paragraph 227.

228. Prior to the 2017 ESOP Transaction, ESOP participants were not informed that the ESOP only owned 57.3% of the McBride Enterprise and that Eilermann, Arri, Schindler, and Todt controlled and owned 42.7%.

ANSWER: The McBride Defendants deny the allegations in paragraph 228.

229. GreatBanc, MS Capital, Eilermann, and Arri were aware, prior to entering into the 2017 ESOP Transaction, that the goal of the 2017 ESOP Transaction was for Eilermann to control [redacted] of the McBride Enterprise and Arri [redacted].

ANSWER: The McBride Defendants deny the allegations in paragraph 229.

230. The MS Capital Balance Sheet used as part of the 2017 ESOP Transaction reported, as of October 31, 2017, the total equity (assets minus liabilities) in the McBride Enterprise as [redacted]. Of this amount, [redacted] was reported as the ESOP's equity and [redacted] was reported as Eilermann, Arri, Schindler, and Todt's equity. By this time, Berger was no longer employed at the McBride Enterprise.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to what Plaintiffs' use of the phrase the "Balance Sheet" refers to and therefore deny this allegation. Paragraph 230 purports to characterize an unidentified "Balance Sheet." The McBride Defendants rely on that "Balance Sheet" to speak for itself rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the "Balance Sheet," the McBride Defendants deny the allegations in paragraph 230. The McBride Defendants admit that Berger was no longer employed by any McBride entity as of October 31, 2017.

231. The MS Capital Statements of Income used as part of the 2017 ESOP Transaction reported Income, from January 1, 2017 to October 31, 2017, from Operations (generally income minus expenses) of the McBride Enterprise as [redacted]. Of this amount, [redacted] was attributable to (but not paid to) the ESOP and [redacted] was reported as attributable to Eilermann, Arri, Schindler, Berger, and Todt.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to what Plaintiffs' use of the phrase the "Statements of Income" refers to and therefore deny this allegation. Paragraph 231 purports to characterize an unidentified "Statements of Income." The McBride Defendants rely on those "Statements of Income" to speak for themselves rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the "Statement of Income," the McBride Defendants deny

the allegations in paragraph 231.

232. An opinion of value prepared by Stern Brothers as part of the 2017 ESOP Transaction used these lower amounts attributable to the ESOP in the different valuation methodologies used to arrive at their opinion of value of the MS Capital stock.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the allegations in paragraph 232, and therefore deny them.

233. The MS Companies, LLC Operating Agreement valued the Class B Units and Class C Units as equivalent to the value of one share of MS Capital common stock. Consequently, the value of MS Capital stock on November 30, 2017 was directly controlled by the amount of Class B Units and Class C Units awarded to Eilermann, Arri, Schindler, Berger, and Todt.

ANSWER: The allegations in the first sentence of paragraph 233 purport to paraphrase and/or cite to a certain operating agreement. The McBride Defendants rely on this source to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent those characterizations are inconsistent with the document cited, the McBride Defendants deny the allegations in the first sentence of paragraph 233. The second sentence of paragraph 233 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in the second sentence of paragraph 233.

234. Eilermann and Arri, as the managers committee of MS Companies, LLC, had sole discretion to issue Class B Units and Class C Units.

ANSWER: Paragraph 234 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 234.

235. Therefore Eilermann and Arri had discretion, authority, and control over the value of MS Capital stock as of November 30, 2017 as used by GreatBanc, MS Capital, Eilermann, and Arri to carry out the 2017 ESOP Transaction.

ANSWER: Paragraph 235 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph

235.

236. The 2017 ESOP Transaction was on less favorable terms to the ESOP participants than a transaction in 2015 that resulted in the sale of a division of the McBride Enterprise.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to what Plaintiffs' use of the phrase "transaction in 2015" refers to and therefore deny the allegations in paragraph 236. The McBride Defendants deny that the 2017 ESOP Transaction was "less favorable" than or comparable to any "transaction in 2015."

237. Stern Brothers, as part of the services they provided for the 2017 ESOP Transaction, was not authorized to solicit, and did not solicit, interest from any third party with respect a merger with or other business combination transaction involving the McBride Enterprise or any of its assets.

ANSWER: Paragraph 237 purports to characterize the terms of a certain engagement agreement. The McBride Defendants rely on that agreement to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent Plaintiffs' characterization is incorrect, the McBride Defendants deny the allegations in paragraph 237.

238. In fact, no one, including GreatBanc, MS Capital, Eilermann, and Arri, solicited interest from any third party with respect to a merger with or other business combination transaction involving the McBride Enterprise or any of its assets. This was by design.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to whether GreatBanc solicited interest from any third party and therefore deny this allegation. The McBride Defendants deny the remaining allegations in paragraph 238.

239. Stern Brothers, as part of the services they provided for the 2017 ESOP Transaction, was not authorized to have discussions or negotiations with any third parties other than MS Capital in connection with the sale of MS Capital stock from the ESOP.

ANSWER: Paragraph 239 purports to characterize the terms of a certain engagement agreement. The McBride Defendants rely on that agreement to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent Plaintiffs' characterization is incorrect, the

McBride Defendants deny the allegations in paragraph 239.

240. In fact, no one, including GreatBanc, MS Capital, Eilermann, and Arri, had discussions or negotiations with any third parties other than MS Capital in connection with the sale of MS Capital stock from the ESOP. This was by design.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to whether GreatBanc had discussions or negotiations with any third party and therefore deny this allegation. The McBride Defendants deny all remaining allegations in paragraph 240.

241. GreatBanc, MS Capital, Eilermann, and Arri were aware that Eilermann and Arri were, for their own purposes, estimating annual income to the McBride Enterprise after the 2017 ESOP Transaction of [redacted] and an annual increase in fair market value of [redacted] per year through 2019. GreatBanc, MS Capital, Eilermann, and Arri allowed the 2017 ESOP Transaction to be based on less favorable assumptions which had the consequence of a drastically lower opinion of the fair market value of MS Capital stock by Stern Brothers.

ANSWER: The McBride Defendants deny the allegations in paragraph 241.

242. The opinion on the value of MS Capital stock prepared by Stern Brothers for purposes of the 2017 ESOP Transaction failed to consider material information about the value of the McBride Enterprise. For example, on March 23, 2018, an article in the St. Louis Business Journal announced that the McBride Enterprise had entered into a joint venture with J.H. Berra Construction Co. to create a new land development company, called Elite Development Services, LLC. The report, citing Eilermann, said that the joint venture was expected to hit $40 or $50 million in revenue in its first year of business. There is no mention of Elite Development Services in any materials prepared by MS Capital, GreatBanc, Eilermann, Arri, or Stern Brothers related to the 2017 ESOP Transaction. Upon information and belief, the future revenue generated by Elite Development Services was not considered in arriving at the sale price of $187 for the 2017 ESOP Transaction.

ANSWER: The McBride Defendants deny the allegations in the first and fifth sentences of paragraph 242. The second and third sentences of paragraph 242 purport to characterize a news article. The McBride Defendants rely on that news article to speak for itself, rather than on Plaintiffs' characterizations thereof. The McBride Defendants admit the allegations in the fourth sentence of paragraph 242.

243. The opinion on the value of MS Capital stock prepared by Stern Brothers for

purposes of the 2017 ESOP Transaction was also not independent. For example, Stern Brothers and Arri conspired to establish the Below FMV Sale Price when Stern Brothers sent an email to Arri prior to the 2017 ESOP Transaction was completed stating that their calculations were resulting in a high estimate of fair market value and requesting additional information so they could change their methodology so it would result in a lower estimate of fair market value. An independent valuation expert would not have conspired with a conflicted plan fiduciary that was seeking to buy the stock from the ESOP and would not have adjusted their methodology to arrive at a lower estimate.

ANSWER: The McBride Defendants deny the allegations in the first and second sentences of paragraph 243. The last sentence of paragraph 243 contains statements of opinion and innuendo, to which no response is required. To the extent a response is required, the McBride Defendants deny such allegation.

244. GreatBanc, under the MS Capital bylaws, had the authority to appoint independent members of the MS Capital Board of Directors. They failed to do so.

ANSWER: Paragraph 244 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 244.

245. Eilermann and Arri, as the only members of the Board of Directors of MS Capital and under the terms of the MS Capital bylaws, had the authority to recommend the termination of a Directors of MS Capital.

ANSWER: Paragraph 245 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 245.

246. As the trustee for and fiduciary to the Plan, it was GreatBanc's duty to ensure that any transactions between the Plan and MS Capital were fair and reasonable, for the exclusive benefit of the Plan's participants and beneficiaries, consistent with ERISA's fiduciary duties, that the Plan would receive no less than fair market value for the stock, and that no prohibited transaction would occur involving Plan assets.

ANSWER: Paragraph 246 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants admit that GreatBanc was the

Trustee for the Plan and carried out certain duties pursuant to its engagement agreement. The McBride Defendants rely on the terms of that agreement to speak for itself, rather than on Plaintiffs' characterizations thereof. The McBride Defendants deny all remaining allegations in paragraph 246.

247. As fiduciaries to the Plan, it was MS Capital, Eilermann, and Arri's duty to ensure that any transactions between the Plan and MS Capital were fair and reasonable, for the exclusive benefit of the Plan's participants and beneficiaries, consistent with ERISA's fiduciary duties, that the Plan would receive no less than fair market value for the stock, and that no prohibited transaction would occur involving Plan assets.

ANSWER: Paragraph 247 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 247.

248. Approving the Below FMV Sale Price was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties. The Below FMV Sale Price for MS Capital stock was below fair market value based upon what an unrelated party would pay in an arm's length negotiated transaction as measured by comparison to sales and valuation data on other similarly situated companies in the same industry.

ANSWER: The McBride Defendants deny the allegations in paragraph 248.

249. Article 2.26 of the 2017 Plan Document defined Fair Market Value as the dollar amount determined by an independent appraiser to be the value of Company Stock in accordance with and subject to Code Section 401(a)(28)(C).

ANSWER: The allegations in paragraph 249 purport to paraphrase and/or cite to certain Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with those Plan provisions, the McBride Defendants deny the allegations in paragraph 249.

250. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to rely on the December 31, 2016, valuation report which was not prepared for purposes of a sale of MS Capital stock from the ESOP. As an example, the December 31, 2016, valuation report included a 15% discount for lack of marketability, which is inapplicable to a situation

where a proposal has been made to buy all the outstanding shares of MS Capital stock.

ANSWER: The McBride Defendants deny the allegations in paragraph 250.

251. The December 31, 2016, valuation report stated "[t]he conclusion of value arrived at herein is valid only for the stated purpose as of the date of the valuation."

ANSWER: The McBride Defendants admit that the Appraisal of Units of McBride & Son Capital, Inc. effective December 31, 2016 states that "[t]he conclusion of value arrived at herein is valid only for the stated purpose as of the date of the valuation."

252. The December 31, 2016, valuation report also stated "[t]his report and the conclusion of value arrived at herein are for the exclusive use of our client for the sole and specific purpose as noted herein. They may not be used for any other purpose or by any other party for any purpose."

ANSWER: The McBride Defendants admit that the Appraisal of Units of McBride & Son Capital, Inc. effective December 31, 2016 states that "[t]his report and the conclusion of value arrived at herein are for the exclusive use of our client for the sole and specific purpose as noted herein. They may not be used for any other purpose or by any other party for any purpose."

253. The stated purpose of the December 31, 2016, valuation was not to value the MS Capital stock held in the Plan for sale.

ANSWER: Paragraph 253 purports to paraphrase and/or cite to certain statements in a December 31, 2016 valuation. The McBride Defendants rely on the statements to speak for themselves and not on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the valuation, the McBride Defendants deny the allegations in paragraph 253.

254. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to rely on the Early October Proposal and Early October Presentation.

ANSWER: The McBride Defendants deny the allegations in paragraph 254.

255. It was inconsistent with GreatBanc's duties to not independently investigate the information provided by Eilermann and Arri in the Early October Proposal and Early October

Presentation before arriving at the Below FMV Sale Price.

ANSWER: The McBride Defendants deny the allegations in paragraph 255.

256. It was inconsistent with GreatBanc's duties to agree on a sale price with Eilermann and Arri in mere weeks, demonstrating a severe lack of due diligence.

ANSWER: The McBride Defendants deny the allegations in paragraph 256.

257. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to allow Eilermann and Arri to push a timetable for purchase that did not allow proper due diligence to occur for the benefit of the Plan's participants and beneficiaries.

ANSWER: The McBride Defendants deny the allegations in paragraph 257.

258. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to not engage in a thorough level of due diligence prior to arriving at a sale price.

ANSWER: The McBride Defendants deny the allegations in paragraph 258.

259. De Craene of GreatBanc in a published article wrote "[a] thorough due diligence review includes a review and discussion of the year-end financial statements, the projected financial statements, the overall industry, the competitors, the suppliers, the customers, key personnel changes, management succession, new product or service offerings, the backlog, the pipeline, litigation, and any other relevant items."

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the allegations in paragraph 259, and therefore deny them.

260. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to agree on a sale price without first obtaining an updated valuation report from an independent and qualified valuation expert.

ANSWER: The McBride Defendants deny the allegations in paragraph 260.

261. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to fail to consider alternative purchasers of MS Capital stock including, but not limited to, publicly traded competitors, privately held competitors, or other potential buyers such as private equity firms.

ANSWER: The McBride Defendants deny the allegations in paragraph 261.

262. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to not hire an independent investment banker that would act on behalf of the Plan to explore alternative purchasers.

ANSWER: The McBride Defendants deny the allegations in paragraph 262.

263. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to not have independent members of the Board of Directors of MS Capital appointed to operate in the best interest of the Plan's participants and beneficiaries.

ANSWER: The McBride Defendants deny the allegations in paragraph 263.

264. De Craene in a published article wrote: "A board of directors consisting solely of insiders is also an area of concern for a trustee. Best practices dictate that an ESOP company has at least one or two outside, independent board members. The implementation of outside board members removes conflicts of interest that may otherwise exist. This adds a level of protection to the decisions made by the board and protects the trustee in monitoring the board. In addition, outside board members add a different perspective and bring different experiences to bear that are often helpful in the boardroom."

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the allegations in paragraph 264, and therefore deny them.

265. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to approve a Below FMV Sale Price of $187 when projections called for increased revenues in 2017 and beyond.

ANSWER: The McBride Defendants deny the allegations in paragraph 265.

266. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to approve a Below FMV Sale Price of $187 when the liquidation value of the ESOP's equity in MS Capital had a higher value than what they received.

ANSWER: The McBride Defendants deny the allegations in paragraph 266.

267. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to approve a Below FMV Sale Price of $187 when Eilermann stated publicly in June 2017 that "[w]e currently have 4,000 homesites under development in St. Louis and that's the most we've ever had at one time. The 2017-2018 outlook is positive which means the St. Louis region will increasingly thrive while we continue to deliver homes in all price points."

ANSWER: The McBride Defendants deny the allegations in paragraph 267.

268. It was inconsistent with MS Capital, Eilermann, and Arri's duties to not remove GreatBanc as trustee for its breaches of duty between the Early October Proposal and the sale of MS Capital stock as the Below FMV Sale Price.

ANSWER: The McBride Defendants deny the allegations in paragraph 268.

269. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to not remove Eilermann and Arri as members of the Board of Directors of MS Capital.

ANSWER: The McBride Defendants deny the allegations in paragraph 269.

270. It was inconsistent with GreatBanc, MS Capital, Eilermann, and Arri's fiduciary duties to not remove those fiduciaries acting against the best interests of the Plan as described herein.

ANSWER: The McBride Defendants deny the allegations in paragraph 270.

271. GreatBanc, MS Capital, Eilermann, and Arri had a dual obligation to first properly determine whether a sale of the MS Capital stock from the Plan was in the best interests of the Plan's participants and beneficiaries and second, assuming such a determination could be made, to ensure that the Plan received fair market value for the MS Capital stock to protect the interests of the Plan's participants and beneficiaries. They failed in both respects.

ANSWER: The first sentence of paragraph 271 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in the first sentence. The McBride Defendants deny the allegations in the second sentence of paragraph 271.

Account Balances of Inactive Participants

272. On October 31, 2017, Amendment Number One to the 2017 Plan Document was executed by Arri. Amendment Number One purports to provide that a former participant's "ESOP Account" and "Matching Contribution Account" (as defined in the 2017 Plan document) may be converted into cash after the former participant terminated employment with MS Capital.

ANSWER: The McBride Defendants admit that the Plan was amended via Amendment Number One to the McBride & Son Employee Stock Ownership Plan, executed on October 31, 2017, but the McBride Defendants rely on the amendment to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with such amendment, the McBride Defendants deny the allegation in paragraph 272.

273. On October 31, 2017, a promissory note was executed between the Plan and MS Capital for $1,516,017.90 and this amount was later deposited into the Plan.

ANSWER: The McBride Defendants admit that the McBride & Son Employee Stock

Ownership Trust executed a promissory note payable to the order of McBride & Son Capital, Inc. in the amount of $1,516,017.90, and that on or about November 1, 2017, that full amount was deposited in the Trust. The McBride Defendants deny the remaining allegations in paragraph 273.

274. Arri has filed a declaration under penalty of perjury alleging that this loan was for the purpose of converting the shares to cash held in the Plan accounts of inactive participants, including Godfrey and Sheldon.

ANSWER: The allegations in paragraph 274 purport to paraphrase certain statements made in a declaration. The McBride Defendants rely on the statements to speak for themselves, rather than on Plaintiffs' characterizations thereof. To the extent that such characterization differs from such declaration, the McBride Defendants deny the allegations in paragraph 274.

275. An Account Statement for the Plan shows that the loan proceeds were received on November 1, 2017. An Account Statement for the Plan shows that the liability for the loan note was entered as of November 1, 2017.

ANSWER: The McBride Defendants lack sufficient knowledge or information to form a belief as to what Plaintiffs' use of the phrase the "Account Statement" refers to and therefore deny this allegation. Paragraph 275 purports to characterize an unidentified "Account Statement." The McBride Defendants rely on that "Account Statement" to speak for itself, rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the "Account Statement," the McBride Defendants deny the allegations in paragraph 275.

276. An Account Statement for the Plan shows that GreatBanc purchased $1,516,017.90 in a Goldman Sachs money market fund on November 1, 2017.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to what Plaintiffs' use of the phrase the "Account Statement" refers to and therefore deny this allegation. Paragraph 276 purports to characterize an unidentified "Account

Statement." The McBride Defendants rely on that "Account Statement" to speak for itself rather than on Plaintiffs' characterization thereof. To the extent such characterization is inconsistent with the "Account Statement," the McBride Defendants deny the allegations in paragraph 276.

277. The same Account Statement does not show the MS Capital shares held by inactive participants being liquidated for cash on November 1, 2017, nor any other day thereafter.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to what Plaintiffs' use of the phrase the "Account Statement" refers to and therefore deny this allegation. The McBride Defendants deny the remaining allegations in paragraph 277.

278. The same Account Statement instead shows that on November 30, 2017, 8,107.0476 shares of MS Capital were transferred to MS Capital in satisfaction of the $1,516,017.90 loan at a share price of $187.

ANSWER: The McBride Defendants lack sufficient knowledge or information to form a belief as to what Plaintiffs' use of the phrase the "Account Statement" refers to and therefore deny this allegation. The McBride Defendants deny the remaining allegations in paragraph 278.

279. The same Account Statement also shows that on November 30, 2017, the trust recognized the difference between the loan payment price of $1,516,017.90 and, upon information and belief, the book value of the 8,107.0476 shares at $987,438.40, demonstrating the shares remained in the accounts of the inactive ESOP participants, including Godfrey and Sheldon, until November 30, 2017, the same day the shares were sold to MS Capital for active participants.

ANSWER: The McBride Defendants lack sufficient knowledge or information to form a belief as to what Plaintiffs' use of the phrase the "Account Statement" refers to and therefore deny this allegation. The McBride Defendants deny the remaining allegations in paragraph 279.

280. Arri declared under penalty of perjury on February 5, 2019 that "[b]ased upon my review of relevant ESOP records and conversations with GreatBanc, neither Mr. Godfrey nor Mr. Sheldon held any shares of [MS Capital Stock] in their respective ESOP accounts after [November 1, 2017]." Arri produced no records demonstrating this statement to be true, either voluntarily as part of the limited discovery allowed by the Court nor under Court order as a result of Godfrey and Sheldon's Motion to Compel. In fact, during his deposition, Arri admitted Participant Valuation Summaries dated December 11, 2017, regarding Godfrey's and Sheldon's

Plan accounts did not show any investment other than an investment in MS Capital stock and that the statements also did not show the date upon which their MS Capital stock was sold. Upon information and belief, Participant Valuation Summaries dated December 11, 2017 for all other active and inactive participants will show the same as Godfrey's and Sheldon's.

ANSWER: The allegations of paragraph 280 purport to paraphrase, quote, and/or cite to certain statements made in a declaration and deposition testimony. The McBride Defendants rely on the statements and testimony to speak for itself, rather than on Plaintiffs' characterizations thereof. The McBride Defendants otherwise deny the allegations in paragraph 280.

281. De Craene declared under penalty of perjury on February 5, 2019, that "GreatBanc records indicate that neither Mr. Godfrey nor Mr. Sheldon held any shares of [MS Capital stock] in their ESOP accounts after November 1, 2017." GreatBanc produced no records demonstrating this statement to be true, either voluntarily as part of the limited discovery allowed by the Court nor under Court order as a result of Godfrey and Sheldon's Motion to Compel.

ANSWER: The first sentence of Paragraph 281 purports to quote and/or cite to certain statements made in a declaration. The McBride Defendants rely on the statements to speak for themselves, rather than on Plaintiffs' characterizations thereof. The McBride Defendants otherwise deny the allegations in paragraph 281.

282. Inconsistent with Amendment Number One to the 2017 Plan Document, no documents were produced to Godfrey and Sheldon demonstrating that the Administrator for the Plan determined the total amount of cash and liquid assets held within the Plan that should be retained for the purposes of funding current and future benefit distributions, implementing Participants' current and future diversification elections, paying legitimate expenses of Plan administration, and satisfying any other reasonable and proper obligations of the Plan.

ANSWER: The McBride Defendants deny the allegations in paragraph 282.

283. Inconsistent with Amendment Number One to the 2017 Plan Document, no documents were produced to Godfrey and Sheldon demonstrating that the Administrator determined that in 2017 the amount of cash and liquid assets held within the Plan exceeds the amount reasonably necessary to satisfy the obligations described in paragraph 282 of this First Amended Complaint.

ANSWER: The McBride Defendants deny the allegations in paragraph 283.

284. Inconsistent with Amendment Number One to the 2017 Plan Document, no documents were produced to Godfrey and Sheldon demonstrating that if a conversion had been successfully done, then the cash transferred to the inactive participants was allocated to Company Stock Proceeds Accounts established on their behalf.

ANSWER: The McBride Defendants deny the allegations in paragraph 284.

285. The decision to convert at $187 was done after the Below FMV Sale Price was agreed to on October 23, 2017.

ANSWER: The McBride Defendants admit that the decision to convert at $187 was made after October 23, 2017, but otherwise deny the allegations in paragraph 285.

286. Arri testified under oath that Amendment Number One to the 2017 Plan Document was not conceived until after the Early October Proposal.

ANSWER: Paragraph 286 purports to paraphrase and/or cite to certain testimony. The McBride Defendants rely on the testimony to speak for itself, rather than on Plaintiffs' characterizations thereof. The McBride Defendants otherwise deny the allegations of paragraph 286.

287. Arri testified under oath that he was acting on behalf of MS Capital, the plan administrator, in administering the Plan. Thus, Arri was acting as a fiduciary to the Plan under ERISA.

ANSWER: The allegations in paragraph 287 purport to paraphrase certain testimony of Arri. The McBride Defendants rely on that testimony to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with such testimony, the McBride Defendants deny the allegation in paragraph 287.

288. ERISA, the 2017 Plan Document, and the 2013 ESOP Trust Agreement required documentation of any conversion that could have been performed under Amendment Number One to the 2017 Plan Document.

ANSWER: Paragraph 288 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 288.

289. Upon information and belief, the Summary of Material Modifications describing Amendment Number One to the 2017 Plan Document was never sent to Plan participants.

ANSWER: The McBride Defendants admit the allegations in paragraph 289.

290. The Plan's 2017 Form 5500 makes no mention of inactive Plan participants having their shares allegedly converted on November 1, 2017.

ANSWER: Paragraph 290 purport to describe the contents of a Plan Form 5500. The McBride Defendants rely on the document to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent that characterization is inaccurate, the McBride Defendants deny the allegation in paragraph 290.

291. Godfrey and Sheldon received a letter signed by Eilermann and dated December 18, 2017, stating:

> As a former participant who still has an account under the McBride & Son Employee Stock Ownership ("ESOP"), you are being notified of some recent changes to the ESOP. McBride & Son Capital, Inc. ("Company"), which sponsors the ESOP, has recapitalized its corporate structure. As part of this recapitalization process, the Company, with the prior approval of the ESOP trustee, GreatBanc Trust Company, purchased all of the Company stock held in your Company stock account and any Company stock held in your matching contribution account.

ANSWER: The allegations in paragraph 291 purport to quote a December 18, 2017 letter from Eilermann. The McBride Defendants rely on that document to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with such document, the McBride Defendants deny the allegation in paragraph 291.

292. Amendment Number One to the 2017 Plan Document required that that any cash used to convert the MS Capital stock of inactive participants must come from the excess cash or other liquid assets already credited to and held in the ESOP Cash Accounts of Participants who are actively employed by MS Capital.

ANSWER: Paragraph 292 purports to paraphrase and/or cite to Plan provisions. The McBride Defendants rely on those provisions to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent that characterization is inaccurate, the McBride

Defendants deny the allegations in paragraph 292.

293. The 2017 Plan Document in Article 2.19 defines the Employer Contribution Account to include ESOP Cash Accounts.

ANSWER: Paragraph 293 purports to paraphrase and/or cite to Plan provisions. The McBride Defendants rely on those provisions to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with the Plan document, the McBride Defendants deny the allegation in paragraph 293.

294. The Plan's 2017 Form 5500 only shows $117,432 in employer contributions.

ANSWER: Paragraph 294 purports to paraphrase and/or cite to a Plan Form 5500. The McBride Defendants rely on the document to speak for itself, rather than on Plaintiffs' characterizations thereof. To the extent such characterization is inconsistent with the Form 5500, the McBride Defendants deny the allegation in paragraph 294.

295. Amendment Number One to the 2017 Plan Document does not provide authority to borrow cash to convert the MS Capital stock of inactive participants.

ANSWER: Paragraph 295 purports to characterize the terms of the Plan document and further states a legal conclusion, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 295.

Failure to Remove GreatBanc as Trustee

296. GreatBanc has been sued numerous times in federal court by plan participants and the DOL over its failures as an ESOP trustee.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 296 and therefore deny them.

297. The DOL has instituted a number of lawsuits against GreatBanc, at least as far back as 2006 in *Chao v. Hagemeyer North America, Inc.*, No. 06-cv-01173 (D.S.C.), alleging that GreatBanc breached its fiduciary duties or otherwise violated ERISA in connection with transactions involving employee stock ownership plans owning privately held or closely held employer stock.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 297 and therefore deny them.

298. In 2012, the DOL filed litigation against GreatBanc concerning its role in the purchase of Sierra Aluminum Company stock by the Sierra Aluminum Company Employee Stock Ownership Plan, entitled *Perez v. GreatBanc Trust Company,* No. 5:12-cv-01648-R-DTB (C.D. Cal.). In the lawsuit, the DOL alleged that GreatBanc (a) failed to adequately inquire into an appraisal that presented unrealistic and aggressively optimistic projections of Sierra Aluminum's future earnings and profitability; (b) failed to investigate the credibility of the assumptions, factual bases and adjustments to financial statements that went into the appraisal; and (c) asked for a revised valuation opinion in order to reconcile the ESOP's higher purchase price with the lower fair market value of the company stock.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 298 and therefore deny them.

299. In a settlement agreement filed June 6, 2014 in *Perez v. GreatBanc Trust Company,* No. 5:12-cv-01648-R-DTB (C.D. Cal.) (Dkt No. 166-1), GreatBanc agreed to pay over $4.7 million to the Sierra ESOP plus $477,273 in fines to the DOL. Most significantly, and as many in the ESOP "industry" have noted, as part of the settlement agreement, GreatBanc was required to implement very specific policies and procedures whenever it serves as a trustee or other fiduciary of an ESOP in connection with transactions in which the ESOP is purchasing or selling, is contemplating purchasing or selling, or receives an offer to purchase or sell employer securities that are not publicly traded.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 299 and therefore deny them.

300. As then U.S. Secretary of Labor Thomas E. Perez observed in the DOL press release announcing the settlement, the "more important[]" part of the settlement was to ensure "safeguards will be put in place to protect ESOPs involved in any future GreatBanc transactions."

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 300 and therefore deny them.

301. Attachment A to the Settlement in *Perez v. GreatBanc Trust Co*., entitled "AGREEMENT CONCERNING FIDUCIARY ENGAGEMENTS AND PROCESS REQUIREMENTS FOR EMPLOYER STOCK TRANSACTIONS" consists of a 10-page set of very detailed and highly proscriptive policies that GreatBanc is required to implement whenever it serves as a trustee of an ESOP and is considering the purchase or sale of employer securities

that are not publicly traded. These policies and procedures are summarized as follows:

a. Selection and Use of Valuation Advisor.

i. GreatBanc is required to hire a qualified valuation advisor, investigate the advisor's qualifications, and prudently determine that it can rely on the advisor *before* entering into the transaction.
ii. GreatBanc cannot use an advisor for a transaction which has previously performed work for the ESOP sponsor (distinguished from the ESOP), any counterparty to the ESOP involved in the transaction, or any other entity that is structuring the transaction (such as an investment bank).
iii. GreatBanc is prohibited from using an advisor that has a familial or corporate relationship to itself and other transaction parties.
iv. In selecting an advisor for a transaction involving the purchase or sale of employer securities, GreatBanc has to prepare a *written* analysis addressing specified topics such as the reason for selecting the particular advisor.
v. GreatBanc has to oversee the valuation process and make sure the advisor documents certain required items; if the advisor does not do so, GreatBanc then has to prepare supplemental documentation addressing a number of matters relating to the analysis.

b. Financial Statements.

i. GreatBanc must request that the company provide GreatBanc and its valuation advisor with audited unqualified financial statements prepared by a CPA for the preceding five fiscal years, unless financial statements extending back five years are unavailable.
ii. In the absence of such audited financial statements, GreatBanc is required to take certain steps before proceeding with the transaction, including additional documentation of why it has chosen to proceed.

c. Fiduciary Review Process.

i. GreatBanc must follow a specified process and document the valuation analysis that includes (a) determine the prudence of relying on the financial statements, (b) critically assess the reasonableness of any projections, and (c) document the basis for its conclusion that the information provided was current, complete and accurate.
ii. GreatBanc must document its analysis of the valuation report in writing by assessing 16 specific items.
iii. GreatBanc must document that its personnel have (a) read and understand the report, (b) identify and question the reports assumptions, (c) make reasonable inquiry about whether the information is consistent with information in the GreatBanc's possession, (d) analyze whether the report's conclusions are consistent with the data and analysis, and (e) analyze whether the report is internally consistent.

iv. If the valuation report does not meet these criteria, then GreatBanc must not proceed with the transaction.

d. Fair Market Value.

GreatBanc specifically agreed that it would not cause an ESOP to purchase employer securities for more than their fair market value or sell employer securities for less than their fair market value.

ANSWER: The McBride Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 301 and therefore deny them.

302. Given the publicity of the GreatBanc-DOL Settlement Agreement within the ESOP community, MS Capital, Eilermann, and Arri should have known about this Settlement. In addition, GreatBanc would have had a fiduciary duty as the trustee to provide this information, if not the settlement agreement itself, to MS Capital, Eilermann, and Arri.

ANSWER: The McBride Defendants deny the allegations in the first sentence of paragraph 302. The second sentence of paragraph 302 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 302.

303. GreatBanc failed to follow the GreatBanc-DOL Settlement Agreement with regard to their conduct in the Loss of Value from 20013 to 2017 and the 2017 ESOP Transaction.

ANSWER: Paragraph 303 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 303.

ERISA'S FIDUCIARY STANDARDS AND PROHIBITED TRANSACTIONS

Fiduciary Status under ERISA

304. Congress enacted ERISA to establish "minimum standards ... assuring the equitable character of [benefit] plans and their financial soundness." 29 U.S.C. § 1001(a). ERISA requires that "authority to control and manage the operation and administration of the plan" be vested in one or more named fiduciaries, and that these fiduciaries abide by "standards of conduct, responsibility, and obligation" to protect the plan's participants and beneficiaries. *Id.* §§ 1001(b), 1102(a).

ANSWER: Paragraph 304 purports to paraphrase, quote, and/or cite to certain ERISA provisions. The McBride Defendants rely on these provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the ERISA provisions, the McBride Defendants deny the allegations in paragraph 304.

305. ERISA defines fiduciary status as not only the persons named as fiduciaries by a benefit plan, but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). Pursuant to ERISA 29 U.S.C. § 1002(21)(A) a person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation ..., or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA thus "defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, *see id.*, thus expanding the universe of persons subject to fiduciary duties," *Mertens*, 508 U.S. at 262, 113 S.Ct. 2063; *see also, Howell v. Motorola, Inc.*, 337 F. Supp. 2d 1079, 1087 (N.D. Ill. 2004).

ANSWER: Paragraph 305 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 305 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 305.

306. A person, thus, assumes fiduciary status in three ways under ERISA: first, as a named fiduciary in the instrument establishing the employee benefit plan, ERISA §§ 402(a)(1)-(2), 29 U.S.C. §§ 1102(a)(1)-(2); second, by becoming a named fiduciary pursuant to a procedure specified in the plan instrument, ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2); third, as a "functional fiduciary" under the broad authority, control, or advice provisions of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). *Perez* v. *Bruister*, 823 F.3d 250, 259 (5th Cir. 2016) *citing Jordan v. Fed. Express* Corp., 116 F.3d 1005, 1014 n. 16 (3rd Cir.1997). As such, an individual may be a fiduciary as to plan functions for which the plan affords him no discretionary authority if he nonetheless exercises discretion over plan assets and specifically is the "final decision-making authority regarding the Plan." *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461, 473 (S.D.N.Y.2005).

ANSWER: Paragraph 306 purports to paraphrase, quote, and/or cite to certain caselaw

and ERISA provisions. The McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 306 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 306.

307. Employers assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA. *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir.1985). Employers who also function as plan administrators and therefore manage, administer, and dispose of ERISA plan assets must separate their ERISA fiduciary "hat" where they act with the discretion recognized in ERISA 29 U.S.C. § 1002(21)(A) from their employer "hat" which encompasses traditional corporate business decisions. *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000) ("ERISA does require, however, that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions.") (citations omitted).

ANSWER: Paragraph 307 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 307 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 307.

308. Fiduciary acts, for example, include the management and administration of the plan, the management and disposition of plan assets, the dispensation of investment advice, and making benefits determinations, but do not encompass actions that involve the termination of an employer-employee relationship. *Varity Corp. v. Howe*, 516 U.S. 489, 505, 116 S. Ct. 1065, 1074, 134 L. Ed. 2d 130 (1996)(making intentional representations about the future of plan benefits in that context is an act of plan administration that is subject to ERISA fiduciary duties*; see Brooks v. Pactiv Corp.*, 729 F.3d 758, 766 (7th Cir. 2013)(emphasizing fiduciary status does not extend to decisions to terminate employees because the decision does not involve the disposition of plan assets and/or management and administration of the plan).

ANSWER: Paragraph 308 purports to paraphrase and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 308 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the

allegations in paragraph 308.

ESOP Fiduciaries

309. In the context of ESOP transactions, members of an employer's board of directors are subject to ERISA fiduciary duties to the extent they have responsibility over the ESOP and over the management or disposition of its assets. *See Acosta v. Saakvitne*, 355 F. Supp. 3d 908, 920-21 (D. Haw. 2019). This has specifically been the DOL's position with respect to directors and controlling shareholders who sit on the board or effectively control the company's ESOP that is the subject of an ESOP transaction breach of fiduciary duty claim. *See Id; see also, Acosta* v. *Reliance Tr. Co.*, No. 17-CV-4540 (SRN/ECW), 2019 WL 3766379, at *9 (D. Minn. Aug. 9, *2019).* ("DOL alleges that, because the Directors 'orchestrated' the final ESOP transaction prior to their appointment of Reliance, and because the Directors knew the ESOP was paying Kuban 'vastly more than fair market value' as part of that transaction, the Directors 'effectively controlled' the ESOP's purchase of Kuban's stock, and thus breached the duties of prudence and loyalty they owed the ESOP as fiduciaries"'); *see also* 29 C.F.R. § 2509.75-8(D-4) ("Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in [29 U.S.C. § 1002(21)(A)].").

ANSWER: Paragraph 309 purports to paraphrase, quote, and/or cite to certain caselaw and Department of Labor regulations. The McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 309 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 309.

310. Where board members exercise de facto control over the plan assets, because they are board of directors of the committee and dictate on what terms the ESOP transaction would proceed they are fiduciaries with respect to that transaction under the meaning of 29 U.S.C. § 1002(21)(A). *Keach* v. *U.S. Tr. Co.*, 234 F. Supp. 2d 872, 883 (C.D. Ill. 2002) (the test of functional fiduciary status is not simplistic or rooted in formal authority with respect to company board members and must be "flexible enough to take cognizance of the different dynamics in which these transactions can occur"). *See also, Rankin v. Rots,* 278 F. Supp. 2d 853, 872 (E.D. Mich. 2003)("Because of Conaway's and the Board of Directors broad authority in regards to the Plan, they simply cannot be dismissed at this time. Rankin has sufficiently alleged Conaway and the Outside Director's fiduciary status").

ANSWER: Paragraph 310 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 310 further states legal arguments and conclusions, to which

no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 310.

311. While the corporate acts of corporate management are not subject to ERISA's fiduciary standards under the "two hat" doctrine, if the alleged misconduct centers on the failure of fiduciaries to take action to protect Plan assets by responding to managerial malfeasance that depleted an ESOP of its value, the misconduct is subject to ERISA's statutory scheme. *Spires v. Sch.*, 271 F. Supp. 3d 795, 802-03 (D.S.C. 2017)("Mismanagement or malfeasance by the executives of an operating company is not in itself a breach of fiduciary duty under ERISA. But in this case, the alleged managerial malfeasance is not the alleged breach of fiduciary duty. The alleged breach of fiduciary duty is the failure of the Plan fiduciaries to take action to protect Plan assets by responding to managerial malfeasance that depleted the Plan assets of most of their value").

ANSWER: Paragraph 311 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 311 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 311.

ERISA Fiduciary Duties

312. ERISA imposes strict fiduciary duties upon the Defendants as fiduciaries of the Plan. 29 U.S.C. § 1104(a), states, in relevant part, that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -
> (A) for the exclusive purpose of
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;
> …
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

ANSWER: Paragraph 312 purports to paraphrase, quote, and/or cite to certain ERISA

provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 312 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 312.

313. The fiduciary duties under 29 U.S.C. § 1104(a)(1)(A), (B), and (D) are referred to as the duty of loyalty, the duty of prudence, and the duty to follow the plan document and they are the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

ANSWER: Paragraph 313 purports to paraphrase, quote, and/or cite to certain caselaw and ERISA provisions. The McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 313 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 313.

Duty of Loyalty

314. Under 29 U.S.C. § 1103(c)(1), with certain exceptions not relevant here, the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. This is known as the exclusive purpose rule.

ANSWER: Paragraph 314 purports to paraphrase and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 314 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 314.

315. According to the DOL, the "primary responsibility of fiduciaries is to run the plan solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses" (emphasis added). In addition, ERISA fiduciaries "must avoid conflicts of interest" and "may not engage in transactions on behalf of the plan that benefit parties related to the plan, such as other fiduciaries, services providers or the plan sponsor."

Thus, the duty of loyalty prohibits fiduciaries from acting in service of their own interests or those of a third party to the detriment of plan participants. Where fiduciaries have conflicting interests that raise questions regarding their loyalty, the fiduciaries "are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." *Kanawi v. Bechtel,* No. 09-16253 (9th Cir. 2009) (DOL Amicus Brief).

ANSWER: Paragraph 315 purports to paraphrase, quote, and/or cite to certain Department of Labor filings. The McBride Defendants rely on those filings to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 315 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 315.

316. To satisfy 29 U.S.C. § 1104 "when facilitating a transaction involving the sale of plan assets, the fiduciary must conduct an 'adequate inquiry into the proper valuation of shares.'" *Hurtado v. Rainbow Disposal Co.*, 2018 WL 3372752, at *6 (C.D. Cal. July 9, 2018) (in which similar claims have been made against GreatBanc as trustee as in this First Amended Complaint) *(citing Allen v. GreatBanc Tr. Co.,* 835 F.3d 670, 678-79 (7th Cir. 2016)).

ANSWER: Paragraph 316 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 316 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 316.

317. Also, in the context of an ESOP transaction, the duty of loyalty "requires that fiduciaries keep the interests of beneficiaries foremost in their minds, taking all steps necessary to prevent conflicting interests from entering into the decision-making process." *Bruister,* 823 F.3d at 261 (5th Cir. 2016) *citing Bussian v. RJR Nabisco, Inc.,* 223 F.3d 286, 298 (5th Cir.2000).

ANSWER: Paragraph 317 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 317 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the

allegations in paragraph 317.

Duty of Prudence

318. ERISA "'imposes a "prudent person" standard by which to measure fiduciaries' investment decisions and disposition of assets.'" *Fifth Third Bancorp v. Dudenhoeffer*, U.S. , 134 S. Ct. 2459, 2467 (2014) (citation omitted). This means that ERISA fiduciaries must discharge their responsibilities "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters would use." 29 U.S.C. §1104(a)(1)(B).

ANSWER: Paragraph 318 purports to paraphrase, quote, and/or cite to certain caselaw and ERISA provisions. The McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 318 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 318.

319. The duty of an ERISA trustee to behave prudently in managing the trust's assets, which in this case consisted of the assets of the ESOP, is fundamental. *Armstrong v. LaSalle Bank Nat. Ass'n*, 446 F.3d 728, 732 (7th Cir. 2006).

ANSWER: Paragraph 319 purports to paraphrase and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 319 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 319.

320. Courts in the Seventh Circuit recognize that case law imposes on an ESOP fiduciary a still more demanding duty of prudence than a typical ERISA fiduciary because an ESOP holds employer stock only, making diversification impossible. *Neil v. Zell*, 677 F. Supp. 2d 1010, 1019 (N.D. Ill. 2009), *as amended* (Mar. 11, 2010) *citing Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 732 (7th Cir. 2006).

ANSWER: Paragraph 320 purports to paraphrase and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 320 further states legal arguments and conclusions, to which

no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 320.

Duty to Monitor

321. Under ERISA § 404(a), an individual with discretion to appoint an ERISA fiduciary has a fiduciary duty to select, retain and monitor those whom they appoint as would a reasonably prudent businessperson. *Chesemore v. All. Holdings, Inc.*, 886 F. Supp. 2d 1007, 1049 (W.D. Wis. 2012), aff'd sub nom. *Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016) *citing Leigh*, 727 F.2d at 135; *Howell*, 337 F.Supp.2d at 1097-99. In *Leigh*, the Seventh Circuit held that a fiduciary who was "responsible for selecting and retaining their close business associates as plan administrators ... had a duty to monitor appropriately the administrators' actions." 727 F.2d at 135 (citations omitted). In *Ed Miniat, Inc. v. Globe Life Ins. Grp., Inc.*, 805 F.2d 732 (7th Cir.1986), the Seventh Circuit explained that corporate entities "may well have some duty to monitor" appointed plan administrators, even when the administrators are not close business associates.

ANSWER: Paragraph 321 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 321 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 321.

322. The Department of Labor has stated that [a]t reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. *Chesemore*, 886 F. Supp. 2d at 1049 citing ERISA Interpretive Bulletin 75-8, 29 C.F.R. § 2509.75-8 at FR-17.

ANSWER: Paragraph 322 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 322 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 322.

Application of ERISA's Fiduciary Duties

323. Application of the duty of loyalty, duty of prudence, duty to follow the plan documents, the duty to monitor, and the exclusive purpose rule generally require a fiduciary to:

(a) Act for the exclusive benefit of plan participants and beneficiaries;
(b) Administer and manage a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor;
(c) Ensure that plan assets are not transferred to the fiduciaries of a plan for their personal enrichment;
(d) Ensure all fiduciary decisions they make are prudent;
(e) Ensure that they follow the terms of all governing plan documents including the plan document and the trust agreement;
(f) Conduct independent, intensive and thorough investigations into, and continually monitor, matters as to which the fiduciaries have decision-making authority;
(g) Establish a prudent process by which a fiduciary and his or her co-fiduciaries are able to make objectively reasonable analyses and decisions concerning matters as to which the fiduciaries have decision-making authority;
(h) Make good faith and objectively reasonable analyses and decisions concerning matters as to which the fiduciaries have decision-making authority;
(i) Be an expert in all matters regarding their responsibilities with a plan, and if not, to hire others who are experts;
(j) Appoint only prudent service providers after engaging in a prudent and thorough process in hiring them that includes consideration of the following:
    - Information about the firm itself: financial condition and experience with retirement plans of similar size and complexity;
    - Information about the quality of the firm's services: the identity, experience, and qualifications of professionals who will be handling the plan's account; any recent litigation or enforcement action that has been taken against the firm; and the firm's experience or performance record; and
    - A description of business practices: how plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled; and whether the firm has fiduciary liability insurance;
(k) Prudently monitor an appointed service provider, and remove them if in the best interests of a plan, which should include a process to:
    - Establish and follow a formal review process at reasonable intervals to decide to continue using the current service providers or look for replacements;
    - Ensure the service provider is performing the agreed-upon services;
    - Evaluate any notices received from the service provider about possible changes to their compensation and the other information they provided when hired (or when the contract or arrangement was renewed);
    - Review the service providers' performance;
    - Read any reports provided by the service provider;
    - Ask about policies and practices (such as trading, investment turnover, and proxy voting); and

- Follow up on participant complaints associated with the service provider;

(l) Delegate fiduciary responsibility over a plan only to appropriate parties after engaging in a prudent and thorough process of examining their qualifications to hold such a position of trust;

(m) Prudently monitor an appointed fiduciary and remove them if in the best interests of a plan;

(n) Prudently exercise stock voting rights which includes, but is not limited to:
- Appointment of independent members of the board of directors to protect a plans participants; and
- Remove of members of the board of directors for misconduct and injuries to a plan;

(o) Bring derivative actions to protect a plan and its participants from breaches of fiduciary duty;

(p) Bring derivative actions to remedy corporate action or inaction giving rise to a derivative claim when a plan's assets include employer stock;

(q) Truthfully disclose and inform plan participants which encompasses: (1) duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries;

(r) Ensure only accurate information is used to calculate the value of stock held by a plan; and

(s) Document the processes used to carry out their fiduciary responsibilities.

ANSWER: Paragraph 323 states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 323.

324. When the assets of a plan are sold or exchanged, including company stock held by a plan, application of the duty of loyalty, duty of prudence, duty to follow the plan documents, the duty to monitor, and the exclusive purpose rule require a fiduciary to:

(a) Ensure that a plan receives no less adequate consideration for any assets sold or exchanged;

(b) Secure an independent and thorough assessment of the valuation of employer stock through a financial advisor or legal counsel;

(c) Undertake an appropriate investigation to determination that a plan and its participants receive no less than adequate consideration for the assets of a plan;

(d) Pursuant to 29 U.S.C. § 1002(18), adequate consideration for an asset for which there is no generally recognized market means the fair market value of the asset determined in good faith by the trustee or the named fiduciary pursuant to the terms of the plan and in accordance with DOL regulations;

(e) Fair market value means the price at which an asset would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, and both parties are able,

as well as willing, to trade and are well informed about the asset and the market for such asset;

(f) Make a good faith determination of fair market value relying on an independent appraiser consistent with its duties under 29 U.S.C. §§ 1104(a)(1), and the good faith determination must investigate the expert's qualifications, provide the expert with complete and accurate information, and make certain that reliance on the expert's advice is reasonably justified under the circumstances; and

(g) A fiduciary must arrive at a determination of fair market value by way of a prudent investigation of circumstances prevailing at the time of the valuation, and the application of sound business principles of evaluation.

ANSWER: Paragraph 324 states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 324.

Co-Fiduciary Liability

325. ERISA also imposes explicit co-fiduciary liability on plan fiduciaries. 29 U.S.C. §1105(a) provides for fiduciary liability for a co-fiduciary's breach: "In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or (2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give risk to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach."

ANSWER: Paragraph 325 purports to paraphrase, quote, and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 325 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 325.

326. Where plaintiffs allege that defendants (1) knowingly participated in and/or concealed the fiduciary breaches of other fiduciaries, (2) enabled other fiduciaries to breach their responsibilities, and (3) knew of other fiduciaries' breaches, but took no reasonable steps to remedy those breaches these allegations are sufficient to state a cause of action for breach of co-fiduciary duties under 29 U.S.C. §1105(a). *Smith v. Aon Corp.,* No. 04 C 6875, 2006 WL 1006052, at *7 (N.D. Ill. Apr. 12, 2006) *citing Howell,* 337 F.Supp.2d at 1101 ("As the court

finds that Plaintiff has stated a claim against Motorola and the Director Defendants, it need not address Plaintiffs' argument that these Defendants should be held liable as 'co-fiduciaries.'").

ANSWER: Paragraph 326 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 326 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 326.

327. Even a proper delegation of fiduciary authority, does not remove the delegating fiduciary's duties from co-fiduciary liability because the delegating fiduciary remains liable if the allocation or retention of the delegation violates § 404(a)(1) or if the delegating fiduciary meets any of the requirements in § 405(a). 29 U.S.C. § 1105(c)(2); *Chesemore,* 886 F. Supp. 2d at 1050 citing *Free v. Briody*, 732 F.2d 1331, 1335-36 (7th Cir.1984). A delegating fiduciary who knows of a breach by the delegated fiduciary cannot "escape liability by simply casting a blind eye toward the breach." *Id.* citing *Willett v. Blue Cross & Blue Shield,* 953 F.2d 1335, 1341 (11th Cir.1992) (citations omitted).

ANSWER: Paragraph 327 purports to paraphrase, quote, and/or cite to certain caselaw and ERISA provisions. The McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 327 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 327.

Prohibited Transactions

328. The general duties of loyalty and prudence imposed by 29 U.S.C. § 1104 are supplemented by a detailed list of transactions that are expressly prohibited by 29 U.S.C. § 1106, and are considered *"per se"* violations because they entail a high potential for abuse. Section 1106(a)(1) states, in pertinent part, that:

> [A] fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect -
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
> (B) lending of money or other extension of credit between the plan and a party in interest;

> (C) furnishing of goods, services, or facilities between the plan and party in interest;
> (D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan...

Section 1106(b) provides, in pertinent part, that:

> [A] fiduciary with respect to the plan shall not -
> (1) deal with the assets of the plan in his own interest or for his own account,
> (2) in his individual or in any other capacity act in a transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interest of the plan or the interest of its participants or beneficiaries, or
> (3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

ANSWER: Paragraph 328 purports to paraphrase, quote, and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 328 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 328.

329. Section 1106 of ERISA prohibits a fiduciary of an ERISA plan from causing the plan to enter into certain transactions with a "party in interest." 29 U.S.C. § 1106. Section 1106 supplements an ERISA fiduciary's general duties of loyalty and prudence to the plan's beneficiaries, as set forth in 29 U.S.C. § 1104 "by categorically barring certain transactions deemed 'likely to injure the pension plan.'" *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc*, 530 U.S. 238, 241-42, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (*quoting Comm'r* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993)). A plan need not suffer an injury in order for a court to find a transaction prohibited by Section 1106. *Etter v. J. Pease Constr. Co.*, 963 F.2d 1005, 1010 (7th Cir.1992).

ANSWER: Paragraph 329 purports to paraphrase, quote, and/or cite to certain caselaw and ERISA provisions. The McBride Defendants rely on those sources to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 329 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the

McBride Defendants deny the allegations in paragraph 329.

330. "Congress (in ERISA § [1106]) intended to create an easily applied per se prohibition ... of certain transactions, no matter how fair, unless the statutory exemption procedures (of ERISA § 408(a)) are followed." *Chao v. Hall Holding* Co., 285 F.3d 415, 439 (6th Cir. 2002) *citing Cutaiar v. Marshall,* 590 F.2d 523, 529-30 (3d Cir.1979); *see also Eaves* v. *Penn,* 587 F.2d 453, 457-59 (10th Cir.1978). Lack of harm to the plan or the good faith or lack of the same on the part of the borrower are not relevant, and certainly not controlling, under ERISA § 406. Rather, "Congress was concerned in ERISA (§ 406) to prevent transactions which offered a high potential for loss of plan assets or for insider abuse." *Chao,* 285 F.3d at 439 citing *Marshall v. Kelly,* 465 F.Supp. 341, 354 (W.D.Okla.1978)).

ANSWER: Paragraph 330 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 330 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 330.

331. In establishing that there has been compliance with the statutory mandate, "[t]he degree to which a fiduciary makes an independent inquiry is critical." *Keach v. U.S. Tr. Co.*, 419 F.3d 626, 636-37 (7th Cir. 2005). "Although securing an independent assessment from a financial advisor or legal counsel is evidence of a thorough investigation," it is not a complete defense against a charge of imprudence. *Id.* citing *Howard v. Shay,* 100 F.3d 1484, 1489 (9th Cir.1996). A fiduciary must "investigate the expert's qualifications," "provide the expert with complete and accurate information" and "make certain that reliance on the expert's advice is reasonably justified under the circumstances." *Id. citing Donovan v. Mazzola,* 716 F.2d 1226, 1234 (9th Cir.1983), and *Donovan v. Cunningham*, 716 F.2d 1455, 1474 (5th Cir.1983)).

ANSWER: Paragraph 331 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 331 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 331.

332. An ERISA plaintiff need not plead the absence of exemptions to prohibited transactions. It is the defendant who bears the burden of proving a section 1108 exemption. *Allen v. GreatBanc Tr. Co.,* 835 F.3d 670, 676 (7th Cir. 2016) ("We now hold squarely that the section 408 exemptions are affirmative defenses for pleading purposes, and so the plaintiff has

no duty to negate any or all of them"); see *also, Stuart v. Local 727, Int'l Bhd. of Teamsters*, 771 F.3d 1014, 1018 (7th Cir. 2014) ("A plaintiff is not required to negate an affirmative defense in his or her complaint[.]").

ANSWER: Paragraph 332 purports to paraphrase, quote, and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 332 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 332.

333. ERISA's fiduciary duty and prohibited transaction provisions prohibit fiduciaries, such as the Defendants here, from causing plans to engage in transactions with fiduciaries and parties in interest that result in benefits to the fiduciaries and parties in interest at the expense of the plan and its participants and beneficiaries.

ANSWER: Paragraph 333 states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 333.

Remedies for Fiduciary Breaches and Prohibited Transaction

334. 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under 29 U.S.C. § 1109. Section 1109(a) provides in relevant part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ANSWER: Paragraph 334 purports to paraphrase, quote, and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 334 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride

Defendants deny the allegations in paragraph 334.

335. 29 U.S.C. § 1132(a)(3) provides a cause of action against a non-fiduciary "party in interest" who knowingly participates in prohibited transactions or knowingly receives payments made in breach of a fiduciary's duty, and authorizes "appropriate equitable relief' such as restitution or disgorgement to recover ill-gotten proceeds from the non-fiduciary.

ANSWER: Paragraph 335 purports to paraphrase, quote, and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 335 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 335.

336. Non-fiduciaries, acting with actual or constructive knowledge, may be held liable under ERISA in two ways: (1) as parties in interest, for participating in a 29 U.S.C. § 1106 prohibited transaction, and (2) as non-fiduciaries, for participating in a transaction that violates ERISA. 29 U.S.C. § 1132(a)(3); *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000).

ANSWER: Paragraph 336 purports to paraphrase and/or cite to certain caselaw. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 336 further states legal arguments and conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 336.

CLAIMS FOR RELIEF

COUNT I
Causing and Engaging in Prohibited Transactions Forbidden by 29 U.S.C. §§ 1106(a)-(b) for the 2013 ESOP Transaction Against GreatBanc

337-352. Count I is brought solely against GreatBanc Trust Company; therefore, the McBride Defendants are not required to answer. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count I as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT II
Causing and Engaging in Prohibited Transactions Forbidden by 29 U.S.C. §§ 1106(a)-(b) for the 2013 ESOP Transaction Against MS Management, Eilermann, and Arri

353-369. The McBride Defendants have moved to dismiss Count II; therefore, no response to Count II is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count II as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT III
Violation of 29 U.S.C. § 1104(a)(1) for the 2013 ESOP Transaction Against GreatBanc

370-384. Count III is brought solely against GreatBanc Trust Company; therefore, the McBride Defendants are not required to answer. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count III as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT IV
Violation of 29 U.S.C. § 1104(a)(1) for the 2013 ESOP Transaction Against MS Management, Eilermann, and Arri

385-399. The McBride Defendants have moved to dismiss Count IV; therefore, no response to Count IV is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count IV as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT V
Violation of 29 U.S.C. § 1105(a), Co-Fiduciary Liability, for the 2013 ESOP Transaction Against GreatBanc, MS Management, Eilermann, and Arri

400-421. The McBride Defendants have moved to dismiss Count V; therefore, no response to Count V is required. The McBride Defendants reserve the right to amend this

Answer to respond to the allegations contained in Count V as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT VI
Knowing Participation in Breaches of Fiduciary Duties & Prohibited Transactions Pursuant to 29 U.S.C. § 1132(a)(3) for the 2013 ESOP Transaction Against MS Capital, Eilermann, and Arri

422-430. The McBride Defendants have moved to dismiss Count VI; therefore, no response to Count VI is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count VI as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT VII
Violation of 29 U.S.C. § 1104(a)(1) for the Loss of Value from 2013 to 2017 Against GreatBanc

431-445. Count VII is brought solely against GreatBanc Trust Company; therefore, the McBride Defendants are not required to answer. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count VII as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT VIII
Violation of 29 U.S.C. § 1104(a)(1) for the Loss of Value from 2013 to 2017 Against MS Capital, Eilermann, and Arri

446-460. The McBride Defendants have moved to dismiss Count VIII; therefore, no response to Count VIII is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count VIII as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT IX
Violation of 29 U.S.C. § 1105(a), Co-Fiduciary Liability, for the Loss of Value from 2013 to 2017 Against GreatBanc, MS Capital, Eilermann, and Arri

461-482. The McBride Defendants have moved to dismiss Count IX; therefore, no response to Count IX is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count IX as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT X
Knowing Participation in Breaches of Fiduciary Duties & Prohibited Transactions Pursuant to 29 U.S.C. § 1132(a)(3) for the Loss of Value from 2013 to 2017 Against Eilermann and Arri

483-491. The McBride Defendants have moved to dismiss Count X; therefore, no response to Count X is required. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count X as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT XI
Causing and Engaging in Prohibited Transactions Forbidden by 29 U.S.C. §§ 1106(a)-(b) for the 2017 ESOP Transaction Against GreatBanc

492-506. Count XI is brought solely against GreatBanc Trust Company; therefore, the McBride Defendants are not required to answer. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count XI as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT XII
Causing and Engaging in Prohibited Transactions Forbidden by 29 U.S.C. §§ 1106(a)-(b) for the 2017 ESOP Transaction Against MS Capital, Eilermann, and Arri

507. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital incorporates its answers as though set forth herein.

508. Under 29 U.S.C. §§ 1106(a) and (b), fiduciaries are prohibited from causing plans to engage in transactions with parties in interest and fiduciaries that are expressly prohibited and are considered "per se" violations because they entail a high potential for abuse and injury to a plan. *See supra* ¶ 328 through ¶ 333.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 508 purports to paraphrase, quote, and/or cite to certain ERISA provisions. MS Capital relies on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, MS Capital denies the allegations in paragraph 508.

509. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 U.S.C. § 1002(16)(A), and 29 U.S.C. § 1002(21) with regard to the 2017 ESOP Transaction when:

(a) MS Capital was the named fiduciary of the Plan as defined in 29 U.S.C. § 1102(a) under the terms of the 2013 Plan Document and the 2017 Plan Document;
(b) MS Capital was the plan administrator of the Plan as defined in 29 U.S.C. § 1002(16)(A) under the terms of the 2013 Plan Document and the 2017 Plan Document;
(c) MS Capital, as a corporate entity, cannot act on its own without any human counterpart. In this regard, MS Capital could only act through its Board of Directors;
(d) Article 17.12 of the 2013 Plan Document and 2017 Plan Document authorized the MS Capital Board of Directors to act on behalf of MS Capital as the named

fiduciary and plan administrator of the Plan;

(e) According to 29 C.F.R. § 2509.75-8(D-4) "Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries... to the extent that they have responsibility for the functions described in 29 U.S.C. § 1002(21)(A)";

(f) Eilermann and Arri were the only members of the MS Capital Board of Directors from December 31, 2013 through the effective termination of the Plan;

(g) Eilermann and Arri, as Directors, carried out all acts of MS Capital in its role as named fiduciary and plan administrator to the Plan from December 31, 2013 through the effective termination of the Plan;

(h) GreatBanc recognized the fiduciary role of MS Capital and Arri when it delivered the annual valuation report prepared by Stern Brother to Arri when it stated: "This report is being delivered to you in your capacity as a plan fiduciary";

(i) Eilermann and Arri had the responsibility of recommending the removal of members of the MS Capital Board of Directors;

(j) Eilermann and Arri, as Directors, executed the Redemption Agreement on behalf of MS Management;

(k) Arri, as a Director of MS Capital, executed the Second Amendment to the 2013 ESOP Trust Agreement;

(l) Eilermann and Arri executed the Unanimous Written Consent of the Board of Directors of MS Capital dated November 30, 2017 on behalf of MS Capital authorizing MS Capital to enter into the Redemption Agreement;

(m) Arri, on behalf of MS Capital, executed the Second Amendment to Trustee Engagement Agreement dated November 20, 2017 which appointed and authorized GreatBanc to consider the 2017 ESOP Transaction;

(n) Arri agreed and accepted the agreement with Stern Brothers who was hired to provide an opinion on the fairness of the 2017 ESOP Transaction and provide an opinion on the value of MS Capital stock as of November 30, 2017;

(o) Eilermann and Arri executed the Assignment and Assumption Agreement on behalf of MS Management;

(p) MS Capital, Eilermann, and Arri had the authority to appoint and remove fiduciaries to the ESOP;

(q) MS Capital, Eilermann, and Arri had the authority to remove GreatBanc as trustee;

(r) Eilermann executed the December 27, 2013 ESOP Trust Agreement as a Director of MS Management;

(s) Eilermann and Arri executed Amendment Number One to the December 27, 2013 ESOP Trust Agreement;

(t) MS Capital, Eilermann, and Arri provided information to GreatBanc and Stern Brothers for consideration as part of the 2013 ESOP Transaction; and

(u) Eilermann and Arri were the only managers of MS Companies, LLC and Eilermann and Arri had direct control over the value of the MS Capital stock as managers of MS Companies when (1) they had total discretion to award additional Class B and Class C Units which directly reduced the income and equity attributable to the Class A Units held by MS Capital and (2) Stern Brothers used the reduced income and equity amounts in calculating the value of MS

Capital stock in 2013, 2014, 2015, 2016, and 2017.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 509 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 509.

510. MS Capital, Eilermann, and Arri caused the Plan to engage in a prohibited transaction in violation of 29 U.S.C. § 1106(a)(1)(A). 29 U.S.C. § 1106(a)(1)(A) prohibits a fiduciary from causing a plan to engage in a sale or exchange of any property with a party in interest. Here, the 2017 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(A).

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 510 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 510.

511. MS Capital, Eilermann, and Arri caused the ESOP to sell property of the Plan, MS Capital stock, to MS Capital.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 511.

512. MS Capital was a party in interest to the ESOP at the time of the 2017 ESOP

Transaction.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 512 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 512.

513. MS Capital, Eilermann, and Arri caused the Plan to engage in a prohibited transaction in violation of 29 U.S.C. § 1106(a)(1)(D). 29 U.S.C. § 1106(a)(1)(D) prohibits a fiduciary from causing a plan to engage in a transaction that constitutes a direct or indirect transfer of plan assets to, or use by or for the benefit of, a party in interest. Here, the 2017 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D).

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 513 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 513.

514. MS Capital, Eilermann, and Arri (1) caused the ESOP to directly transfer property of the Plan, MS Capital stock, to MS Capital and (2) caused the ESOP to indirectly transfer property of the Plan, MS Capital stock, to and for the use and benefit of Eilermann, Arri, Schindler, and Todt.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 514.

515. MS Capital, Eilermann, Arri, Schindler, and Todt were all parties in interest to the ESOP at the time of the 2017 ESOP Transaction.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 515 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 515.

516. MS Capital, Eilermann, and Arri caused the Plan to engage in prohibited transactions in violation of 29 U.S.C. § 1106(b). 29 U.S.C. § 1106(b), *inter alia*, mandates that a plan fiduciary shall not "deal with the assets of the plan in his own interest or for his own account", "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants," or "receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." Here, the 2017 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(b)(1), (2), and (3).

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 516 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 516.

517. MS Capital, Eilermann, and Arri, in violation of 29 U.S.C. § 1106(b)(1), dealt with the assets of the Plan in their own interest and for their own account when they caused the Plan to sell MS Capital stock to MS Capital at a price below fair market value. Eilermann and Arri immediately upon the transfer of MS Capital stock to MS Capital, took ownership and control of MS Capital.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and

MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 517.

518. MS Capital, Eilermann, and Arri, in violation of 29 U.S.C. § 1106(b)(2), acted on behalf of MS Capital, Eilermann, Arri, Schindler, and Todt in connection with the 2017 ESOP Transaction by causing the Plan to sell MS Capital stock to MS Capital at a price below fair market value. This greatly benefited MS Capital, Eilermann, Arri, Schindler, and Todt as they ultimately took control and ownership of MS Capital after the 2017 ESOP Transaction, to the substantial detriment of the Plan, even though MS Capital, Eilermann, and Arri, as fiduciaries to the Plan, were required to act in the best interests of the Plan.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 518.

519. MS Capital, Eilermann, and Arri, in violation of 29 U.S.C. § 1106(b)(3), received consideration for their own personal account from GreatBanc, MS Capital, Eilermann, and Arri when they caused the Plan to sell MS Capital stock to MS Capital at a price below fair market value and for the benefit of MS Capital, Eilermann, and Arri as they ultimately took control and ownership of MS Capital after the 2017 ESOP Transaction.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 519.

520. MS Capital, Eilermann, and Arri have caused losses to the Plan and have profited for themselves by the prohibited transactions described in this count in an amount to be proved specifically at trial.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management

is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 520.

521. 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits which have been made through use of assets of the plan, and additionally is subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 521 purports to paraphrase and/or cite to certain ERISA provisions. MS Capital relies on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, MS Capital denies the allegations in paragraph 521.

522. MS Capital, Eilermann, and Arri, are personally, and jointly and severally, liable under 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3) to make good to the Plan the losses to the Plan resulting from the aforementioned breaches and to restore to the Plan any profits made through the use of Plan assets or through their control of the Plan, and are subject to other equitable or remedial relief as appropriate.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 522.

523. The losses suffered by the participants in the Plan and the profits to the fiduciaries and parties in interest are coterminous with those of the Plan, and each Plaintiff's individual loss is proportional to the losses of fellow participants.

ANSWER: Eilermann and Arri have moved to dismiss Count XII and MS Management is not named in Count XII therefore, no response to Count XII is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XII as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 523.

COUNT XIII
Violation of 29 U.S.C. § 1104(a)(1) for the 2017 ESOP Transaction Against GreatBanc

524-538. Count XIII is brought solely against GreatBanc Trust Company; therefore, the McBride Defendants are not required to answer. The McBride Defendants reserve the right to amend this Answer to respond to the allegations contained in Count XIII as required by the Court and/or the Federal Rules of Civil Procedure.

COUNT XIV
Violation of 29 U.S.C. § 1104(a)(1) for the 2017 ESOP Transaction Against MS Capital, Eilermann, and Arri

539. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital incorporates its answers as though set forth herein.

540. 29 U.S.C. § 1104(a)(1) requires that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administration of the plan, (B) with "care, skill, prudence, and

diligence" and (D) to act in accordance with the documents and instruments governing the plan insofar as those documents and instruments are consistent with ERISA.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 540 purports to paraphrase, quote, and/or cite to certain ERISA provisions. MS Capital relies on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, MS Capital denies the allegations in paragraph 540.

541. These duties are known as the duty of loyalty, the duty of prudence, and duty to follow the plan documents. *See supra* ¶ 312 through ¶ 322.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 541 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations of paragraph 541.

542. The duty of loyalty, the duty of prudence, and the duty to follow the plan documents require strict application of the fiduciary duties to a fiduciary's responsibilities regarding a plan. *See supra* ¶ 323.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil

Procedure. Paragraph 542 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations of paragraph 542.

543. When plan assets are sold or exchanged, the duty of loyalty, the duty of prudence, and the duty to follow the plan documents require strict application of the fiduciary duties. *See supra* ¶ 324.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 543 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations of paragraph 543.

544. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 U.S.C. § 1002(16)(A), and 29 U.S.C. § 1002(21) with regard to the 2017 ESOP Transaction when:

(a) MS Capital was the named fiduciary of the Plan as defined in 29 U.S.C. § 1102(a) under the terms of the 2013 Plan Document and the 2017 Plan Document;
(b) MS Capital was the plan administrator of the Plan as defined in 29 U.S.C. § 1002(16)(A) under the terms of the 2013 Plan Document and the 2017 Plan Document;
(c) MS Capital, as a corporate entity, cannot act on its own without any human counterpart. In this regard, MS Capital could only act through its Board of Directors;
(d) Article 17.12 of the 2013 Plan Document and 2017 Plan Document authorized the MS Capital Board of Directors to act on behalf of MS Capital as the named fiduciary and plan administrator of the Plan;
(e) According to 29 C.F.R. § 2509.75-8(D-4) "Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries. to the extent that they have responsibility for the functions described in 29 U.S.C. § 1002(21)(A)";
(f) Eilermann and Arri were the only members of the MS Capital Board of Directors from December 31, 2013 through the effective termination of the Plan;
(g) Eilermann and Arri, as Directors, carried out all acts of MS Capital in its role as named fiduciary and plan administrator to the Plan from December 31, 2013 through the effective termination of the Plan;
(h) GreatBanc recognized the fiduciary role of MS Capital and Arri when it delivered

the annual valuation report prepared by Stern Brother to Arri when it stated: "This report is being delivered to you in your capacity as a plan fiduciary";

(i) Eilermann and Arri had the responsibility of recommending the removal of members of the MS Capital Board of Directors;

(j) Eilermann and Arri, as Directors, executed the Redemption Agreement on behalf of MS Management;

(k) Arri, as a Director of MS Capital, executed the Second Amendment to the 2013 ESOP Trust Agreement;

(l) Eilermann and Arri executed the Unanimous Written Consent of the Board of Directors of MS Capital dated November 30, 2017 on behalf of MS Capital authorizing MS Capital to enter into the Redemption Agreement;

(m) Arri, on behalf of MS Capital, executed the Second Amendment to Trustee Engagement Agreement dated November 20, 2017 which appointed and authorized GreatBanc to consider the 2017 ESOP Transaction;

(n) Arri agreed and accepted the agreement with Stern Brothers who was hired to provide an opinion on the fairness of the 2017 ESOP Transaction and provide an opinion on the value of MS Capital stock as of November 30, 2017;

(o) Eilermann and Arri executed the Assignment and Assumption Agreement on behalf of MS Management;

(p) MS Capital, Eilermann, and Arri had the authority to appoint and remove fiduciaries to the ESOP;

(q) MS Capital, Eilermann, and Arri had the authority to remove GreatBanc as trustee;

(r) Eilermann executed the December 27, 2013 ESOP Trust Agreement as a Director of MS Management;

(s) Eilermann and Arri executed Amendment Number One to the December 27, 2013 ESOP Trust Agreement;

(t) MS Capital, Eilermann, and Arri provided information to GreatBanc and Stern Brothers for consideration as part of the 2013 ESOP Transaction; and (u) Eilermann and Arri were the only managers of MS Companies, LLC and Eilermann and Arri had direct control over the value of the MS Capital stock as managers of MS Companies when (1) they had total discretion to award additional Class B and Class C Units which directly reduced the income and equity attributable to the Class A Units held by MS Capital and (2) Stern Brothers used the reduced income and equity amounts in calculating the value of MS Capital stock in 2013, 2014, 2015, 2016, and 2017.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 544 states legal conclusions to which no response is required. To the

extent a response is required, MS Capital denies the allegations in paragraph 544.

545. As a fiduciaries of the Plan, MS Capital, Eilermann, and Arri were required to comply with the duty of loyalty, the duty of prudence, and the duty to follow the plan documents. *See supra* ¶ 312 through ¶ 322.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 545 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 545.

546. The documents governing the Plan, including the 2013 ESOP Trust Agreement, as amended, and the 2017 Plan Document, as amended, required MS Capital, Eilermann, and Arri to comply with ERISA's stringent fiduciary standards.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 546 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 546.

547. As a fiduciaries of the Plan, MS Capital, Eilermann, and Arri were required to strictly apply ERISA's fiduciary duties in carrying out their fiduciary responsibilities with regard to the 2017 ESOP Transaction. *See supra* ¶ 323.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil

Procedure. Paragraph 547 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 547.

548. As a fiduciaries of the Plan, MS Capital, Eilermann, and Arri were required to strictly apply ERISA's fiduciary duties in ensuring the Plan received no less than adequate consideration, or fair market value, for any Plan assets sold or exchanged. *See supra* ¶ 324.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 548 states legal conclusions to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 548.

549. MS Capital, Eilermann, and Arri breached their fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D) when it:

(a) Caused the Plan to sell MS Capital stock to MS Capital for less than adequate consideration and at a price below fair market value in the 2017 ESOP Transaction;
(b) Failed to make a good faith determination of fair market value of MS Capital stock in the 2017 ESOP Transaction;
(c) Failed to request or receive third party bids to determine the fair market value of MS Capital stock;
(d) Failed to prevent the execution of the Redemption Agreement;
(e) Failed to prevent execution of the Unanimous Written Consent of the Board of Directors of MS Capital dated November 30, 2017;
(f) Failed to prevent the execution of the November 28, 2017 subscription agreement between MS Capital and Eilermann;
(g) Failed to prevent the execution of the November 28, 2017 subscription agreement between MS Capital and Arri;
(h) Failed to appoint independent members of the Board of Directors of MS Capital;
(i) Failed to ensure that Stern Brothers was independent from MS Capital, MS Companies, LLC, Eilermann, and Arri;
(j) Failed to hire an investment bank for the benefit of the Plan;
(k) Failed to prevent Eilermann and Arri from setting in motion the 2017 ESOP Transaction;
(l) Failed to remove Eilermann and Arri as members of the Board of Directors of MS Capital;
(m) Failed to remove MS Capital, Eilermann, and Arri as fiduciaries to the ESOP;

(n) Failed to prevent Stern Brothers from providing a faulty and inadequate opinion of value;
(o) Failed to prevent the value of MS Capital stock from being valued below fair market value;
(p) Failed to prevent the 2017 ESOP Transaction from being for the benefit of anyone other than the ESOP;
(q) Failed to determine that the 2017 ESOP Transaction was in the best interests of the ESOP;
(r) Failed to prevent the dilution of value of MS Capital stock after the 2013 ESOP Transaction;
(s) Failed to prevent the loss in value to the ESOP described in the Loss of Value from 2013 to 2017;
(t) Failed to prevent the synthetic equity paid to Eilermann, Arri, Schindler, Berger, and Todt;
(u) Failed to prevent Eilermann and Arri from controlling the value of MS Capital stock inside the ESOP;
(v) Failed to prevent indemnification provisions that may result in the reduction of value to the ESOP;
(w) Failed to ensure MS Capital, Eilermann, and Arri provided truthful information;
(x) Failed to ensure the governing plan documents were followed;
(y) Failed to ensure that committees required by the governing plan documents were created;
(z) Failed to prevent improper and faulty valuation methods from being used that resulted in lower values of the stock held by the ESOP as compared to prudent and appropriate valuation methods;
(aa) Failed to inform the ESOP participants that Eilermann, Arri, Schindler, and Todt already owned 42.7% of the McBride Enterprise;
(bb) Failed to inform participants about the loss to the ESOP and the improper benefit to Eilermann, Arri, Schindler, Berger, and Todt; and
(cc) Failed to prudently monitor and remove GreatBanc as trustee of the Plan.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 549.

550. MS Capital, Eilermann, and Arri have caused losses to the Plan and MS Capital, Eilermann, and Arri have profited by the breaches of fiduciary duty described in this count in an amount to be proved specifically at trial.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 550.

551. 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits which have been made through use of assets of the plan, and additionally is subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 551 purports to paraphrase and/or cite to certain ERISA provisions. MS Capital relies on these provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the ERISA provisions, MS Capital denies the allegations in paragraph 551.

552. MS Capital, Eilermann, and Arri, are personally, and jointly and severally, liable under 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3) to make good to the Plan the losses to the Plan resulting from the aforementioned breaches and to restore to the Plan any profits made through the use of Plan assets or through their control of the Plan, and are subject to other equitable or remedial relief as appropriate.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil

Procedure. MS Capital denies the allegations in paragraph 552.

553. The losses suffered by the participants in the Plan and the profits to the fiduciaries and parties in interest are coterminous with those of the Plan, and each Plaintiff's individual loss is proportional to the losses of fellow participants.

ANSWER: Eilermann and Arri have moved to dismiss Count XIV and MS Management is not named in Count XIV therefore, no response to Count XIV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XIV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 553.

COUNT XV
Violation of 29 U.S.C. § 1105(a), Co-Fiduciary Liability, for the 2017 ESOP Transaction Against GreatBanc, MS Capital, Eilermann, and Arri

554. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital incorporates its answers as though set forth herein.

555. 29 U.S.C. §1105(a), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary, in addition to any liability which he may have under any other provision of ERISA, if:

(1) he participates knowingly in or knowingly undertakes to conceal an act or omission of such other fiduciary knowing such act or omission is a breach;

(2) by his failure to comply with 29 U.S.C. § 1104(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) he knows of a breach by another fiduciary and fails to make reasonable efforts to remedy it.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 555 purports to paraphrase, quote, and/or cite to certain ERISA provisions. MS Capital relies on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, MS Capital denies the allegations in paragraph 555.

556. Liability under 29 U.S.C. 1105(a) is known as co-fiduciary liability. *See supra* ¶ 325 through ¶ 327.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 556 purports to paraphrase and/or cite to certain ERISA provisions. MS Capital relies on these provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the ERISA provisions, MS Capital denies the allegations in paragraph 556.

GreatBanc

557. GreatBanc was a fiduciary to the Plan as described in paragraphs 494 and 529 of the SAC.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained

in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 557 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 557.

558. GreatBanc knowingly participated in the breaches of MS Capital, Eilermann, and Arri in Count XII and Count XIV when they performed the actions described in the 2017 ESOP Transaction, Count XI, and Count XIII including but not limited to the breaches and failures described in paragraph 534.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 558.

559. GreatBanc enabled the breaches of MS Capital, Eilermann, and Arri in Count XII and Count XIV by their own breaches of ERISA when they committed the breaches of fiduciary duty described in Count XI and Count XIII;

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 559.

560. GreatBanc knew of the breaches of MS Capital, Eilermann, and Arri in Count XII and Count XIV and failed to make reasonable efforts to remedy it when they performed the actions described in the 2017 ESOP Transaction, Count XI, and Count XIII including but not limited to the breaches and failures described in paragraph 534.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained

in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 560.

MS Capital

561. MS Capital was a fiduciary to the Plan as described in paragraphs 509 and 544 of the SAC.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 561 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 561.

562. MS Capital knowingly participated in (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of Eilermann, and Arri in Count XII and Count XIV when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 562.

563. MS Capital enabled (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of Eilermann and Arri in Count XII and Count XIV by their own breaches of ERISA when they committed the breaches of fiduciary duty described in Count XII and Count XIV;

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained

in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 563.

564. MS Capital knew of (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of Eilermann and Arri in Count XII and Count XIV and failed to make reasonable efforts to remedy it when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 564.

Eilermann

565. Eilermann was a fiduciary to the Plan as described in paragraphs 509 and 544 of the SAC.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 565 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 565.

566. Eilermann knowingly participated in (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of MS Capital and Arri in Count XII and Count XIV when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and

MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 566.

567. Eilermann enabled (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of MS Capital and Arri in Count XII and Count XIV by his own breaches of ERISA when he committed the breaches of fiduciary duty described in Count XII and Count XIV;

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 567.

568. Eilermann knew of (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of MS Capital and Arri in Count XII and Count XIV and failed to make reasonable efforts to remedy it when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 568.

Arri

569. Arri was a fiduciary to the Plan as described in paragraphs 509 and 544 of the SAC.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained

in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 569 states legal conclusions, to which no response is required. To the extent a response is required, MS Capital denies the allegations in paragraph 569.

570. Arri knowingly participated in (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of MS Capital and Eilermann in Count XII and Count XIV when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 570.

571. Arri enabled (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of MS Capital and Eilermann in Count XII and Count XIV by his own breaches of ERISA when he committed the breaches of fiduciary duty described in Count XII and Count XIV;

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 571.

572. Arri knew of (1) the breaches of GreatBanc in Count XI and Count XIII and (2) the breaches of MS Capital and Eilermann in Count XII and Count XIV and failed to make reasonable efforts to remedy it when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained

in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 572.

573. 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits which have been made through use of assets of the plan, and additionally is subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. Paragraph 573 purports to paraphrase and/or cite to certain ERISA provisions. MS Capital relies on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, MS Capital denies the allegations in paragraph 573.

574. GreatBanc, MS Capital, Eilermann, and Arri, are personally, and jointly and severally, liable under 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3) to make good to the Plan the losses to the Plan resulting from the aforementioned breaches and to restore to the Plan any profits made through the use of Plan assets or through their control of the Plan, and are subject to other equitable or remedial relief as appropriate.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 574.

575. The losses suffered by the participants in the Plan and the profits to the fiduciaries and parties in interest are coterminous with those of the Plan, and each Plaintiff's individual loss is proportional to the losses of fellow participants.

ANSWER: Eilermann and Arri have moved to dismiss Count XV and MS Management is not named in Count XV therefore, no response to Count XV is required. Eilermann, Arri, and MS Management reserve the right to amend this Answer to respond to the allegations contained in Count XV as required by the Court and/or the Federal Rules of Civil Procedure. MS Capital denies the allegations in paragraph 575.

COUNT XVI
Knowing Participation in Breaches of Fiduciary Duties & Prohibited Transactions Pursuant to 29 U.S.C. § 1132(a)(3) for the 2017 ESOP Transaction Against MS Capital, Eilermann, and Arri

576. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

ANSWER: The McBride Defendants incorporate their answers as though set forth herein.

577. 29 U.S.C. § 1132(a)(3) permits a plan participant to bring a civil action to obtain appropriate equitable relief to enforce the provisions of Title I of ERISA or to enforce the terms of a plan.

ANSWER: Paragraph 577 purports to paraphrase and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, the McBride Defendants deny the allegations in paragraph 577.

578. The Supreme Court has held that anyone, including a non-fiduciary, who receives the benefit of conduct that violates ERISA may be subject to equitable remedies under 29 U.S.C. § 1132(a)(3) if they have "actual or constructive knowledge of the circumstances that rendered the transaction unlawful." *Harris Trust & Sav. Bank v. Soloman Smith Barney, Inc.*, 530 U.S. 238, 251 (2000).

ANSWER: Paragraph 578 purports to paraphrase, quote, and/or cite to certain case law. The McBride Defendants rely on that caselaw to speak for itself, rather than on Plaintiffs' characterization thereof. Paragraph 578 further states legal conclusions, to which no response is

required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 578.

579. MS Capital, Eilermann, and Arri were all parties in interest to the Plan under 29 U.S.C. § 1002(14).

ANSWER: Paragraph 579 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 579.

580. As a result of the fiduciary breaches and prohibited transactions described in Counts XI through XV, MS Capital, Eilermann, and Arri received ownership and control of MS Capital stock as a result of the 2017 ESOP Transaction that otherwise would have been Plan assets to be used exclusively for the benefit of the Plan participants and beneficiaries.

ANSWER: The McBride Defendants deny the allegations in paragraph 580.

581. MS Capital, Eilermann, and Arri had actual knowledge of the circumstances that made the transactions unlawful in Counts XI through XV, when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: The McBride Defendants deny the allegations in paragraph 581.

582. Despite knowledge of these the circumstances, MS Capital, Eilermann, and Arri proceeded to knowingly participate in the breaches described in Counts XI through XV, when they performed the actions described in the 2017 ESOP Transaction, Count XII, and Count XIV including but not limited to the breaches and failures described in paragraph 549.

ANSWER: The McBride Defendants deny the allegations in paragraph 582.

583. MS Capital, Eilermann, and Arri have profited from the fiduciary breaches described in Counts XI through XV in an amount to be proven at trial, and upon information and belief, they remain in possession of some or all of the MS Capital stock and consideration that belong to the Plan.

ANSWER: The McBride Defendants deny the allegations in paragraph 583.

584. By knowingly participating in these breaches and violations, MS Capital, Eilermann, and Arri as parties in interest to the Plan are subject to appropriate equitable relief including disgorgement of any profits, having a constructive trust placed on any proceeds received (or which are traceable thereto), having the transactions rescinded, requiring all or part of the MS Capital stock and consideration to be restored to the Plan, or to be subject to other

appropriate equitable relief.

ANSWER: The McBride Defendants deny the allegations in paragraph 584.

COUNT XVII
Violation of 29 U.S.C. § 1104(a)(1) for Failure to Monitor and Terminate GreatBanc as Trustee to the Plan Against MS Capital, Eilermann, and Arri

585. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

ANSWER: The McBride Defendants incorporate their answers as though set forth herein.

586. 29 U.S.C. § 1104(a)(1) requires that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administration of the plan, (B) with "care, skill, prudence, and diligence" and (D) to act in accordance with the documents and instruments governing the plan insofar as those documents and instruments are consistent with ERISA.

ANSWER: Paragraph 586 purports to paraphrase, quote, and/or cite to certain ERISA provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the provisions of ERISA, the McBride Defendants deny the allegations in paragraph 586.

587. These duties are known as the duty of loyalty, the duty of prudence, and duty to follow the plan documents. *See supra* ¶ 312 through ¶ 322.

ANSWER: Paragraph 587 purports to paraphrase and/or cite to certain provisions of ERISA and certain paragraphs of Plaintiffs' Second Amended Complaint. The McBride Defendants rely on those provisions and paragraphs to speak for themselves, rather than on Plaintiffs' characterization thereof. The McBride Defendants otherwise deny the allegations in paragraph 587.

588. The duty of loyalty, the duty of prudence, and the duty to follow the plan documents require strict application of the fiduciary duties to a fiduciary's responsibilities regarding a plan. *See supra* ¶ 323.

ANSWER: Paragraph 588 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 588.

589. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 U.S.C. § 1002(16)(A), and 29 U.S.C. § 1002(21) with regard to the monitoring and termination of GreatBanc when:

(a) MS Capital was the named fiduciary of the Plan as defined in 29 U.S.C. § 1102(a) under the terms of the 2013 Plan Document and the 2017 Plan Document;

(b) MS Capital was the plan administrator of the Plan as defined in 29 U.S.C. § 1002(16)(A) under the terms of the 2013 Plan Document and the 2017 Plan Document;

(c) MS Capital, as a corporate entity, cannot act on its own without any human counterpart. In this regard, MS Capital could only act through its Board of Directors;

(d) Article 17.12 of the 2013 Plan Document and 2017 Plan Document authorized the MS Capital Board of Directors to act on behalf of MS Capital as the named fiduciary and plan administrator of the Plan;

(e) According to 29 C.F.R. § 2509.75-8(D-4) "Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries, to the extent that they have responsibility for the functions described in 29 U.S.C. § 1002(21)(A)";

(f) Eilermann and Arri were the only members of the MS Capital Board of Directors from December 31, 2013 through the effective termination of the Plan;

(g) Eilermann and Arri, as Directors, carried out all acts of MS Capital in its role as named fiduciary and plan administrator to the Plan from December 31, 2013 through the effective termination of the Plan;

(h) GreatBanc recognized the fiduciary role of MS Capital and Arri when it delivered the annual valuation report prepared by Stern Brother to Arri when it stated: "This report is being delivered to you in your capacity as a plan fiduciary";

(i) Arri, as a Director of MS Capital, executed the Second Amendment to the 2013 ESOP Trust Agreement;

(j) Arri, on behalf of MS Capital, executed the Second Amendment to Trustee Engagement Agreement dated November 20, 2017 which appointed and authorized GreatBanc to consider the 2017 ESOP Transaction;

(k) MS Capital, Eilermann, and Arri had the authority to appoint and remove fiduciaries to the ESOP;

(l) MS Capital, Eilermann, and Arri had the authority to remove GreatBanc as trustee;

(m) Eilermann executed the December 27, 2013 ESOP Trust Agreement as a Director of MS Management; and

(n) Eilermann and Arri executed Amendment Number One to the December 27, 2013 ESOP Trust Agreement.

ANSWER: Paragraph 589 states legal conclusions to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 589.

590. As a fiduciaries of the Plan, MS Capital, Eilermann, and Arri were required to comply with the duty of loyalty, the duty of prudence, and the duty to follow the plan documents. *See supra* ¶ 312 through ¶ 322.

ANSWER: Paragraph 590 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 590.

591. The documents governing the Plan, including the 2013 ESOP Trust Agreement, as amended, the 2013 Plan Document, as amended, and the 2017 Plan Document, as amended, required MS Management, MS Capital, Eilermann, and Arri to comply with ERISA's stringent fiduciary standards.

ANSWER: Paragraph 591 purports to characterize certain Trust Agreement and Plan provisions. The McBride Defendants rely on those provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. Paragraph 591 further states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 591.

592. As a fiduciaries of the Plan, MS Management, MS Capital, Eilermann, and Arri were required to strictly apply ERISA's fiduciary duties in carrying out their fiduciary responsibilities with regard to monitoring and terminating GreatBanc as trustee. *See supra* ¶ 323.

ANSWER: Paragraph 592 states legal conclusions, to which no response is required.

To the extent a response is required, the McBride Defendants deny the allegations in paragraph 592.

593. MS Capital, Eilermann, and Arri breached their fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D) when they:

(a) Failed to properly monitor GreatBanc as trustee;

(b) Failed to remove GreatBanc as trustee after their actions and fiduciary breaches as part of the 2013 ESOP Transaction;

(c) Failed to remove GreatBanc as trustee after their actions and fiduciary breaches as part of the Loss of Value from 2013 to 2017;

(d) Failed to remove GreatBanc as trustee after their actions and fiduciary breaches as part of the 2017 ESOP Transaction;

(e) Failed to remove GreatBanc after they were repeatedly sued by other ESOP participants and the DOL for failures under ERISA;

(f) Failed to remove GreatBanc after they entered into the settlement agreement with the DOL in 2014;

(g) Failed to remove GreatBanc after they knew or should have known that GreatBanc is not properly capitalized to protect plans they act as fiduciaries to in the case of losses to the plan; and

(h) Failed to remove GreatBanc when the amount covered by their fiduciary insurance policy was reduced from earlier years.

ANSWER: The McBride Defendants deny the allegations in paragraph 593.

594. MS Capital, Eilermann, and Arri have caused losses to the Plan and MS Capital, Eilermann, and Arri have profited by the breaches of fiduciary duty described in this count in an amount to be proved specifically at trial.

ANSWER: The McBride Defendants deny the allegations in paragraph 594.

595. 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by Title I of ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits which have been made through use of assets of the plan, and additionally is subject to such other equitable or remedial relief as the court may deem appropriate, including removal of the fiduciary.

ANSWER: Paragraph 595 purports to paraphrase and/or cite to certain ERISA provisions. The McBride Defendants rely on these provisions to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the ERISA provisions, the McBride Defendants deny the allegations in paragraph 595.

596. MS Capital, Eilermann, and Arri, are personally, and jointly and severally, liable under 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3) to make good to the Plan the losses to the Plan resulting from the aforementioned breaches and to restore to the Plan any profits made through the use of Plan assets or through their control of the Plan, and are subject to other equitable or remedial relief as appropriate.

ANSWER: The McBride Defendants deny the allegations in paragraph 596.

597. The losses suffered by the participants in the Plan and the profits to the fiduciaries and parties in interest are coterminous with those of the Plan, and each Plaintiff's individual loss is proportional to the losses of fellow participants.

ANSWER: The McBride Defendants deny the allegations in paragraph 597.

CLASS ACTION ALLEGATIONS

598. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b), on behalf of the following class:

> All participants in the McBride & Son Employee Stock Ownership Plan, and the beneficiaries of such participants, at any time between March 30, 2013 (or earlier as permitted by the applicable statute of limitation) and December 15, 2017. Excluded from the Class are Eilermann and Arri and their immediate families; and legal representatives, successors, and assigns of any such excluded persons.

ANSWER: The McBride Defendants admit that Plaintiffs purport to bring this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b). The McBride Defendants deny that a class action is appropriate or that the proposed class definition would be appropriate if a class were certified.

599. The Class is so numerous that joinder of all members is impracticable. Although the exact number and identities of Class members are unknown to Plaintiffs at this time, the Plan's Form 5500 filings indicate that as of December 31, 2015, there were 171 participants and deceased participants whose beneficiaries were receiving or entitled to receive benefits in the

Plan and, as of December 31, 2016, there were 169 such individuals.

ANSWER: The first sentence of paragraph 599 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in the first sentence of paragraph 599. The McBride Defendants lack knowledge or information sufficient to form a belief as to what is unknown to Plaintiffs, and therefore deny the allegations in the second sentence of paragraph 599, except that the McBride Defendants admit that Plaintiffs purport to cite to certain Plan Form 5500s, but the McBride Defendants rely on those documents to speak for themselves, rather than on Plaintiffs' characterization thereof. To the extent that characterization is inconsistent with the Form 5500s, the McBride Defendants deny the allegations in the second sentence of paragraph 599.

600. Questions of law and fact common within the Class as a whole include, but are not limited to, the following:

A. Whether GreatBanc served as Trustee to the Plan for the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and the 2017 ESOP Transaction;

B. Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri were ERISA fiduciaries of the Plan;

C. Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri caused the Plan to engage in prohibited transactions under ERISA by causing the 2013 ESOP Transaction and the 2017 ESOP Transaction;

D. Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri engaged in good faith valuations of the stock held by the Plan in connection with the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and the 2017 ESOP Transaction;

E. Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri caused the Plan to receive less than fair market value for MS Capital stock in the 2017 ESOP Transaction and less than adequate consideration for the MS Companies, Inc. stock in the 2013 ESOP Transaction;

F. Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri breached their fiduciary duties under ERISA with regard to the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and the 2017 ESOP Transaction;

G. Whether MS Capital, Eilermann, and Arri, as parties in interest, knowingly participated in prohibited transactions and fiduciary breaches;

H. Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri breached their co-fiduciary duties with respect to the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and the 2017 ESOP Transaction.

I. Whether MS Capital, Eilermann, and Arri breached their fiduciary duties in failing to remove GreatBanc as trustee;

J. The proper valuation of the Plan's holdings in stock;

K. The amount of losses suffered by the Plan and its participants as a result of GreatBanc, MS Management, MS Capital, Eilermann, and Arri's ERISA violations;

L. The amount of profits gained by the Plan's fiduciaries and parties in interest as a result of GreatBanc, MS Management, MS Capital, Eilermann, and Arri's ERISA violations; and

M. The appropriate relief for Defendants' violations of ERISA.

ANSWER: Paragraph 600 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 600.

601. Plaintiffs' claims are typical of those of the Class. For example, Plaintiffs, like other Plan participants in the Class, suffered (1) a loss in the value of their Plan accounts when MS Companies, Inc. stock was exchanged for MS Capital stock; (2) a loss in the value of their Plan accounts from the excessive compensation and award of Class B and Class C Units described in the Loss of Value from 2013 to 2017; and (3) a diminution in the value of their Plan accounts because the Plan received a lower than fair market value price for MS Capital stock.

ANSWER: The first sentence of paragraph 601 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in the first sentence of paragraph 601. The McBride Defendants deny the allegations in the second sentence of paragraph 601.

602. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have retained counsel competent and experienced in complex class actions,

ERISA, and employee benefits litigation.

ANSWER: Paragraph 602 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 602.

603. Class certification of Plaintiffs' Claims for Relief for the alleged violations of ERISA is appropriate pursuant to Fed. R. Civ. P. 23(b)(1) because the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendants, and/or because adjudications with respect to individual Class members would as a practical matter be dispositive of the interests of non-party Class members.

ANSWER: Paragraph 603 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in paragraph 603.

604. In the alternative, class certification of Plaintiff's Claims for Relief for the alleged violations of ERISA is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to each member of the Class, making appropriate declaratory and injunctive relief with respect to the Class as a whole. The members of the Class are entitled to declaratory and injunctive relief to remedy Defendants' violations of ERISA.

ANSWER: The first sentence of paragraph 604 states legal conclusions, to which no response is required. To the extent a response is required, the McBride Defendants deny the allegations in the first sentence of paragraph 604. The McBride Defendants deny the allegations in the second sentence of paragraph 604.

605. The names and addresses of the Class members are available from Defendants and the Plan. Notice will be provided to all members of the Class to the extent required by Fed. R. Civ. P. 23.

ANSWER: The McBride Defendants deny the allegations in paragraph 605.

ENTITLEMENT TO RELIEF

606. By virtue of the violations set forth in the foregoing paragraphs, Plaintiffs and the Class are entitled to sue each of the Defendants who are fiduciaries and/or parties in interest

pursuant to 29 U.S.C. § 1132(a)(2), for relief on behalf of the Plan as provided in 29 U.S.C. § 1109, including for recovery of any losses to the Plan, the recovery of any profits resulting from the breaches of fiduciary duty, and such other equitable relief as the Court may deem appropriate.

ANSWER: The McBride Defendants deny the allegations in paragraph 606.

607. By virtue of the violations set forth in the foregoing paragraphs, Plaintiffs and the Class are entitled pursuant to 29 U.S.C. § 1132(a)(3) to sue any of the Defendants for appropriate equitable relief to redress the wrongs described herein.

ANSWER: The McBride Defendants deny the allegations in paragraph 607.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment against Defendants and for the following relief:

A. Declare that Defendants GreatBanc, MS Management, MS Capital, Eilermann, and Arri breached their fiduciary duties under ERISA;

B. Declare that Defendants GreatBanc, MS Management, MS Capital, Eilermann, and Arri caused the Plan to engage in and themselves engaged in prohibited transactions and thereby breached their duties under ERISA;

C. Declare that Defendants MS Capital, Eilermann and Arri knowingly participated in the breaches of ERISA by Defendants GreatBanc, MS Management, MS Capital, Eilermann, and Arri;

D. Declare that Defendants GreatBanc, MS Management, MS Capital, Eilermann, and Arri breached their co-fiduciary duties under ERISA;

E. Order each Defendant found to have violated ERISA to jointly and severally make good to the Plan those losses resulting from the breaches of ERISA and restore any profits it has made through use of assets of the Plan;

F. Declare the 2013 ESOP Transaction to be a breach of fiduciary duty and prohibited transaction and (1) require any fiduciary or party in interest who profited or engaged in a prohibited transaction to disgorge any profits made, (2) declare a constructive trust over the proceeds of any such transaction, and (3) provide any other appropriate equitable relief, whichever is in the best interest of the Plan;

G. Declare the Loss of Value from 2013 to 2017 to be a breach fiduciary duty and (1) require any fiduciary or party in interest who profited to disgorge any profits made, (2) declare a constructive trust over the profits, and (3) provide any other appropriate equitable relief, whichever is in the best interest of the Plan;

H. Declare the 2017 ESOP Transaction to be a breach of fiduciary duty and prohibited transaction and (1) require any fiduciary or party in interest who profited or engaged in a prohibited transaction to disgorge any profits made, (2) declare a constructive trust over the proceeds of any such transaction, and (3) provide any other appropriate equitable relief, whichever is in the best interest of the Plan;

I. Order Defendants to provide other appropriate equitable relief to the Plan, and any successor trust, and its participants and beneficiaries, including but not limited to surcharge, providing an accounting for profits, and imposing a constructive trust and/or equitable lien on any funds wrongfully held by Defendants;

J. Order the proceeds of any recovery for the Plan, and any successor trust, to be allocated to the accounts of the class members to make them whole for any injury that they suffered as a result of the breaches of ERISA in accordance with the Court's declaration;

K. Order the removal of any of the breaching fiduciaries from their position as fiduciaries for the Plan and enjoin any of the breaching fiduciaries from acting as fiduciaries for any plan that covers any McBride Enterprise employees or any members of the Class;

L. Appoint an Independent Fiduciary to manage the Plan to the extent necessary and the costs of such Independent Fiduciary to be paid for by any Defendants found to have breached their fiduciary duties or otherwise violated ERISA;

M. Order (1) a constructive trust be placed on any proceeds resulting from the breaches in Count I through Count XVII, (2) disgorgement of profits made by a breaching fiduciary or party in interest resulting from the breaches in Count I through Count XVII, (3) any rescission as necessary resulting from the breaches in Count I through Count XVII, and/or (4) any other appropriate equitable relief against a breaching fiduciary or party in interest resulting from the breaches in Count I through Count XVII, whichever is in the best interest of the Plan;

N. Order pursuant to 29 U.S.C. § 1056(d)(4) that any amount to be paid to the Plan accounts of the class can be satisfied by using or transferring any breaching fiduciary's ESOP account in the Plan (or the proceeds of that account) to the extent of that fiduciary's liability;

O. Award Plaintiffs reasonable attorneys' fees and costs of suit incurred herein pursuant to 29 U.S.C. § 1132(g), and/or for the benefit obtained for the common fund;

P. Order Defendant GreatBanc to disgorge any fees it received in conjunction with

its services as trustee for the Plan as well as any earnings and profits thereon;

Q. Order Defendants to pay pre-judgment and post-judgment interest;

R. Certify this action as a class action pursuant to Fed. R. Civ. P. 23, certify the named Plaintiffs as class representatives, and their counsel as class counsel; and

S. Award such other and further relief as the Court deems equitable and just.

ANSWER: The McBride Defendants deny that Plaintiffs are entitled to any of the relief requested or to any relief whatsoever.

McBRIDE DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE: Lack of Standing and/or Subject Matter Jurisdiction

1. Plaintiffs' claims are barred in whole or in part because Plaintiffs have not each suffered an injury in fact, including but not limited to because Gregory Godfrey and Jeffrey Sheldon did not hold any shares that were redeemed in the November 30, 2017 Transaction. Absent an injury in fact, Plaintiffs lack standing to sue for harm to the Plan, and the Court lacks subject matter jurisdiction.

SECOND AFFIRMATIVE DEFENSE: Exemption from Prohibited Transaction

1. Plaintiffs' prohibited transaction claims fails in whole or in part because the November 30, 2017 Transaction satisfies the exemptions set forth in ERISA § 408(e) and/or § 408(b). The Plan received adequate consideration and fair market value for the shares redeemed by McBride & Son Capital, Inc. in the November 30, 2017 Transaction, which the Trustee determined in good faith following a prudent investigation prior to approving the transaction. The amount of compensation paid by McBride & Son Capital, Inc. to the Trustee for its services in connection with the November 30, 2017 Transaction was reasonable, satisfying the exemptions set forth in ERISA § 408(b) and/or ERISA § 408(c).

THIRD AFFIRMATIVE DEFENSE: Lack of Intent

1. ERISA § 406(a)(1)(D) prohibits transactions between a plan and a party in interest that constitute a direct or indirect "transfer to, or use by or for the benefit of a party in interest, of any assets of the plan."

2. Courts have held that a prohibited use of plan assets for the benefit of a party in interest, as described by ERISA § 406(a)(1)(D), requires a "subjective intent to benefit" a party in interest.

3. Plaintiffs have not alleged and cannot establish that any McBride Defendant had any "subjective intent to benefit" any party in interest.

FOURTH AFFIRMATIVE DEFENSE: Failure to State a Claim

1. Plaintiffs' Second Amended Complaint fails, in whole or in part, to state a cause of action upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE: Statute of Limitations

1. Plaintiffs' claims against the McBride Defendants related to or arising out of the duty to monitor GreatBanc for alleged acts and omission in connection with the 2013 business reorganization and payment of compensation are barred in part by the three-year statute of limitations in ERISA § 413. Upon information and belief, Plaintiffs had actual knowledge of the facts surrounding the 2013 business reorganization and the payment of compensation and the alleged events giving rise to their claims more than three years before they filed their Second Amended Complaint.

SIXTH AFFIRMATIVE DEFENSE: Waiver and Estoppel

1. Plaintiffs' claims related to the November 30, 2017 Transaction are barred in whole or in part by the doctrines of waiver and estoppel because the participants entitled to vote

their shares overwhelmingly supported the transaction. Additionally, Plaintiff Debra Ann Kopinski did not vote her shares against the transaction, and has therefore waived and is estopped from asserting her claims in the matter.

SEVENTH AFFIRMATIVE DEFENSE: Ratification and/or Consent

1. Plaintiffs' claims related to the November 30, 2017 Transaction are barred in whole or in part by the doctrines of ratification and/or consent because the participants entitled to vote their shares overwhelmingly supported the transaction.

EIGHTH AFFIRMATIVE DEFENSE: Waiver and Release

1. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs waived or released his or her claims.

RESERVATION OF DEFENSES

The McBride Defendants reserve the right to assert additional affirmative defenses as they may become evident during the course of discovery or during further investigation into the background of this matter.

WHEREFORE, the McBride Defendants respectfully request the following relief:

a) That this Court enter judgment in the McBride Defendants' favor and against Plaintiffs;

b) That the McBride Defendants be awarded its costs, expenses, and reasonable attorneys' fees; and

c) That the McBride Defendants be awarded such further relief as the Court deems just and proper.

Dated: February 26, 2020

Respectfully submitted,

/s/ Lars C. Golumbic

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Counsel for Defendants McBride & Son Management Company, LLC, John F. Eilermann, Jr., Michael D. Arri, and McBride & Son Capital, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020, I electronically filed the foregoing document with the clerk of the court for The Northern District of Illinois, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of E-Filing" to all attorneys of record in this case.

Dated: February 26, 2020

By: */s/ Lars C. Golumbic*
Lars C. Golumbic