

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

**GREGORY GODFREY, JEFFREY  
SHELDON, and DEBRA ANN  
KOPINSKI, on behalf of the MCBRIDE &  
SON EMPLOYEE STOCK OWNERSHIP  
PLAN, and on behalf of a class of all other  
persons similarly situated,**

**Plaintiffs,**

**v.**

**GREATBANC TRUST COMPANY,  
McBRIDE & SON CAPITAL INC.,  
McBRIDE & SON MANAGEMENT  
COMPANY, LLC, JOHN F.  
EILERMANN, JR., and MICHAEL D.  
ARRI,**

**Defendants.**

**Case No. 1:18-cv-07918**

**Judge Matthew F. Kennelly**

**Magistrate Judge Michael T. Mason**

**ANSWER TO SECOND AMENDED COMPLAINT**

For its Answer to Plaintiffs' Second Amended Complaint ("SAC"), Defendant GreatBanc Trust Company ("GreatBanc" or "Defendant") states as follows:

**ANSWER**

The numbered paragraphs below correspond to the paragraph numbers contained in Plaintiffs' SAC. The headings used match those chosen by Plaintiffs – they are included for ease of reference only and do not constitute any admission. GreatBanc generally denies all allegations contained in the SAC not expressly and specifically admitted, including all allegations contained in the headings, footnotes, and prayer for relief.

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.”<sup>1</sup> Their conduct plainly violated ERISA fiduciary duties.

**ANSWER: GreatBanc denies the allegations contained in paragraph 1.**

2. The largest home builder in Saint Louis, MO, the McBride & Son Homes enterprise (“McBride Enterprise”)<sup>2</sup>, 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<sup>3</sup>, they began taking the value of the McBride Enterprise from the ESOP, for their own benefit, in violation of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the largest current home builder in Saint Louis, MO, denies the remaining allegations in paragraph 2, and denies that Plaintiffs’ use of the term “McBride Enterprise” is an accurate or proper way to identify various separate and independent corporate entities.**

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.<sup>4</sup> 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: GreatBanc admits that phantom stock and stock appreciation rights were issued to Eilermann and Arri at various points in time, but denies the remaining allegations in paragraph 3.**

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,

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<sup>1</sup> *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992).

<sup>2</sup> 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.”

<sup>3</sup> 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 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.

<sup>4</sup> 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.

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: GreatBanc denies 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: GreatBanc admits that a corporate reorganization closed on or about December 31, 2013 (the “2013 Reorganization”), and denies that paragraph 5 contains an accurate or complete description of the 2013 Reorganization. GreatBanc further states that it lacks knowledge or information sufficient to form a belief as to what the ESOP participants may have been told, and denies the remaining allegations in paragraph 5.**

6. From 2013 to 2017, Eilermann and Arri paid themselves, and other insiders, at least \$45 million 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: GreatBanc states that it lacks knowledge or information sufficient to form a belief as to what the ESOP participants may have been told, and denies the remaining 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: GreatBanc admits that on or about November 30, 2017 McBride & Son Capital, Inc. redeemed its outstanding shares from the ESOP (the “2017 Transaction”), but denies that paragraph 7 contains an accurate or complete description of the 2017 Transaction. GreatBanc denies the remaining 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc admits that Plaintiffs purportedly seek to recover damages through this lawsuit, denies that the ESOP has suffered any losses, and denies the remaining 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: GreatBanc admits that paragraph 11 purports to paraphrase, quote, and/or cite various cases and obligations arising under ERISA. GreatBanc refers to those cases and the provisions of ERISA for their exclusive terms, denies all allegations in paragraph 11 that are inconsistent with the full text of those cases and the provisions of ERISA, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 11 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to bring this action under the cited ERISA sections in paragraph 13, but denies all wrongdoing and denies that Plaintiffs are entitled to any relief.**

### **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: GreatBanc admits that Plaintiffs purport to bring this action under the cited ERISA sections in paragraph 14, but denies all wrongdoing and denies that Plaintiffs are entitled to any relief.**

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

**ANSWER: GreatBanc denies that this Court has subject matter jurisdiction over this action because Plaintiffs have not personally suffered an injury in fact.**

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: GreatBanc admits that venue is proper in this District, and admits that its headquarters is located at 801 Warrenville Road, Suite 500, Lisle, Illinois 60352. GreatBanc denies 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: GreatBanc admits that from on or about December 31, 2013 through the 2017 Transaction, McBride & Son Capital, Inc. sponsored the McBride & Son Employee Stock Ownership Plan (the “Plan” or “ESOP”), after which time the Plan was converted to a profit sharing plan named the “McBride & Son Profit Sharing Plan” and merged into the McBride & Son 401(k) Savings Plan. Answering further, GreatBanc denies that McBride & Son Management Company LLC sponsored the plan rather than McBride & Son Management Co. prior to December 31, 2013, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 17.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the meaning of the allegations in paragraph 18 that “control of the ESOP was vested,” and denies the remaining 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 related to the Plan’s operation before it served as Trustee. Answering further, GreatBanc admits that during the time it served as Trustee the Plan was intended to be an ESOP and to**

**qualify under and satisfy all requirements of an employee stock ownership plan as defined under Internal Revenue Code sections 401(a) and 4975(e)(7) and related regulations.**

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: GreatBanc admits that the Plan was amended and restated as of January 1, 2013 (the “2013 Plan Document”) and as of January 1, 2017 (the “2017 Plan Document”). GreatBanc admits that at various times MS Capital amended the Plan, but denies the remaining 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: GreatBanc admits that prior to the 2013 Plan Document and 2017 Plan Document, the Plan was amended and restated as of January 1, 2007 (the “2007 Plan Document”).**

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: GreatBanc admits that after, on or about December 31, 2013, the Plan held shares of stock in MS Capital, and that at certain points prior to December 31, 2013 the Plan held shares of stock in MS Companies, Inc. and McBride & Sons Enterprises, Inc.**

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: GreatBanc refers to the terms of the 2017 Plan Document, 2013 Plan Document, and 2007 Plan Document and any amendments thereto for their**



**exclusive terms, and denies all allegations in paragraph 23 inconsistent with their complete terms. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the eligibility of “nearly all employees of the McBride Enterprise.”**

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: GreatBanc refers to the 2017 Plan Document, 2013 Plan Document, and 2007 Plan Document for their exclusive terms, and denies all allegations in paragraph 24 inconsistent with their complete terms.**

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: GreatBanc admits 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: GreatBanc admits that Patrick J. De Craene executed the 2013 ESOP Trust Agreement on behalf of GreatBanc, but denies the remaining allegations in paragraph 26 insofar as McBride & Son Management Co. executed the 2013 ESOP Trust Agreement.**

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: GreatBanc admits that the 2013 ESOP Trust Agreement was amended via Amendment Number One effective January 1, 2014, refers to Amendment Number One for its exclusive terms, and denies all allegations in paragraph 27 inconsistent with the complete terms of that Amendment Number One.**

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

**ANSWER: GreatBanc admits that the 2013 ESOP Trust Agreement was amended via Amendment Number One effective January 1, 2014, refers to Amendment Number One for its exclusive terms, and denies all allegations in paragraph 28 inconsistent with the complete terms of that Amendment Number One.**

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: GreatBanc refers to the 2013 ESOP Trust Agreement for its exclusive terms, and denies all allegations in paragraph 29 inconsistent with the complete terms of the 2013 ESOP Trust Agreement.**

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: GreatBanc denies 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: GreatBanc admits there was an Amendment Number Two to the 2017 Plan Document, refers to Amendment Number Two for its exclusive terms, and denies all allegations in paragraph 31 inconsistent with the complete terms of that Amendment Number Two.**

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: GreatBanc admits there was an Amendment Number Two to the 2017 Plan Document, refers to Amendment Number Two for its exclusive terms, and denies all allegations in paragraph 32 inconsistent with the complete terms**

**of that Amendment Number Two. Answering further, GreatBanc admits that the Trust to Trust Transfer agreement was made effective December 15, 2017 evidencing a complete transfer of all of the assets and liabilities held under the trust forming part of the McBride & Son Profit Sharing Plan to the trust forming part of the McBride & Son 401(k) Savings Plan, but denies all allegations in paragraph 32 inconsistent with the complete terms of that Trust to Trust Transfer agreement. GreatBanc denies the remaining allegations in 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: GreatBanc admits that at one time Gregory Godfrey was a participant in the Plan and was vested in his account. GreatBanc lacks knowledge or information sufficient to form a belief as to whether Gregory Godfrey has been a participant “at all relevant times” and denies that he was a participant in the Plan as of November 30, 2017. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that at one time Jeffrey Sheldon was a participant in the Plan and was vested in his account. GreatBanc lacks knowledge or information sufficient to form a belief as to whether Jeffrey Sheldon has been**

**a participant “at all relevant times” and denies that he was a participant in the Plan as of November 30, 2017. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that at one time Debra Ann Kopinski was a participant in the Plan, but GreatBanc lacks knowledge or information sufficient to form a belief as to whether Debra Ann Kopinski has been a participant “at all relevant times.” Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that it was the Trustee for the Plan from on or about December 28, 2001 through the 2017 Transaction. GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc’s Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 36**

**inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies the 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: GreatBanc admits that Plaintiffs purport to cite to the 2013 ESOP Trust Agreement. GreatBanc refers to the 2013 ESOP Trust Agreement for its exclusive terms, and denies all allegations in paragraph 37 inconsistent with the complete terms of the 2013 ESOP Trust Agreement.**

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: GreatBanc admits that it was the Trustee for the Plan from on or about December 28, 2001 through the November 30, 2017 Transaction. GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement**

**agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 38 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and 29 U.S.C. § 1103. GreatBanc refers to those statutes for their exclusive terms, and denies all allegations in paragraph 38 inconsistent with the complete terms of 29 U.S.C. § 1002 and 29 U.S.C. § 1103.**

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: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA. GreatBanc refers to the Plan and those agreements and the provisions of ERISA for their exclusive terms, denies that it violated any duties under ERISA, the Employee Stock Ownership Plan and Trust Agreements and their amendments, or GreatBanc's Engagement Agreements and their amendments, and denies the remaining allegations in paragraph 39.**

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

**ANSWER: GreatBanc admits that it was the Trustee for the Plan from on or about December 28, 2001 through the November 30, 2017 Transaction. GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc’s Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 40 inconsistent with the complete terms of the Plan and those agreements and ERISA**

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

**ANSWER: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 41 inconsistent with the complete terms of 29 U.S.C. § 1002, and denies the remaining allegations in paragraph 41.**

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

**ANSWER: GreatBanc admits the allegations in paragraph 42.**

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: GreatBanc admits the allegations in paragraph 43.**

**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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and the 2007 Plan Document and 2013 Plan Document. GreatBanc refers to that statute and the 2007 Plan Document and 2013 Plan Document for their exclusive terms, and denies any allegations in paragraph 44 inconsistent with the complete terms of 29 U.S.C. § 1002, the 2007 Plan Document, and the 2013 Plan Document.**

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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1102 and 1002 and the 2007 Plan Document and 2013 Plan Document. GreatBanc refers to those statutes and the 2007 Plan Document and 2013 Plan Document for their exclusive terms, and denies any allegations in paragraph 45 inconsistent with the complete terms of 29 U.S.C. § 1102 and 1002, the 2007 Plan Document, and the 2013 Plan Document.**

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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and the 2007 Plan Document and 2013 Plan Document. GreatBanc refers to that statute and the 2007 Plan Document and 2013 Plan Document for their exclusive terms, and denies any allegations in paragraph 46 inconsistent with the complete terms of 29 U.S.C. § 1002, the 2007 Plan Document, and the 2013 Plan Document.**

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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 47 inconsistent with the complete terms of 29 U.S.C. § 1002, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits Plaintiffs cite to the 2017 Plan Document and the 2013 Plan Document, refers to the 2017 Plan Document and the 2013 Plan Document for their exclusive terms, and denies any allegations in paragraph 49 inconsistent with the complete terms of the 2007 Plan Document and the 2013 Plan Document.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc admits that Plaintiffs cite to the 2013 Plan Document and Amendment Number Two, the 2017 Plan Document, and 29 U.S.C. § 1002. GreatBanc refers to those documents and the statute for their exclusive terms, and denies any allegations in paragraph 53 inconsistent with the complete terms of the 2013 Plan Document and Amendment Number Two, the 2017 Plan Document, and 29 U.S.C. § 1002.**

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: GreatBanc admits that Plaintiffs cite to the 2013 Plan Document and Amendment Number Two, the 2017 Plan Document, 29 U.S.C. § 1002, and 29 U.S.C. § 1102. GreatBanc refers to those documents and statutes for their exclusive terms, and denies any allegations in paragraph 54 inconsistent with the complete terms of the 2013 Plan Document and Amendment Number Two, the 2017 Plan Document, 29 U.S.C. § 1002, and 29 U.S.C. § 1102.**

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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 55 inconsistent with the complete terms of 29 U.S.C. § 1002, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 56 inconsistent with the complete terms of 29 U.S.C. § 1002, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.**

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: GreatBanc admits Plaintiffs cite to the 2017 Plan Document and the 2013 Plan Document, refers to the 2017 Plan Document and the 2013 Plan Document for their exclusive terms, and denies any allegations in paragraph 58 inconsistent with the complete terms of the 2007 Plan Document and the 2013 Plan Document.**

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: GreatBanc admits that during the time it served as Trustee, Eilermann and Arri were the only members of the board of directors of McBride & Son Capital, Inc.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61.**

**Defendant Eilermann**

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

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and 29 U.S.C. 1102. GreatBanc refers to those statutes for their exclusive terms, and denies any allegations in paragraph 66 inconsistent with the complete terms of 29 U.S.C. § 1002 and 29 U.S.C. § 1102. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that during the time it served as Trustee, Eilermann and Arri were the only members of the board of directors of McBride & Son Capital, Inc.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and 29 U.S.C. 1102. GreatBanc refers to those statutes for their exclusive terms, and denies**

**any allegations in paragraph 69 inconsistent with the complete terms of 29 U.S.C. § 1002 and 29 U.S.C. § 1102. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, and denies any allegations in paragraph 70 inconsistent with the complete terms of 29 U.S.C. § 1002. GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 71 inconsistent with the complete terms of 29 U.S.C. § 1002, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 71.**

**Defendant Arri**

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

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 72.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and 29 U.S.C. 1102. GreatBanc refers to those statutes for their exclusive terms, and denies any allegations in paragraph 76 inconsistent with the complete terms of 29 U.S.C. § 1002 and 29 U.S.C. § 1102. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that during the time it served as Trustee, Eilermann and Arri were the only members of the board of directors of McBride & Son Capital, Inc.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002 and 29 U.S.C. 1102. GreatBanc refers to those statutes for their exclusive terms, and denies any allegations in paragraph 79 inconsistent with the complete terms of 29 U.S.C. § 1002 and 29 U.S.C. § 1102. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, and denies any allegations in paragraph 80 inconsistent with the complete terms of 29 U.S.C. § 1002. GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in**



**paragraph 81 inconsistent with the complete terms of 29 U.S.C. § 1002, and states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 83 inconsistent with the complete terms of 29 U.S.C. § 1002, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 85 inconsistent with the complete terms of 29 U.S.C. § 1002 and**

**lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the 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: GreatBanc admits that Plaintiffs cite to 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 87 inconsistent with the complete terms of 29 U.S.C. § 1002, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that at various points in time it engaged Stern Brothers to perform valuations, that Stern Brothers provided GreatBanc with valuation reports, and that at certain times GreatBanc passed those valuation reports on to Arri. GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 88.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 89.**

**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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of what the "Plan originally held." Answering further, GreatBanc admits that at one point in time the Plan held shares of McBride & Son Enterprises, Inc.**

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

**ANSWER: GreatBanc admits that on or about January 8, 2010, the common shares of McBride & Son Enterprises, Inc. were transferred to McBride & Son Companies, Inc., which was owned by the ESOP.**

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

**ANSWER: GreatBanc admits that from on or about December 31, 2013 through the 2017 Transaction, the ESOP primarily held stock in McBride & Son Capital, Inc.**

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: GreatBanc admits that during the time it was Trustee stock of McBride & Son Enterprises, Inc., McBride & Son Companies, Inc., and McBride & Son Capital, Inc. was not readily tradable on an established securities market.**

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

**ANSWER: GreatBanc admits that as of December 31, 2012, the Plan 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: GreatBanc admits that on or about December 31, 2013, the outstanding 88,201.4119 shares of McBride & Son Companies, Inc. were effectively converted to 88,201.4119 shares of McBride & Son Capital, Inc.**

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

**ANSWER: GreatBanc admits that on or about December 31, 2013, the outstanding 88,201.4119 shares of McBride & Son Companies, Inc. were effectively converted to 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: GreatBanc admits that as of December 31, 2014, the Plan 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: GreatBanc admits that as of December 31, 2015, the Plan 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: GreatBanc admits that as of December 31, 2016, the Plan 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: GreatBanc admits that a Form 5500 was submitted for 2012, refers to the final 2012 Form 5500 for its exclusive terms, and denies all allegations in paragraph 100 inconsistent with the complete terms of the final 2012 Form 5500.**

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: GreatBanc admits that a Form 5500 was submitted for 2013, refers to the final 2013 Form 5500 for its exclusive terms, and denies all allegations in paragraph 101 inconsistent with the complete terms of the final 2013 Form 5500. GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that a Form 5500 was submitted for 2014, refers to the final 2014 Form 5500 for its exclusive terms, and denies all allegations in paragraph 102 inconsistent with the complete terms of the final 2014 Form 5500.**

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: GreatBanc admits that a Form 5500 was submitted for 2015, refers to the final 2015 Form 5500 for its exclusive terms, and denies all allegations in paragraph 103 inconsistent with the complete terms of the final 2015 Form 5500.**

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: GreatBanc admits that a Form 5500 was submitted for 2016, refers to the final 2016 Form 5500 for its exclusive terms, and denies all allegations in paragraph 104 inconsistent with the complete terms of the final 2016 Form 5500.**

**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: GreatBanc admits that it engaged Stern Brothers for valuation services as memorialized in an engagement letter dated May 25, 2010 and executed by Stern Brothers, GreatBanc, and McBride & Son Enterprises, Inc. GreatBanc refers to that engagement letter for its exclusive terms, and denies all allegations in paragraph 105 inconsistent with the complete terms of that May 25, 2010 engagement letter.**

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: GreatBanc admits that it engaged Stern Brothers for valuation services at various points in time while it served as Trustee, which were memorialized in engagement letters, but lacks knowledge or information sufficient to form a belief as to the specific "engagement with Stern Brothers" referenced in paragraph 106 and therefore the truth of the remaining allegations in paragraph 106.**

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

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that Stern Brothers determined that the fair market value of a controlling interest of McBride & Son Companies, Inc. was \$121.80 per share as of December 31, 2012.**

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

**ANSWER: GreatBanc admits that Stern Brothers determined that the fair market value of a controlling interest of McBride & Son Companies, LLC was \$142.80 per share as of December 31, 2013.**

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

**ANSWER: GreatBanc admits that Stern Brothers determined that the fair market value of a controlling interest in McBride & Son Capital, Inc. was \$168.00 per share as of December 31, 2014.**

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

**ANSWER: GreatBanc admits that Stern Brothers determined that the fair market value of a controlling interest in McBride & Son Capital, Inc. was \$168.00 per share as of December 31, 2015.**

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

**ANSWER: GreatBanc admits that Stern Brothers determined that the fair market value of a controlling interest in McBride & Son Capital, Inc. was \$153.00 per share as of December 31, 2016.**

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: GreatBanc admits that the cover correspondence with a copy of the Stern Brothers valuation reports it sent to Arri between 2012-2016 stated in part that the "report is being delivered to you in your capacity as plan fiduciary." GreatBanc denies the remaining allegations in paragraph 113.**

**Eilermann, Arri, and Other Insiders Receive Synthetic Equity**

114. Synthetic equity is a catch-all term for a variety of economic interests in a company that do not also include the legal ownership of an equity interest. For anything that is labeled synthetic equity, the potential economic claim/benefit granted to the holder uses a company's stock price to determine the economic return, but the economic return is paid in cash instead of shares. Accordingly, the payments may dilute (i.e. reduce) the value of the business because cash leaves the company, but they don't dilute percentage ownership because no additional shares are issued.

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 114 insofar as they are generalized statements made without reference to the facts or circumstances of any specific company or situation.**

115. Phantom stock and stock appreciation rights ("SARs") are forms of synthetic equity.

**ANSWER: GreatBanc admits that phantom stock and stock appreciation rights are sometimes referred to as forms of "synthetic equity," and denies the remaining allegations in paragraph 115.**

116. Phantom stock is intended to mimic the actual ownership vehicle of direct share ownership. SARs are intended to mimic the actual ownership vehicle of stock options.



**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 116 insofar as they are generalized statements made without reference to the facts or circumstances of any specific company or situation.**

117. Synthetic equity represents a claim on the equity of a company and therefore reduces the value that accrues to all other stakeholders. This reduction is often referred to as dilution.

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 117 insofar as they are generalized statements made without reference to any specific company or situation.**

118. Eilermann received the following phantom stock grants, approved by Arri:

2006	█
2007	█
2010	█
2013	█
<b>Total</b>	█

**ANSWER: GreatBanc admits that Eilermann received phantom stock in the rounded amounts listed in paragraph 118, and denies the remaining allegations in paragraph 118.**

119. Arri received the following phantom stock grants, approved by Eilermann:

2010	█
2013	█
<b>Total</b>	█

**ANSWER: GreatBanc admits that Arri received phantom stock in the rounded amounts listed in paragraph 119, and denies the remaining allegations in paragraph 119.**

120. Schindler received the following phantom stock grants, approved by Eilermann:

2012	██████████
2013	██████████
<b>Total</b>	██████████

**ANSWER:** GreatBanc admits that Schindler received phantom stock in the rounded amounts listed in paragraph 120, and denies the remaining allegations in paragraph 120.

121. Berger received the following phantom stock grants, approved by Eilermann:

2012	██████████
2013	██████████
<b>Total</b>	██████████

**ANSWER:** GreatBanc admits that Berger received phantom stock in the rounded amounts listed in paragraph 121, and denies the remaining allegations in paragraph 121.

122. Todt received the following phantom stock grants, approved by Eilermann:

2012	██████████
2013	██████████
<b>Total</b>	██████████

**ANSWER:** GreatBanc admits that Todt received phantom stock in the rounded amounts listed in paragraph 122, and denies the remaining allegations in paragraph 122.

123. In total, Eilermann, Arri, Schindler, Berger, and Todt were granted ██████ shares of phantom stock.

**ANSWER:** GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 123 insofar as the allegations are unlimited in time and unspecified as to entity.

124. Over time, the awards were amended so that by December 31, 2013, all of the phantom stock grants were synthetic equity of MS Companies, Inc., the same stock held by the ESOP.

**ANSWER: GreatBanc admits that as of December 31, 2013 the “phantom stock” referenced in paragraphs 118-122 were phantom stock units of McBride & Son Companies, Inc., and denies the remaining allegations in paragraph 124.**

125. In 2011, Eilermann received a grant of [REDACTED] SARs in MS Companies, Inc. stock, approved by Arri.

**ANSWER: GreatBanc denies the allegations in paragraph 125.**

126. In 2011, Arri received a grant of [REDACTED] SARs in MS Companies, Inc. stock, approved by Eilermann.

**ANSWER: GreatBanc denies the allegations in paragraph 126.**

127. In total, Eilermann and Arri were granted [REDACTED] SARs in the same stock that was held by the ESOP.

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 127 insofar as the allegations are unlimited in time and unspecified as to entity.**

128. By December 31, 2013, the amount of synthetic equity issued to Eilermann, Arri, Schindler, Berger, and Todt was approximately 30% of the McBride Enterprise.

**ANSWER: GreatBanc denies the allegations in paragraph 128.**

### **The 2013 ESOP Transaction**

129. At or around the end of 2011, Eilermann and Arri learned that they could not issue additional synthetic equity to themselves and other insiders without risking penalties and non-compliance with 26 U.S.C. § 409(p). Section 409(p) of the IRC requires that an employee stock ownership plan holding employer securities consisting of stock in an S corporation shall provide that no portion of the assets of the plan attributable to such employer securities may, during a nonallocation year, accrue for the benefit of any disqualified person. A disqualified person is someone who accrues certain thresholds of control in the employer security that the IRS deems to be abusive. IRC section 409(p) is intended to limit the establishment of ESOPs by S corporations to those that provide broad-based employee coverage and that benefit rank-and- file employees, and thus prevent the ESOPs from discriminating in favor of highly compensation employees.

**ANSWER: GreatBanc admits that Plaintiffs cite to 26 U.S.C. § 409(p). GreatBanc refers to that statute for its exclusive terms, and denies any allegations in paragraph 129 inconsistent with the complete terms of 26 U.S.C. § 409(p). Answering further, GreatBanc states that it lacks knowledge or information sufficient to form a belief as to what “Eilermann and Arri learned,” and denies the remaining allegations in paragraph 129 regarding what “section 409(p) is intended” to accomplish.**

130. Consequently, Eilermann and Arri began looking for alternative structures to the McBride Enterprise that would allow them to continue awarding themselves value from the ESOP at the expense of the ESOP and its participants.

**ANSWER: GreatBanc denies the allegations in paragraph 130.**

131. Eilermann and Arri engaged Butcher Joseph, an investment bank, to assist them in their efforts.

**ANSWER: GreatBanc admits that McBride engaged Butcher Joseph, and denies the remaining allegations in paragraph 131.**

132. The alternative structure Eilermann and Arri then set in motion and the additional facts and actions described in this section, are what the SAC refers to as the “2013 ESOP Transaction.”

**ANSWER: GreatBanc admits that the 2013 Reorganization closed on or about December 31, 2013, and denies that paragraph 132 and the other allegations in the SAC contain an accurate or complete description of the 2013 Reorganization and the structure, rationale, and benefits of that corporate reorganization to the company and the ESOP.**

133. The 2013 ESOP Transaction was consummated through at least two legal agreements. First, a Contribution Agreement was executed by GreatBanc and Eilermann and Arri, on behalf of MS Management, on December 31, 2013, in which all of the shares of MS Companies, Inc. held by the ESOP were exchanged for the shares of a new entity, MS Capital, formed on December 31, 2013. The ESOP received no other consideration for the MS Companies, Inc. stock it exchanged.

**ANSWER: GreatBanc admits that the 2013 Reorganization closed on or about December 31, 2013, and as part of that transaction, a Contribution Agreement was executed. GreatBanc refers to the Contribution Agreement for its exclusive terms and denies all allegations in paragraph 133 inconsistent with the complete terms of that document. Answering further, GreatBanc denies the remaining allegations in paragraph 133, and denies that paragraph 133 and the other allegations in the SAC contain an accurate or complete description of the 2013 Reorganization and the structure, rationale, and benefits of that corporate reorganization to the company and the ESOP.**

134. Second, GreatBanc and Eilermann and Arri, as the only Directors of MS Management, executed an Assignment and Assumption Agreement exchanging with MS Capital the MS Companies, Inc. stock held by the ESOP for MS Capital stock.

**ANSWER: GreatBanc admits that the 2013 Reorganization closed on or about December 31, 2013, and as part of that transaction, an Assignment and Assumption Agreement was executed. GreatBanc refers to the Assignment and Assumption Agreement for its exclusive terms and denies all allegations in paragraph 134 inconsistent with the complete terms of that document. Answering further, GreatBanc denies the remaining allegations in paragraph 134, and denies that paragraph 134 and the other allegations in the SAC contain an accurate or complete description of the 2013 Reorganization and the structure, rationale, and benefits of that corporate reorganization to the company and the ESOP.**

135. As a result of the exchange, the ESOP was now the owner of 88,201 shares of MS Capital and MS Capital was now the owner of 88,201 shares of MS Companies, Inc.

**ANSWER: GreatBanc admits that following the 2013 Reorganization the ESOP owned 100% of McBride & Son Capital, Inc., which in turn owned 88,201.4119 units in McBride & Son Companies, LLC. GreatBanc denies the remaining allegations in paragraph 135, and denies that paragraph 135 and the other allegations in the SAC contain an accurate or complete description of the 2013 Reorganization and the structure, rationale, and benefits of that corporate reorganization to the company and the ESOP.**

136. MS Companies, Inc. then effected a conversion from a corporation to a limited liability company and changed its name from McBride & Son Companies, Inc. to McBride & Son Companies, LLC.

**ANSWER: GreatBanc admits that as part of the 2013 Reorganization McBride & Son Companies, Inc. was converted to a limited liability company called McBride & Son Companies, LLC. GreatBanc denies the remaining allegations in paragraph 136, and denies that paragraph 136 and the other allegations in the SAC contain an accurate or complete description of the 2013 Reorganization and the structure, rationale, and benefits of that corporate reorganization to the company and the ESOP.**

137. MS Capital's investment in the MS Companies, Inc. stock became an investment in 88,201 Class A Units of MS Companies, LLC.

**ANSWER: GreatBanc admits that following the 2013 Reorganization McBride & Son Capital, Inc. owned 88,201.4119 units in McBride & Son Companies, LLC. GreatBanc denies the remaining allegations in paragraph 137, and denies that paragraph 137 and the other allegations in the SAC contain an accurate or complete description of the 2013 Reorganization and the structure,**

**rationale, and benefits of that corporate reorganization to the company and the ESOP.**

138. Eilermann and Arri were each issued [REDACTED] Class B Units of MS Companies, LLC.

**ANSWER: GreatBanc admits Eilermann and Arri each purchased the number of Class B Units of McBride & Son Companies, LLC listed in paragraph 138, and denies the remaining allegations in paragraph 138.**

139. Eilermann, Arri, Schindler, Berger, and Todt each entered into an agreement prior to the 2013 ESOP Transaction agreeing to exchange all of their awards of phantom stock and SARs in MS Companies, Inc. stock for new awards in MS Companies, LLC Class B and Class C Units. Eilermann, Arri, Schindler, Berger, and Todt received the Class B and Class C Units on January 1, 2015 as further described below. See infra f 166. Unlike phantom stock and SARs, which had no voting rights, Class B and Class C Units carried expansive rights to control MS Companies, LLC.

**ANSWER: GreatBanc admits that as part of the 2013 Reorganization, Eilermann, Arri, Schindler, Berger, and Todt entered into multiple agreements related to the termination and amendment of their deferred compensation plans. GreatBanc refers to all of those agreements for their exclusive terms, and denies all allegations in paragraph 139 inconsistent with the complete terms of those agreements. Answering further, GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 139 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 139.**

140. The 2013 ESOP Transaction was not done for the benefit of the ESOP and its participants, but instead for the benefit of the corporate insiders such as Eilermann, Arri, Schindler, Berger and Todt.

**ANSWER: GreatBanc denies the allegations in paragraph 140.**

141. The MS Companies, Inc. stock held by the ESOP was exchanged for less than adequate consideration in the 2013 ESOP Transaction.

**ANSWER: GreatBanc denies the allegations in paragraph 141.**

142. GreatBanc, MS Management, Eilermann, and Arri knew that at the time of the exchange, MS Capital stock was worth less than MS Companies, Inc. stock because:

- (a) MS Capital stock would not directly own the McBride Enterprise but would instead only hold Class A Units of MS Companies, LLC;
- (b) Eilermann and Arri were to be the holders of Class B Units of MS Companies, LLC;
- (c) Schindler, Berger, and Todt were to be the holders of Class C Units of MS Companies, LLC;
- (d) The immediate issuing of [REDACTED] Class B Units each to Eilermann and Arri would dilute the ESOP's interest in the McBride Enterprise;
- (e) Eilermann and Arri, as the only members of the Board of Managers of MS Companies, LLC, would have discretion to issue new Class B Units and Class C Units of MS Companies, LLC;
- (f) Eilermann and Arri intended to continue to dilute the ESOP's interest in the McBride Enterprise by issuing additional Class B Units and Class C Units of MS Companies, LLC to Eilermann, Arri, Schindler, Berger, and Todt;
- (g) Eilermann and Arri intended to continue to dilute the ESOP's interest in the McBride Enterprise by executing agreements to convert the previously granted phantom stock awards and SARs to Class B Units and Class C Units along with cash to satisfy federal and state income tax obligations for the benefit of Eilermann, Arri, Schindler, Berger, and Todt;
- (h) Class B Unit and Class C Unit holders had superior preferential distribution rights over the Class A Units that would be held by the ESOP through MS Capital;
- (i) MS Companies, LLC's operating agreement gave to Eilermann and Arri, as the only members of the Board of Managers, authority to make distributions to the holders of Class A, Class B, and Class C Units at their own discretion;
- (j) Eilermann and Arri intended to make distributions to only the holders of Class B Units and Class C Units of MS Companies, LLC;



- (k) The MS Companies, EEC operating agreement would give Eilermann and Arri, as holder of the Class B Units, a controlling vote in the amendment of the terms of the operating agreement;
- (l) Eilermann and Arri intended that by 2018, the ESOP would own less than 40% of the McBride Enterprise; and
- (m) Under the MS Companies, EEC operating agreement, the value of Class B Units and Class C units were made the equivalent to the value of a share of MS Capital.

**ANSWER: GreatBanc denies the allegations in paragraph 142.**

143. There was no discussion in the Contribution Agreement about how the 2013 ESOP Transaction was in the best interest of the ESOP.

**ANSWER: GreatBanc denies that the 2013 Reorganization was not “in the best interest of the ESOP.” Answering further, GreatBanc refers to the Contribution Agreement for its exclusive terms and denies any allegations in paragraph 143 inconsistent with its complete terms.**

144. There was no discussion in the materials provided to GreatBanc by Butcher Joseph about how the 2013 ESOP Transaction was in the best interest of the ESOP.

**ANSWER: GreatBanc denies the allegations in paragraph 144.**

145. GreatBanc, MS Management, Eilermann, and Arri failed to protect the ESOP from the consequences of the 2013 ESOP Transaction.

**ANSWER: GreatBanc denies the allegations in paragraph 145.**

146. The opinion prepared by Stem Brothers for the 2013 ESOP Transaction failed to consider how the 2013 ESOP Transaction was in the best interests of the ESOP and its participants.

**ANSWER: GreatBanc denies the allegations in paragraph 146.**

147. The opinion prepared by Stem Brothers for the 2013 ESOP Transaction was unreliable because on December 31, 2013, the day of the exchange of the stock, Stem Brothers sent an email admitting they had not received, and therefore had not reviewed, documents that the opinion claimed to be relying on.

**ANSWER: GreatBanc denies the allegations in paragraph 147.**

148. ESOP Participants were never told by GreatBanc, MS Management, MS Capital, Eilermann, nor Arri that as a result of the 2013 ESOP Transaction they would no longer be 100% direct owners of the McBride Enterprise. In fact, communications with participants were purposely

drafted to mislead participants from learning that Eilermann, Arri, Schindler, Berger, and Todt had any direct ownership at all.

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to everything that ESOP participants were or were not told, and denies the remaining allegations in paragraph 148.**

**Loss of Value from 2013 to 2017**

149. The ESOP had a “Loss of Value from 2013 to 2017” as a deliberate consequence of the 2013 ESOP Transaction based on the facts and actions described in this section of the SAC.

**ANSWER: GreatBanc denies the allegations in paragraph 149.**

150. Any payment of excessive compensation in any form including the issuance of synthetic equity, payment of incentive pay, the award of Class B Units and Class C Units, and distributions made to Class B and Class C Unit holders lowered the ESOP’s value by diminishing the value of its investment in MS Capital’s holding of the Class A Units of MS Companies, LLC.

**ANSWER: GreatBanc denies the allegations in paragraph 150.**

151. As fiduciaries to the ESOP, GreatBanc, MS Capital, Eilermann, and Am had a duty to protect the ESOP from such losses. They did not.


**ANSWER: GreatBanc denies the allegations in paragraph 151.**

*Excessive Compensation*

152. Excessive compensation was paid to Eilermann, Am, Schindler, Berger, and Todt from at least 2013 though the effective termination of the ESOP. This included the benefit of perquisites, including but not limited to, the benefit of and/or reimbursement of excessive expenses that included repeated trips to Las Vegas.


**ANSWER: GreatBanc denies the allegations in paragraph 152.**

153. In 2013, the following compensation was paid to Eilermann, Ani, Schindler, Berger, and/or Todt:

Base Pay	
Bonus	
Incentive Pay	
Phantom Stock/SARs	
Car Expense	
<b>Total</b>	

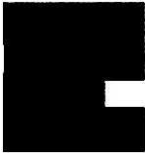
**ANSWER:** GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 153, including the source(s) of the information cited in paragraph 153 regarding the amount and categories that each of Eilermann, Arri, Schindler, Berger, and Todt allegedly received in “compensation” from unspecified sources.

154. In 2014, the following compensation was paid to Eilermann, Am, Schindler, Berger, and/or Todt:

Base Pay	
Incentive Pay	
Car Expense	
<b>Total</b>	

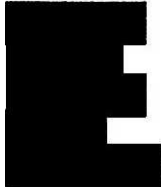
**ANSWER:** GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 154, including the source(s) of the information cited in paragraph 154 regarding the amount and categories that each of Eilermann, Arri, Schindler, Berger, and Todt allegedly received in “compensation” from unspecified sources.

155. In 2015, upon information and belief, at least the following compensation was paid to Eilermann, Ani, Schindler, Berger, and/or Todt:

Base Pay	
Incentive Pay	
Car Expense	
<b>Total</b>	


**ANSWER:** GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 155, including the source(s) of the information cited in paragraph 155 regarding the amount and categories that each of Eilermann, Arri, Schindler, Berger, and Todt allegedly received in “compensation” from unspecified sources.

156. In 2016, the following compensation was paid to Eilermann, Arri, Schindler, Berger, and/or Todt:

Base Pay	
Taxable Fringe	
Incentive Pay	
Car Expense	
<b>Total</b>	

**ANSWER:** GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 156, including the source(s) of the information cited in paragraph 156 regarding the amount and categories that each of Eilermann, Arri, Schindler, Berger, and Todt allegedly received in “compensation” from unspecified sources.



157. In 2017, the following compensation was paid to Eilermann, Arri, Schindler, Berger, and/or Todt:

Base Pay	
Incentive Plan	
Car Expense	
<b>Total:</b>	

**ANSWER:** GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 157, including the source(s) of the information cited in paragraph 157 regarding the amount and categories that each of Eilermann, Arri, Schindler, Berger, and Todt allegedly received in “compensation” from unspecified sources.

*Audited Financial Statements*

158. The following information was reported on the audited financial statements for the McBride Enterprise:

- (a) In 2012,  was reported as an expense for “ESOP and incentive plans expense.”
- (b) In 2012,  was reported as an expense for “Deferred compensation.”

- (c) In 2012, [REDACTED] was reported as a liability for “Deferred compensation.”
- (d) In 2013, [REDACTED] was reported as an expense for “ESOP and incentive plans expense.”
- (e) In 2013, [REDACTED] was reported as an expense for “Deferred compensation.”
- (f) In 2013, [REDACTED] was reported as a liability for “Deferred compensation.”
- (g) In 2014, [REDACTED] was reported as an expense for “ESOP and incentive plan expense.”
- (h) In 2014, [REDACTED] was reported as an expense for “Deferred compensation.”
- (i) In 2014, [REDACTED] was reported as a liability for “Deferred compensation.”
- (j) In 2015, [REDACTED] was reported as an expense for “ESOP and incentive plan expense.”
- (k) In 2016, [REDACTED] was reported as an expense for “ESOP and incentive plan expense.”
- (l) In 2017, [REDACTED] was reported as an expense for “ESOP and incentive plans expense.”

**ANSWER: GreatBanc admits that paragraph 158 purports to cite to “audited financial statements” for “the McBride Enterprise.” GreatBanc refers to all those alleged audited financial statements—as well as the audited financial statements for McBride & Son Companies, Inc., McBride & Son Capital, Inc., McBride & Son Companies, LLC, and any other affiliated parent or subsidiary corporations—for their exclusive terms, and denies all allegations in paragraph 158 inconsistent with the complete terms of those audited financial statements.**

159. Any reported liabilities and expenses of the McBride Enterprise directly reduced the value of the ESOP because liabilities and expenses were used by Stem Brothers to calculate an opinion of the value of MS Capital stock.

**ANSWER: GreatBanc denies the allegations in paragraph 159.**

*Ownership of the Class A, Class B, and Class C Units of MS Companies, LLC*

160. Eilermann, Arri, Schindler, Berger, and Todt benefitted from the award of Class B and Class C Units of MS Companies, LLC at the direct expense of the ESOP as holder of the Class A Units through MS Capital. Eilermann and Arri possessed complete control and discretion to

award Class B and Class C Units as the sole members of the “board of managers” or “managers committee” of MS Companies, LLC pursuant to the operating agreement of MS Companies, LLC.

**ANSWER: GreatBanc admits that paragraph 160 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 160 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 160.**

161. As of December 31, 2014, MS Companies, LLC had two classes of membership units outstanding. Class A Units, held by the ESOP, had voting rights and certain preferential rights to distributions based upon ESOP repurchase liabilities payable by the ESOP. Class B Units, held by Eilermann and Arri, had voting rights and certain preferential rights to distributions based upon income tax liabilities payable by the Class B Unit holders with respect to their proportionate shares of MS Companies, LLC income. Under the MS Companies, LLC operating agreement, the preferential distribution rights of Eilermann and Arri, as Class B Unit holders, were superior to the preferential distribution rights of the ESOP.

**ANSWER: GreatBanc admits that paragraph 161 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 161 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 161.**

162. At December 31, 2015, MS Companies, LLC had three classes of membership units outstanding. Class A Units, held by the ESOP, had voting rights and certain preferential rights to distributions based upon ESOP repurchase liabilities payable by the ESOP. Class B Units, held by Eilermann and Arri, had voting rights. Class C Units, held by Schindler, Berger, and Todt, did not have voting rights. Both Class B Units and Class C Units had certain preferential rights to distributions based upon income tax liabilities payable by the Class B and Class C unit holders with respect to their proportionate shares of MS Companies, LLC income. Under the MS

Companies, LLC operating agreement, the preferential distribution rights of Eilermann and Arri, as Class B Unit holders, and the preferential distribution rights of Schindler, Berger, and Todt, as Class C Unit holders, were superior to the preferential distribution rights of the ESOP.

**ANSWER: GreatBanc admits that paragraph 162 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 162 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 162.**

163. At December 31, 2016, MS Companies, LLC had three classes of membership units outstanding. Class A Units, held by the ESOP, had voting rights and certain preferential rights to distributions based upon ESOP repurchase liabilities payable by the ESOP. Class B Units, held by Eilermann and Arri, that had voting rights. Class C Units, held by Schindler, Berger, and Todt, did not have voting rights. Both Class B Units and Class C Units had certain preferential rights to distributions based upon income tax liabilities payable by the Class B and Class C unit holders with respect to their proportionate shares of MS Companies, LLC income. Under the MS Companies, LLC operating agreement, the preferential distribution rights of Eilermann and Arri, as Class B Unit holders, and the preferential distribution rights of Schindler, Berger, and Todt, as Class C Unit holders, were superior to the preferential distribution rights of the ESOP.

**ANSWER: GreatBanc admits that paragraph 163 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 163 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 163.**

164. As of December 31, 2013, the ownership of the McBride Enterprise was as follows:

ESOP  
Eilermann



Class A Units  
Class B Units



Arri		Class B Units
<b>Total</b>		<b>Class A and B Units</b>

**ANSWER: GreatBanc denies the allegations in paragraph 164**

165. As of December 31, 2014, the ownership of the McBride Enterprise was as follows:

ESOP	██████████	Class A Units	██████████
Eilermann	██████████	Class B Units	██████████
Arri	██████████	Class B Units	██████████
<b>Total</b>	██████████	<b>Class A and B Units</b>	██████████

**ANSWER: GreatBanc denies the allegations in paragraph 165**

166. On January 1, 2015, the synthetic equity that had been reissued after the 2013 ESOP Transaction was converted into ██████████ Class B Units to Eilermann, ██████████ Class B Units to Arri, ██████████ Class C Units to Schindler, ██████████ Class C Units to Berger, and ██████████ Class C Units to Todt, totaling ██████████ Class B and Class C Units. ██████████ Phantom stock shares were converted on a one for one basis while ██████████ SAR units were converted into ██████████ Class B Units.

**ANSWER: GreatBanc admits that as part of the 2013 Reorganization, Eilermann, Arri, Schindler, Berger, and Todt entered into multiple agreements related to the termination and amendment of their deferred compensation plans. GreatBanc refers to all of those agreements for their exclusive terms, and denies all allegations in paragraph 166 inconsistent with the complete terms of those agreements. Answering further, GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 166 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 166.**

167. During 2015, Eilermann redeemed ██████████ Class B Units on September 30, 2015 resulting in additional compensation paid to him. Arri redeemed ██████████ Class B Units on September 30, 2015 resulting in additional compensation paid to him.



**ANSWER: GreatBanc admits that Eilermann and Arri redeemed the rounded number of Class B Units listed in paragraph 167, and denies the remaining allegations in paragraph 167.**

168. As of December 31, 2015, the ownership of the McBride Enterprise was as follows after (1) the synthetic equity that had been reissued after the 2013 ESOP Transaction was converted into Class B Units and Class C Units and (2) additional awards of Class B and Class C Units:

ESOP	██████████	%	██████████	Class A Units
Eilermann	██████████	%	██████████	Class B Units
Arri	██████████	%	██████████	Class B Units
Schindler	██████████	%	██████████	Class C Units
Berger	██████████	%	██████████	Class C Units
Todt	██████████	%	██████████	Class C Units
<b>Total</b>				<b>Class A, B and C Units</b>

**ANSWER: GreatBanc denies the allegations in paragraph 168.**

169. During 2016, Eilermann redeemed ██████████ Class B Units on January 1, 2016 and ██████████ Class B Units on September 30, 2016 resulting in additional compensation paid to him. Arri redeemed ██████████ Class B Units on September 30, 2016 resulting in additional compensation paid to him.

**ANSWER: GreatBanc admits that Arri redeemed the rounded number of Class B Units listed in the second sentence of paragraph 169, and denies the remaining allegations in paragraph 169.**

170. As of December 31, 2016, the ownership of the McBride Enterprise was as follows after additional awards of Class B and Class C Units:

ESOP	██████████	%	██████████	Class A Units
Eilermann	██████████	%	██████████	Class B Units
Arri	██████████	%	██████████	Class B Units
Schindler	██████████	%	██████████	Class C Units
Berger	██████████	%	██████████	Class C Units
Todt	██████████	%	██████████	Class C Units
<b>Total</b>				<b>Class A, B, and C Units</b>

**ANSWER: GreatBanc denies the allegations in paragraph 168.**

171. During 2017, Eilermann redeemed [REDACTED] Class B Units on January 5, 2017 and [REDACTED] Class B Units on September 25, 2017 resulting in additional compensation paid to him. Arri redeemed [REDACTED] Class B Units on September 25, 2017 resulting in additional compensation paid to him. Berger redeemed [REDACTED] Class C Units on June 30, 2017 resulting in additional compensation paid to him.

**ANSWER: GreatBanc admits the individuals identified redeemed the number of rounded Class B or Class C Units listed in paragraph 171, and denies the remaining allegations in paragraph 171.**

172. As of November 30, 2017, the ownership of the McBride Enterprise was as follows:

ESOP	[REDACTED]	%	[REDACTED]	Class A Units
Eilermann	[REDACTED]	%	[REDACTED]	Class B Units
Arri	[REDACTED]	%	[REDACTED]	Class B Units
Schindler	[REDACTED]	%	[REDACTED]	Class C Units
Berger	[REDACTED]	%	[REDACTED]	Class C Units
Todt	[REDACTED]	%	[REDACTED]	Class C Units
<b>Total</b>	[REDACTED]	<b>%</b>	[REDACTED]	<b>Class A, B, and C Units</b>

**ANSWER: GreatBanc denies the allegations in paragraph 172.**

*MS Companies, LLC Distributions*

173. Eilermann, Arri, Schindler, Berger, and Todt benefited at the expense of the ESOP by receiving distributions from MS Companies, LLC which resulted in a lower value of the Class A Units held by MS Capital for the benefit of the ESOP. Eilermann and Arri possessed complete control and discretion to initiate these distributions as the sole members of the “board of managers” or “managers committee” of MS Companies, LLC pursuant to the operating agreement of MS Companies, LLC.

**ANSWER: GreatBanc admits that paragraph 173 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 173 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 173.**

174. Distributions paid to Class B Unit holders for the year ended December 31, 2014 included \$ [REDACTED].

**ANSWER: GreatBanc denies the allegations in paragraph 174.**

175. Distributions paid to Class B Unit and Class C Units holders for the year ended December 31, 2015 included \$ [REDACTED].

**ANSWER: GreatBanc denies the allegations in paragraph 175.**

176. Distributions paid to Class B Unit and Class C Unit holders for the year ended December 31, 2016 included \$ [REDACTED].

**ANSWER: GreatBanc denies the allegations in paragraph 176.**

177. MS Companies, LLC redeemed Class B Units from Eilermann and Arri in exchange for redemption payments totaling \$ [REDACTED] in 2016 and \$ [REDACTED] in 2015.

**ANSWER: GreatBanc admits paragraph 177 purports to reference the audited financial statements of McBride & Son Companies, LLC. GreatBanc refers to the audited financial statements of McBride & Son Capital, Inc., McBride & Son Companies, LLC, and any affiliated parent or subsidiary corporations, and denies all allegations in paragraph 177 inconsistent with the complete terms of those audited financial statements.**

178. As reported on MS Capital's audited financial statements, no distributions were paid by MS Companies, LLC to MS Capital, and thus the ESOP, as the owner of Class A Units from 2013 to 2017.

**ANSWER: GreatBanc admits that paragraph 178 purports to cite to "audited financial statements" for McBride & Son Capital, Inc. GreatBanc refers to all those alleged audited financial statements for their exclusive terms, and denies all allegations in paragraph 178 inconsistent with the complete terms of those audited financial statements.**

*Eilermann and Arri's Control over the Value of MS Capital Stock*

179. The valuation report prepared by Stem Brothers as of December 31, 2015 differed from the report prepared as December 31, 2014, in that the income amount and equity amount (assets minus liabilities) of the entire McBride Enterprise were no longer considered that of MS Capital (and thus the ESOP's). Instead, MS Capital's interest in the McBride Enterprise, held through MS Capital's ownership of the Class A Units of MS Companies, LLC, was reduced by ownership of Class B and/or Class C Units of MS Companies, LLC by Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc admits that paragraph 179 purports to cite, paraphrase, or quote valuation reports prepared by Stern Brothers as of December 31, 2015 and December 31, 2014. GreatBanc refers to those valuation reports for their exclusive terms, and denies all allegations in paragraph 179 inconsistent with the complete terms of those valuation reports.**

180. The December 31, 2015 valuation report by Stem Brothers attached the MS Capital Balance Sheet which reported 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, Berger, and Todt's equity.

**ANSWER: GreatBanc admits that paragraph 180 purports to cite, paraphrase, or quote the valuation report prepared by Stern Brothers as of December 31, 2015. GreatBanc refers to that valuation report for its exclusive terms, and denies all allegations in paragraph 180 inconsistent with the complete terms of that valuation report.**

181. The December 31, 2015 valuation report by Stem Brothers attached the MS Capital Statements of Income which reported Income 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: GreatBanc admits that paragraph 181 purports to cite, paraphrase, or quote the valuation report prepared by Stern Brothers as of December 31, 2015. GreatBanc refers to that valuation report for its exclusive terms, and**

**denies all allegations in paragraph 181 inconsistent with the complete terms of that valuation report.**

182. The December 31, 2015 valuation report by Stern Brothers 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: GreatBanc admits that paragraph 182 purports to cite, paraphrase, or quote the valuation report prepared by Stern Brothers as of December 31, 2015. GreatBanc refers to that valuation report for its exclusive terms, and denies all allegations in paragraph 182 inconsistent with the complete terms of that valuation report.**

183. The MS Companies, LLC Operating Agreement value the Class B Units and Class C Units as equivalent to the value of one share of MS Capital common stock.

**ANSWER: GreatBanc admits that paragraph 183 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 183 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 183.**

184. Consequently, the value of MS Capital stock on December 31, 2015 was directly controlled by the amount of Class B Units and Class C Units awarded to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc denies the allegations in paragraph 184.**

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

**ANSWER: GreatBanc admits that paragraph 185 purports to cite, paraphrase, or quote the Operating Agreement of McBride & Son Companies, LLC.**

**GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 185 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 185.**

186. Therefore Eilermann and Arri had discretion, authority, and control over the value of MS Capital stock as of December 31, 2015.

**ANSWER: GreatBanc denies the allegations in paragraph 186.**

187. The December 31, 2016 valuation report by Stern Brothers attached the MS Capital Balance Sheet which reported 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, Berger, and Todt's equity.

**ANSWER: GreatBanc admits that paragraph 187 purports to cite, paraphrase, or quote the valuation report prepared by Stern Brothers as of December 31, 2016. GreatBanc refers to that valuation report for its exclusive terms, and denies all allegations in paragraph 187 inconsistent with the complete terms of that valuation report.**

188. The December 31, 2016 valuation report by Stern Brothers attached the MS Capital Statements of Income which reported Income 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: GreatBanc admits that paragraph 188 purports to cite, paraphrase, or quote the valuation report prepared by Stern Brothers as of December 31, 2016. GreatBanc refers to that valuation report for its exclusive terms, and denies all allegations in paragraph 188 inconsistent with the complete terms of that valuation report.**

189. The December 31, 2016 valuation report by Stern Brothers 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: GreatBanc admits that paragraph 189 purports to cite, paraphrase, or quote the valuation report prepared by Stern Brothers as of December 31, 2016. GreatBanc refers to that valuation report for its exclusive terms, and denies all allegations in paragraph 189 inconsistent with the complete terms of that valuation report.**

190. The MS Companies, LLC Operating Agreement value the Class B Units and Class C Units was equivalent to the value of one share of MS Capital common stock.

**ANSWER: GreatBanc admits that paragraph 190 purports to cite to the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms, and denies all allegations in paragraph 190 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 190.**

191. Consequently, the value of MS Capital stock on December 31, 2016 was directly controlled by the amount of Class B Units and Class C Units awarded to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc denies the allegations in paragraph 191.**

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

**ANSWER: GreatBanc admits that paragraph 192 purports to cite, paraphrase, or quote the Operating Agreement of McBride & Son Companies, LLC. GreatBanc refers to the Operating Agreement of McBride & Son Companies, LLC and any amendments and restatements thereto for their exclusive terms,**

**and denies all allegations in paragraph 192 inconsistent with the complete terms of that operating agreement and all amendments and restatements thereto. GreatBanc denies the remaining allegations in paragraph 192.**

193. Therefore Eilermann and Arri has discretion, authority, and control over the value of MS Capital stock as of December 31, 2016.

**ANSWER: GreatBanc denies the allegations in paragraph 193.**

*Losses to the ESOP*

194. 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: GreatBanc admits that paragraph 194 purports to cite to the Bylaws of McBride & Son Capital, Inc. GreatBanc refers to those Bylaws and any amendments and restatements thereto for their exclusive terms, denies all allegations in paragraph 194 inconsistent with the complete terms of those Bylaws and any amendments and restatements thereto, and denies the remaining allegations in paragraph 194.**

195. 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 Director of MS Capital.

**ANSWER: GreatBanc admits that paragraph 195 purports to cite to the Bylaws of McBride & Son Capital, Inc. GreatBanc refers to those Bylaws and any amendments and restatements thereto for their exclusive terms, denies all allegations in paragraph 195 inconsistent with the complete terms of those Bylaws and any amendments and restatements thereto, and denies the remaining allegations in paragraph 195.**

196. It would have been obvious to a competent and independent board of directors of MS Capital that the value of the Plan's investment in MS Capital was being depleted and stolen at the expense of the Plan's participants and beneficiaries.



**ANSWER: GreatBanc denies the allegations in paragraph 196.**

197. It would have been obvious to a prudent trustee that the value of the Plan's investment in MS Capital was being depleted and stolen at the expense of the Plan's participants and beneficiaries.

**ANSWER: GreatBanc denies the allegations in paragraph 197**

198. It would have been obvious to prudent and non-conflicted fiduciaries that the value of the Plan's investment in MS Capital was being depleted and stolen at the expense of the Plan's participants and beneficiaries.

**ANSWER: GreatBanc denies the allegations in paragraph 198.**

199. Thus, the GreatBanc, MS Capital, Eilermann, and Arri failed to protect the Plan from the Loss of Value from 2013 to 2017.

**ANSWER: GreatBanc denies the allegations in paragraph 199.**

200. GreatBanc, MS Capital, Eilermann, and Arri failed to protect the Plan by having independent members appointed to the Board of Directors of MS Capital.

**ANSWER: GreatBanc denies the allegations in paragraph 200.**

201. GreatBanc, MS Capital, Eilermann, and Arri failed to protect the Plan by having independent officers appointed to MS Capital and others entities inside the McBride Enterprise.

**ANSWER: GreatBanc denies the allegations in paragraph 201.**

202. GreatBanc, MS Capital, Eilermann, and Arri failed to protect the Plan by having prudent and loyal fiduciaries appointed.

**ANSWER: GreatBanc denies the allegations in paragraph 202.**

203. GreatBanc, MS Capital, Eilermann, and Arri failed to file suit in their fiduciary capacity representing the Plan's shareholder rights in MS Capital and membership rights in the Class A Units of MS Companies, LLC. A prudent and loyal fiduciary to the Plan in similar circumstances would have brought one or more derivative actions against MS Capital, Eilermann, and Arri to remedy the failures as outlined above and would not have concluded that such derivative actions were likely to harm MS Capital, the ESOP, or any other relevant entity. Such derivative actions would have been successful, as demonstrated by the allegations herein. Such derivative actions would have recovered the substantial losses to the Plans caused by the allegations described above.

**ANSWER: GreatBanc denies the allegations in paragraph 203.**

204. It was inconsistent with MS Capital, Eilermann, and Arri's fiduciary duties to not remove GreatBanc as trustee for its breaches related to the Loss of Value from 2013 to 2017.

**ANSWER: GreatBanc denies the allegations in paragraph 204.**

205. Plan participants and beneficiaries were never informed of Loss of Value from 2013 to 2017 in the form of excessive compensation paid to Eilermann, Arri, Schindler, Berger, and Todt as described in this section of the SAC.

**ANSWER: GreatBanc denies the allegations in paragraph 205.**

### **The 2017 ESOP Transaction**

206. After paying Eilermann, Arri, Schindler, Berger, and Todt approximately \$45 million 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: GreatBanc denies 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: GreatBanc admits that it engaged Stern Brothers for valuation services related to the proposed 2017 Transaction as memorialized in an engagement letter dated September 20, 2017 and executed by Stern Brothers, GreatBanc, and McBride & Son Capital, Inc. GreatBanc refers to that engagement letter for its exclusive terms, and denies all allegations in paragraph 207 inconsistent with the complete terms of that September 20, 2017 engagement letter.**

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: GreatBanc admits that it engaged Stern Brothers for valuation services related to the proposed 2017 Transaction as memorialized in an engagement letter dated September 20, 2017 and executed by Stern Brothers, GreatBanc, and McBride & Son Capital, Inc. GreatBanc refers to that engagement letter for its exclusive terms, and denies all allegations in paragraph 208 inconsistent with the complete terms of that September 20, 2017 engagement letter.**

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: GreatBanc denies the allegations contained 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: GreatBanc admits that Butcher Joseph & Co. (“Butcher Joseph”) was engaged by McBride & Son Companies, LLC to provide services related to the 2017 Transaction. GreatBanc denies the 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: GreatBanc admits that Arri executed the Second Amendment to Trustee Engagement Agreement with GreatBanc on behalf of McBride & Son Capital, Inc. GreatBanc refers to the Second Amendment to Trustee Engagement Agreement for its exclusive terms, denies all allegations in paragraph 211 inconsistent with the complete terms of the Second Amendment**

**to Trustee Engagement Agreement, and denies the remaining allegations in 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: GreatBanc denies the allegations in paragraph 212 and denies that Plaintiffs’ use of the term “Early October Proposal” 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: GreatBanc admits that Eilermann and Arri attended a meeting in Lisle, Illinois in the fall of 2017 where a presentation was made. Further responding, GreatBanc lacks knowledge or information sufficient to form a belief as to how Eilermann and Arri traveled to the meeting. GreatBanc denies the remaining allegations in paragraph 213.**

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: GreatBanc admits that the stock of McBride & Son Capital, Inc. was valued at \$153.00 per share as of December 31, 2016, and that the per-share redemption price initially proposed to GreatBanc was 20% above that December 31, 2016 per-share valuation of \$153 per share, or \$183.60 per share. GreatBanc denies 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: GreatBanc denies the alleged meaning of the “Early October Proposal” and “Early October Presentation” terms used by Plaintiffs, and answering**

**further, states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 215.**

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: GreatBanc denies the alleged meaning of the “Early October Proposal” and “Early October Presentation” terms used by Plaintiffs, and answering further, states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc admits that paragraph 219 contains one possible description of a “subscription agreement.”**

220. On November 28, 2017, Eilermann entered into a subscription agreement with MS Capital for 688 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: GreatBanc admits that on or about November 30, 2017 Eilermann entered into a Subscription Agreement with McBride & Son Capital, Inc, refers to that Subscription Agreement for its exclusive terms, and denies any allegations in paragraph 220 inconsistent with the complete terms of the**

**Subscription Agreement. GreatBanc admits that on or about November 30, 2017, the Board of Directors of McBride & Son Capital, Inc. executed a Unanimous Written Consent, which among other things, approved the Subscription Agreement.**

221. On November 28, 2017, Arri entered into a subscription agreement with MS Capital for 203 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: GreatBanc admits that on or about November 30, 2017 Arri entered into a Subscription Agreement with McBride & Son Capital, Inc, refers to that Subscription Agreement for its exclusive terms, and denies any allegations in paragraph 221 inconsistent with the complete terms of the Subscription Agreement. GreatBanc admits that on or about November 30, 2017, the Board of Directors of McBride & Son Capital, Inc. executed a Unanimous Written Consent, which among other things, approved the Subscription Agreement.**

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: GreatBanc admits that on or about November 30, 2017 Eilermann and Arri entered into Subscription Agreements with McBride & Son Capital, Inc, refers to the Subscription Agreements for their exclusive terms, denies any allegations in paragraph 222 inconsistent with the complete terms of the Subscription Agreements, and denies the remaining 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: GreatBanc denies that the allegations in paragraph 223 are a complete or accurate description of the terms of the November 30, 2017 Transaction, and denies that \$187 was below fair market value. Answering further, GreatBanc admits that a true and accurate description of the terms of the November 30, 2017 Transaction is contained in the Redemption Agreement produced at GBT\_0000103 to GBT\_0000120, refers to the Redemption Agreement for its exclusive terms, and denies any allegations in paragraph 223 inconsistent with its complete terms. GreatBanc further admits that, following a fully informed vote of the ESOP participants, the receipt of adequate consideration and a fairness opinion from an independent financial and valuation advisor, and a fulsome and thorough evaluation and arms-length negotiation process, GreatBanc decided to follow the overwhelming direction of the ESOP participants and approve execution of the Redemption Agreement and the closing of the transaction.**

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: GreatBanc admits that on or about November 30, 2017, the Board of Directors of McBride & Son Capital, Inc. executed a Unanimous Written Consent. GreatBanc refers to that Unanimous Written Consent for its exclusive terms, and denies any allegations in paragraph 224 inconsistent with its complete terms.**

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

**ANSWER: GreatBanc admits that Eilermann executed the Redemption Agreement on behalf of McBride & Son Capital, Inc., but denies any allegations in paragraph 225 inconsistent with the complete terms of the Redemption Agreement.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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 51% of the McBride Enterprise and Arri 18%.

**ANSWER: GreatBanc denies 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 \$48,280,928. Of this amount, \$31,947,733 was reported as the ESOP's equity and \$16,333,195 was reported as Eilermann, Arri, Schindler, and Todt's equity. By this time, Berger was no longer employed at the McBride Enterprise.

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the specific "MS Capital Balance Sheet" referenced in paragraph 230**



**and therefore the truth of the allegations contained in paragraph 230. GreatBanc further lacks knowledge or information sufficient to form a belief as to the truth of Berger's employment status.**

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 \$12,297,841. Of this amount, \$3,439,654 was attributable to (but not paid to) the ESOP and \$2,258,728 was reported as attributable to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc lacks knowledge or information sufficient to form a belief as to the specific "Statements of Income" referenced in paragraph 231 and therefore the truth of the allegations contained 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: GreatBanc admits that Stern Brothers provided various opinions of value in connection with the 2017 Transaction, including reports dated effective October 13, 2017 and November 30, 2017. GreatBanc refers to those valuation reports for their exclusive terms, and denies any allegations in paragraph 232 inconsistent with their complete terms.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to which "Operating Agreement" Plaintiffs are referencing in paragraph 233. GreatBanc admits that McBride & Son Companies, LLC entered into a Limited Liability Company Agreement, Amended and Restated Limited Liability Company Agreement, and Second Amended and Restated Limited**

**Liability Company Agreement. GreatBanc refers to those agreements for their exclusive terms, and denies any allegations in paragraph 233 inconsistent with their complete terms.**

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: GreatBanc admits that McBride & Son Companies, LLC entered into a Limited Liability Company Agreement, Amended and Restated Limited Liability Company Agreement, and Second Amended and Restated Limited Liability Company Agreement. GreatBanc refers to those agreements for their exclusive terms, and denies any allegations in paragraph 234 inconsistent with their complete terms.**

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: GreatBanc denies 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: GreatBanc denies the allegations in paragraph 236.**

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: GreatBanc states that the terms of the Stern Brothers engagement related to the 2017 Transaction are set forth in Stern Brothers' September 20, 2017 engagement letter, and denies any allegations in paragraph 237 inconsistent with the complete terms of that engagement letter. Answering further, GreatBanc states that Stern Brothers was not engaged to solicit bids**

**from third parties with respect to the 2017 Transaction, and lacks knowledge or information sufficient to form a belief as to the truth of all other 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: GreatBanc admits that it did not solicit bids from third parties with respect to the 2017 Transaction, states that it was not engaged or retained to do so, and lacks knowledge or information sufficient to form a belief as to the truth of all other 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: GreatBanc states that the terms of Stern Brothers engagement related to the 2017 Transaction are set forth in Stern Brothers' September 20, 2017 engagement letter, and denies any allegations in paragraph 239 inconsistent with the complete terms of that engagement letter.**

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: GreatBanc denies the allegations contained 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 \$10,000,000 and an annual increase in fair market value of \$10,000,000 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: GreatBanc denies the allegations contained 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of what was contained in the “March 23, 2018” article referenced in paragraph 242 and what is contained in all of “the materials prepared” related to the 2017 Transaction, and denies the remaining allegations contained in 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: GreatBanc denies the allegations in paragraph 243.**

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: GreatBanc denies the allegations in paragraph 244. Further responding, GreatBanc refers to the Bylaws of McBride & Son Capital, Inc. for their exclusive terms, and denies any allegations in paragraph 244 inconsistent with their complete terms.**

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: GreatBanc refers to the Bylaws of McBride & Son Capital, Inc. for their exclusive terms, and denies any allegations in paragraph 245 inconsistent with their complete terms. GreatBanc admits that during the time it served as Trustee, Eilermann and Arri were the two members of the board of directors of McBride & Son Capital, Inc.**

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: GreatBanc denies that it breached any fiduciary duties to the Plan and its participants and beneficiaries, and denies that paragraph 246 is a complete and accurate description of its duties under ERISA as the Trustee for the Plan.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc denies 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: GreatBanc refers to the 2017 Plan Document for its exclusive terms, and denies all allegations in paragraph 249 inconsistent with the complete terms of the 2017 Plan Document.**

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: GreatBanc denies the allegations in paragraph 250, and denies that it relied upon the December 31, 2016 valuation report rather than an updated valuation for purposes of evaluating, negotiating, and approving the 2017 Transaction.**

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: GreatBanc admits a valuation was conducted as of December 31, 2016 and that a report for that valuation was produced at MS\_0000342 to MS\_0000432. GreatBanc refers to the December 31, 2016 valuation report for its exclusive terms, and denies all allegations in paragraph 251 inconsistent with the complete terms of the December 31, 2016 valuation report.**

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: GreatBanc admits a valuation was conducted as of December 31, 2016 and that a report for that valuation was produced at MS\_0000342 to MS\_0000432. GreatBanc refers to the December 31, 2016 valuation report for its exclusive terms, and denies all allegations in paragraph 252 inconsistent with the complete terms of the December 31, 2016 valuation report.**

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: GreatBanc admits a valuation was conducted as of December 31, 2016 and that a report for that valuation was produced at MS\_0000342 to MS\_0000432. GreatBanc refers to the December 31, 2016 valuation report for its exclusive terms, and denies all allegations in paragraph 253 inconsistent with the complete terms of the December 31, 2016 valuation report.**

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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc admits that Patrick De Craene has published a number of articles, and answering further, states that it lacks knowledge or information sufficient to form a belief as to the specific article referenced or the accuracy of the alleged quote in paragraph 259.**

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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc admits that Patrick De Craene has published a number of articles, and answering further, states that it lacks knowledge or information**



**sufficient to form a belief as to the specific article referenced or the accuracy of the alleged quote in paragraph 264.**

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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies the allegations in 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: GreatBanc admits that the 2017 Plan Document was amended via Amendment Number One on or about October 31, 2017, refers to Amendment Number One for its exclusive terms, and denies all allegations in paragraph 272 inconsistent with the complete terms of that Amendment Number One.**

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: GreatBanc admits that on or about October 31, 2017, 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 and invested in a Goldman Sachs money market account.**

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: GreatBanc admits that the loan in the amount of \$1,516,017.90 was for the purpose of converting to cash the shares of McBride & Son Capital, Inc. stock held in the ESOP accounts of 13 individuals, including Gregory Godfrey and Jeffrey Sheldon. Answering further, GreatBanc admits that Michael Arri executed a declaration dated February 5, 2019, refers to that declaration for its exclusive terms, and denies all allegations in paragraph 274 inconsistent with the complete terms of that declaration.**

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: GreatBanc admits that a Trust statement shows that \$1,516,017.90 in proceeds were received by the Trust on November 1, 2017—for the purpose of converting to cash the shares of McBride & Son Capital, Inc. stock held in the ESOP accounts of 13 individuals, including Gregory Godfrey and Jeffrey Sheldon—and that the full amount of those funds was invested in a Goldman Sachs money market account on that same day. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to what particular “Account Statement” Plaintiffs reference and as to the remaining 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: GreatBanc admits that a Trust statement shows that \$1,516,017.90 in proceeds were received by the Trust on November 1, 2017—for the purpose of converting to cash the shares of McBride & Son Capital, Inc. stock held in the ESOP accounts of 13 individuals, including Gregory Godfrey and Jeffrey Sheldon—and that the full amount of those funds was invested in a Goldman Sachs money market account on that same day. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to what particular “Account Statement” Plaintiffs reference and as to the remaining 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: GreatBanc admits that a Trust statement shows that \$1,516,017.90 in proceeds were received by the Trust on November 1, 2017—for the purpose of converting to cash the shares of McBride & Son Capital, Inc. stock held in the ESOP accounts of 13 individuals, including Gregory Godfrey and Jeffrey Sheldon—and that the full amount of those funds was invested in a Goldman Sachs money market account on that same day. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to what particular “Account Statement” Plaintiffs reference and as to 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: GreatBanc admits that a Trust statement shows that the loan from McBride & Son Capital, Inc. to the Trust in the amount of \$1,516,017.90 was repaid on November 30, 2017 by transferring 8,107.0476 unallocated shares of McBride & Son Capital, Inc. stock at \$187 per share. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to what particular “Account Statement” Plaintiffs reference and as to 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: GreatBanc admits that a Trust statement shows that the loan in the amount of \$1,516,017.90 was paid off on November 30, 2017 with shares. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to what particular “Account Statement” Plaintiffs reference, and denies 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: GreatBanc admits that paragraph 280 contains an accurate excerpted quote from Mr. Arri’s February 5, 2019 Declaration. GreatBanc admits Mr. Arri was deposed in this case on March 12, 2019, and that his sworn testimony was transcribed by a court reporter. GreatBanc refers to the sworn and signed deposition transcript for its exclusive terms, and denies all allegations in paragraph 280 inconsistent with the complete transcribed and signed deposition testimony of Mr. Arri. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the remaining 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: GreatBanc admits that paragraph 281 contains an accurate excerpted quote from Mr. De Craene's February 5, 2019 Declaration. GreatBanc denies that the documents produced by GreatBanc and the McBride Defendants do not support Mr. De Craene's declaration, and answering further, states that it produced documents responsive to Plaintiffs' particular requests.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc denies 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: GreatBanc denies the alleged meaning of the “Early October Proposal” term used by Plaintiffs. Answering further, GreatBanc admits Mr. Arri was deposed in this case on March 12, 2019, and that his sworn testimony was transcribed by a court reporter. GreatBanc refers to the sworn and signed deposition transcript for its exclusive terms, and denies all allegations in paragraph 286 inconsistent with the complete transcribed and signed deposition testimony of Mr. Arri.**

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: GreatBanc admits Mr. Arri was deposed in this case on March 12, 2019, and that his sworn testimony was transcribed by a court reporter. GreatBanc refers to the sworn and signed deposition transcript for its exclusive terms, and denies all allegations in paragraph 287 inconsistent with the complete transcribed and signed deposition testimony of Mr. Arri. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of whether Arri was “acting as a fiduciary.”**

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: GreatBanc admits that Plaintiffs refer to the 2017 Plan Document, one or more ESOP Trust agreements, and certain unidentified provisions of ERISA. GreatBanc refers to the 2017 Plan Document, ESOP Trust agreements, and provisions of ERISA for their exclusive terms, and denies all**

**allegations in paragraph 288 inconsistent with the complete terms and requirements of the 2017 Plan Document, the ESOP Trust agreements, and the provisions of ERISA. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the “documentation” referred to by Plaintiffs, and denies that it ever acted inconsistent with ERISA, the 2017 Plan Document, or the ESOP Trust agreements.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of 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: GreatBanc admits that a Form 5500 was submitted for 2017, refers to the final 2017 Form 5500 for its exclusive terms, and denies all allegations in paragraph 290 inconsistent with the complete terms of the final 2017 Form 5500.**

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: GreatBanc admits that Godfrey and Sheldon were sent letters dated December 18, 2017 and produced at MS\_0000247 and MS\_0000248, refers to those letters for their exclusive terms, and denies all allegations in paragraph**



**291 inconsistent with the complete terms of those letters. Answering further, GreatBanc admits that Plaintiffs' counsel produced a copy of the December 18, 2017 letter sent to Mr. Sheldon, but lacks knowledge or information sufficient to form a belief as to whether Godfrey received the letter addressed to him.**

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: GreatBanc admits that the 2017 Plan Document was amended via Amendment Number One on or about October 31, 2017, refers to Amendment Number One for its exclusive terms, and denies all allegations in paragraph 292 inconsistent with the complete terms of that Amendment Number One.**

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

**ANSWER: GreatBanc admits that Plaintiffs cite to the 2017 Plan Document. GreatBanc refers to the 2017 Plan Document for its exclusive terms, and denies all allegations in paragraph 293 inconsistent with the cited provision and the complete terms of the 2017 Plan Document.**

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

**ANSWER: GreatBanc admits that a Form 5500 was submitted for 2017, refers to the final 2017 Form 5500 for its exclusive terms, and denies all allegations in paragraph 294 inconsistent with the complete terms of the final 2017 Form 5500.**

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: GreatBanc admits that the 2017 Plan Document was amended via Amendment Number One on or about October 31, 2017, refers to Amendment Number One for its exclusive terms, and denies all allegations in paragraph 295 inconsistent with the complete terms of that Amendment Number One.**

**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: GreatBanc admits that lawsuits have been filed against it in the past, and denies the remaining allegations in paragraph 296.**

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: GreatBanc admits that the cited case was a lawsuit brought by the DOL, denies the DOL's allegations that GreatBanc breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 297.**

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: GreatBanc admits that the cited case was a lawsuit brought by the DOL, denies the DOL's allegations that GreatBanc breached any fiduciary**

**duties or provisions of ERISA, and denies the remaining allegations in paragraph 298.**

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: GreatBanc admits that a true and accurate copy of the settlement agreement filed in the cited case is contained at Dkt. No. 166-1. GreatBanc refers to that settlement agreement for its exclusive terms, denies all allegations in paragraph 299 inconsistent with the complete terms of that settlement agreement, and denies Plaintiffs’ characterization of what is “most significant[]” in the settlement agreement. Answering further, GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of the allegations about what the purported “many in the ESOP ‘industry’” have allegedly “noted.”**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the referenced “press release” and alleged statements of Thomas E. Perez.**

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: GreatBanc admits that a true and accurate copy of Attachment A to the settlement agreement filed in the cited case is contained at Dkt. No. 166-1, refers to the settlement agreement and Attachment A for their exclusive terms, denies all allegations in paragraph 301 inconsistent with the complete terms of the settlement agreement and Attachment A, and denies Plaintiffs' characterization of the "policies and procedures" in Attachment A.**

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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth of this allegation about what others should have known, and denies the remaining 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: GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1001 and 29 U.S.C. § 1102. GreatBanc refers to those statutes for their exclusive terms, denies any allegations in paragraph 304 inconsistent with the complete text of 29 U.S.C. § 1001 and 29 U.S.C. § 1102, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 304 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1002 and various cases. GreatBanc refers to those cases and statute for their exclusive terms, denies any allegations in paragraph 305 inconsistent with the complete text of those cases and statute, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 305 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1102 and 29 U.S.C. § 1002 and various cases. GreatBanc refers to those cases and statutes for their exclusive terms, denies any allegations in paragraph 306 inconsistent with the complete text of those cases and statutes, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 306 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1002 and various cases. GreatBanc refers to those cases and statute for their exclusive terms, denies any allegations in paragraph 307 inconsistent with the complete text of those cases and statute, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or**

**provisions of ERISA. To the extent paragraph 307 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of various cases. GreatBanc refers to those cases for their exclusive terms, denies any allegations in paragraph 308 inconsistent with the complete text of those cases, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 308 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of various cases and the code of federal regulations. GreatBanc refers to those cases and regulations for their exclusive terms, denies any allegations in paragraph 309 inconsistent with the complete text of those cases and regulations, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 309 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1002 and various cases. GreatBanc refers to those cases and statute for their exclusive terms, denies any allegations in paragraph 310 inconsistent with the complete text of those cases and statute, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 310 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of a case in paragraph 311. GreatBanc refers to that case for its exclusive terms, denies any allegations in paragraph 311 inconsistent with the complete text of that case, denies that case is the only authority on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 311 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C.**

**§ 1104. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 312 inconsistent with the complete text of 29 U.S.C.**

**§ 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 312 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that paragraph 313 purports to paraphrase, quote, and/or cite to certain court opinions and statutes. GreatBanc refers to those court opinions and statutes for their exclusive terms, denies any allegations in paragraph 313 inconsistent with their complete terms, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 313 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C.**

**§ 1103. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 314 inconsistent with the complete text of 29 U.S.C.**

**§ 1103, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 314 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that paragraph 315 purports to paraphrase, quote,**

**and/or cite to certain court opinions or statutes or regulations, but states that it lacks sufficient knowledge or information sufficient to form a belief as to their accuracy. GreatBanc refers to any such court opinions or statutes or regulations for their exclusive terms, and denies that such court opinions or statutes or regulations are the only authorities on the matter. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 315 contains factual allegations of**

**wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that paragraph 316 purports to paraphrase, quote, and/or cite to certain court opinions and statutes. GreatBanc refers to those opinions and statutes for their exclusive terms and denies any allegations that are inconsistent with the entire opinions and statutes, denies Plaintiffs’ characterization of claims against GreatBanc, denies that those cases are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 316 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of various cases in paragraph 317. GreatBanc refers to those cases for their exclusive terms, denies any allegations in paragraph 317 inconsistent with the complete text of those cases, denies that those cases are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 317 contains factual allegations of**

wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1104 and a case. GreatBanc refers to that statute and case for their exclusive terms, denies any allegations in paragraph 318 inconsistent with the complete text of that statute and case, denies that those are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 318 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of a case in paragraph 319. GreatBanc refers to that case for its exclusive terms, denies any allegations in paragraph 319 inconsistent with the complete text of that case, denies that the cited case is the only authority on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 319 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of various cases in paragraph 320. GreatBanc refers to those cases for their exclusive terms, denies any allegations in paragraph 320 inconsistent with the complete text of those cases, denies that those cases are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 320 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of various cases and a statute in paragraph 321. GreatBanc refers to those cases and statute for their exclusive terms, denies any allegations in paragraph 321 inconsistent with the complete text of those cases and statute, denies that those cases and statute are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent**

**paragraph 321 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of a case and regulation in paragraph 322. GreatBanc refers to that case and regulation for their exclusive terms, denies any allegations in paragraph 322 inconsistent with the complete text of that case and regulation, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 322 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth or accuracy of the purported legal authorities Plaintiffs purport to cite and/or summarize in paragraph 323. GreatBanc admits that its responsibilities and conduct were governed by the Employee Stock Ownership Plan and Trust Agreements and their amendments, GreatBanc's Engagement Agreements and their amendments, and the applicable provisions of ERISA. GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 323 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc lacks knowledge or information sufficient to form a belief as to the truth or accuracy of the purported legal authorities Plaintiffs purport to cite and/or summarize in paragraph 324. GreatBanc admits that its responsibilities and conduct were governed by the Employee Stock Ownership Plan and Trust Agreements and their amendments, GreatBanc's Engagement Agreements and their amendments, and the applicable provisions of ERISA. GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 324 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C.**

**§ 1105. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 325 inconsistent with the complete text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 325 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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 Plaintiff's argument that these Defendants should be held liable as 'co-fiduciaries.'").

**ANSWER: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C.**

**§ 1105 and various cases. GreatBanc refers to that statute and cases for their exclusive terms, denies any allegations in paragraph 326 inconsistent with the complete text of that statute and cases, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 326 contains factual allegations of**

**wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1104 and 1105 and various cases. GreatBanc refers to those statutes and cases for their exclusive terms, denies any allegations in paragraph 327 inconsistent with the complete text of those statutes and cases, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 327 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C.**

**§ 1106. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 328 inconsistent with the complete text of 29 U.S.C.**

**§ 1106, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 328 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C.**

**§ 1106 and various cases. GreatBanc refers to the statute and cases for their exclusive terms, denies any allegations in paragraph 329 inconsistent with the complete text of 29 U.S.C. § 1106 and those cases, denies that they are the only**

**authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 329 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1106 and various cases. GreatBanc refers to the statute and cases for their exclusive terms, denies any allegations in paragraph 330 inconsistent with the complete text of 29 U.S.C. § 1106 and those cases, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 330 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite various cases. GreatBanc refers to those cases for their exclusive terms, denies any**

**allegations in paragraph 331 inconsistent with the complete text of those cases, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 331 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite various cases.**

**GreatBanc refers to those cases for their exclusive terms, denies any allegations in paragraph 332 inconsistent with the complete text of those cases, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 332 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite to various “provisions”**

**of ERISA, lacks knowledge or information sufficient to form a believe as to the specific “provisions” Plaintiffs reference, and refers to the complete text of the ERISA statutes for their exclusive terms. GreatBanc denies Plaintiffs’ characterization of the conduct and status of “Defendants,” and denies that it**



**breached any fiduciary duties or provisions of ERISA. To the extent paragraph 333 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1132 and 29 U.S.C. § 1109. GreatBanc refers to those statutes for their exclusive term, denies any allegations in paragraph 334 inconsistent with the complete text of 29 U.S.C. § 1132 and 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA and that Plaintiffs are entitled to any relief. To the extent paragraph 334 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that Plaintiffs purport to cite portions of 29 U.S.C. § 1132. GreatBanc refers to that statute for its exclusive terms, denies any allegations in paragraph 335 inconsistent with the complete text of 29 U.S.C. § 1132, and denies that it breached any fiduciary duties or provisions of**

**ERISA and that Plaintiffs are entitled to any relief. To the extent paragraph 335 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc admits that paragraph 336 purports to paraphrase, quote, and/or cite a case and 29 U.S.C. § 1106. GreatBanc refers to that statute and case for their exclusive terms, denies all allegations in paragraph 336 that are inconsistent with the full text of that case and 29 U.S.C. § 1106, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 336 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

338. Under 29 U.S.C. §§ 1106(a) and (b), fiduciaries are prohibited from causing plans to engaged 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: GreatBanc admits that paragraph 338 purports to cite 29 U.S.C. § 1106. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 338 that are inconsistent with the full text of 29 U.S.C. § 1106, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 338 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 338. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 328-333 of the SAC.**

339. GreatBanc, as the Plan's discretionary trustee, was a fiduciary under 29 U.S.C. § 1103(a) and 29 U.S.C. § 1002(21) with regard to the 2013 ESOP Transaction when:

- (a) GreatBanc was the discretionary trustee under the terms of the 2013 ESOP Trust Agreement, as amended;
- (b) GreatBanc's fiduciary responsibilities were listed in the 2013 ESOP Trust Agreement, as amended;
- (c) The 2013 Plan Document recognized that a trustee to the Plan would be a fiduciary;
- (d) GreatBanc executed the Contribution Agreement on behalf of the ESOP;
- (e) GreatBanc executed the Assignment and Assumption Agreement;
- (f) GreatBanc hired Stern Brothers as a service provider to the ESOP;
- (g) GreatBanc had the authority to appoint and remove fiduciaries to the ESOP;
- (h) GreatBanc had the authority to appoint members of the MS Management Board of Directors; and
- (i) GreatBanc had the authority to appoint members of the MS Capital Board of Directors.

**ANSWER: GreatBanc admits Plaintiffs cite 29 U.S.C. § 1103 and 1002 and certain documents, refers to those statutes and documents for their exclusive terms, and denies any allegations in paragraph 339 inconsistent with their complete terms. GreatBanc further admits that the extent of its services and fiduciary**

**responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc’s Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 339 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 339.**

340. GreatBanc 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: GreatBanc admits that paragraph 340 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 340 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 340.**

341. GreatBanc caused the ESOP to exchange property of the Plan, MS Companies, Inc. stock, with MS Capital for MS Capital stock.

**ANSWER: GreatBanc denies the allegations in paragraph 341.**

342. MS Capital was a party in interest to the ESOP at the time of the 2013 ESOP Transaction.

**ANSWER: GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 342 inconsistent with its complete terms, denies that it breached any fiduciary**

**duties or other provisions of ERISA, and denies the remaining allegations in paragraph 342.**

343. GreatBanc 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 2013 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D).

**ANSWER: GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 343 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 343.**

344. GreatBanc (1) caused the ESOP to directly transfer property of the Plan, MS Companies, Inc., to MS Capital and (2) caused the ESOP to indirectly transfer property of the Plan, MS Companies, Inc. stock, to and for the use and benefit of Eilermann and Arri.

**ANSWER: GreatBanc denies the allegations in paragraph 344.**

345. MS Capital, Eilermann, and Arri were all parties in interest to the ESOP at the time of the 2013 ESOP Transaction.

**ANSWER: GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 345 inconsistent with its complete terms, denies that it breached any fiduciary duties or other provisions of ERISA, and denies the remaining allegations in paragraph 345.**

346. GreatBanc caused the Plan to engage in a prohibited transaction 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 2013 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(b)(2).

**ANSWER: GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 346 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 346.**

347. GreatBanc, in violation of 29 U.S.C. § 1106(b)(2), acted on behalf of MS Management, MS Capital, Eilermann, and Arri in connection with the 2013 ESOP Transaction by causing the Plan to exchange MS Companies, Inc. stock for MS Capital stock for less than adequate consideration. This greatly benefited MS Management, MS Capital, Eilermann, and Arri as they ultimately took control and ownership of MS Companies, Inc. stock after the 2013 ESOP Transaction, to the substantial detriment of the Plan, even though GreatBanc, as a fiduciary to the Plan, was required to act in the best interests of the Plan.

**ANSWER: GreatBanc denies the allegations in paragraph 347.**

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

**ANSWER: GreatBanc denies the allegations in paragraph 348.**

349. 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: GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1109.**

**GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 349 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 349 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 349.**

350. GreatBanc, is personally 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: GreatBanc denies the allegations in paragraph 350.**

351. GreatBanc has caused losses to the Plan and has profited for themselves by the prohibited transactions described in this count in an amount to be proved specifically at trial.

**ANSWER: GreatBanc denies the allegations in paragraph 351.**

352. 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: GreatBanc denies the allegations in paragraph 352.**

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

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

354. Under 29 U.S.C. §§ 1106(a) and (b), fiduciaries are prohibited from causing plans to engaged 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1106. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 354 that are inconsistent with the full text of 29 U.S.C. § 1106, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent**

**paragraph 354 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 354. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 328-333 of the SAC.**

355. MS Management, 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 2013 ESOP Transaction when:

- (a) MS Management was the named fiduciary of the Plan as defined in 29 U.S.C. § 1102(a) under the terms of the 2013 Plan Document;
- (b) MS Management 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;
- (c) 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;
- (d) Article 17.12 of 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;
- (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 Management Board of Directors for the relevant time period for the SAC prior to and including December 31, 2013;
- (g) Eilermann and Arri, as Directors, carried out all acts of MS Management in its role as named fiduciary and plan administrator to the Plan for the relevant time period for the SAC prior to and including December 31, 2013;
- (h) GreatBanc recognized the fiduciary role of MS Management 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 has the responsibility of recommending the removal of members of the MS Management Board of Directors;
- (j) Eilermann and Arri executed the Contribution Agreement on behalf of MS Management;



- (k) Eilermann and Arri executed the Assignment and Assumption Agreement on behalf of MS Management;
- (l) MS Management, Eilermann, and Arri had the authority to appoint and remove fiduciaries to the ESOP;
- (m) MS Management, Eilermann, and Arri had the authority to remove GreatBanc as trustee;
- (n) Eilermann executed the December 27, 2013 ESOP Trust Agreement as a Director of MS Management; and
- (o) MS Management, Eilermann, and Arri provided information to GreatBanc and Stern Brothers for consideration as part of the 2013 ESOP Transaction.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs cite 29 U.S.C. § 1102 and 1002 and 29 C.F.R. § 2509.75-8, as well as certain documents, refers to those statutes and regulation and documents for their exclusive terms, and denies any allegations in paragraph 355 inconsistent with their complete terms. GreatBanc denies the allegations in sub-paragraph (h), and states it lacks knowledge or information sufficient to form a belief as to the purported actions of third-parties and the potential effect they had on whether they “were fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies any factual allegations of wrongdoing against it in paragraph 355.**

356. MS Management, 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 2013 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(A).

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 356 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 356 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 356.**

357. MS Management, Eilermann, and Arri caused the ESOP to exchange property of the Plan, MS Companies, Inc., with MS Capital for MS Capital stock.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 357.**

358. MS Capital was a party in interest to the ESOP at the time of the 2013 ESOP Transaction.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 358 inconsistent with its complete terms, denies that it breached any fiduciary duties or other provisions of ERISA, and denies the remaining allegations in paragraph 358.**

359. MS Management, 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 2013 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D).

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 359 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 359 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 359.**

360. MS Management, Eilermann, and Arri (1) caused the ESOP to directly transfer property of the Plan, MS Companies, Inc. stock, to MS Capital and (2) caused the ESOP to indirectly transfer property of the Plan, MS Companies, Inc, stock, to and for the use and benefit of MS Capital, Eilermann, and Arri.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 360.**

361. MS Capital, Eilermann, and Arri were all parties in interest to the ESOP at the time of the 2013 ESOP Transaction.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 361 inconsistent with its complete terms, denies that it breached any fiduciary duties or other provisions of ERISA, and denies the remaining allegations in paragraph 361.**

362. MS Management, 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 2013 ESOP Transaction was a prohibited transaction under 29 U.S.C. § 1106(b)(1), (2), and (3).

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 362 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 362 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 362.**

363. 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 exchange MS Companies, Inc. stock with MS Capital for MS Capital stock for less than adequate consideration. Eilermann and Arri immediately upon the exchange of MS Companies, Inc. stock for MS Capital stock, gave themselves an interest in the MS Companies, Inc. stock after converting MS Companies, Inc. into a limited liability corporation and issuing themselves Class B Units of MS Companies, LLC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 363.**

364. MS Management, Eilermann, and Arri, in violation of 29 U.S.C. § 1106(b)(2), acted on behalf of MS Capital, Eilermann, and Arri in connection with the 2013 ESOP Transaction by causing the Plan to exchange MS Companies, Inc. stock with MS Capital for MS Capital stock for less than adequate consideration. This greatly benefited Eilermann and Arri as they ultimately took control and ownership of MS Companies, Inc. stock after the 2013 ESOP Transaction, to the substantial detriment of the Plan, even though GreatBanc, as a fiduciary to the Plan, was required to act in the best interests of the Plan.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 364.**

365. Eilermann and Arri, in violation of 29 U.S.C. § 1106(b)(3), received consideration for their own personal account from MS Management, MS Capital, GreatBanc, Eilermann, Arri, and MS Companies, LLC when they caused the Plan to exchange MS Companies, Inc. stock to MS Capital for MS Capital stock to and received consideration in the form of control and ownership of the McBride Enterprise, ownership of Class B Units of MS Companies, LLC, and the award of synthetic equity, additional Class B Units, and other excessive compensation as outlined in the Loss of Value from 2013 to 2017.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 365.**

366. MS Management, 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 366.**

367. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 367 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 367 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 367 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 367.**

368. MS Management, 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 368.**

369. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 368.**

### **COUNT III**

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

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

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

371. 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: GreatBanc admits that paragraph 371 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 371 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of**

**ERISA. To the extent paragraph 371 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 371.**

372. 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: GreatBanc admits that paragraph 372 purports to reference 29 U.S.C.**

**§ 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 372 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 372 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 372. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

373. 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: GreatBanc admits that paragraph 373 purports to reference 29 U.S.C.**

**§ 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 373 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 373 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 373. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

374. 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: GreatBanc admits that paragraph 374 purports to reference 29 U.S.C.**

**§ 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 374 that are inconsistent with the full text of 29 U.S.C.**

**§ 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 374 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 374. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

375. GreatBanc, as the Plan's discretionary trustee, was a fiduciary under 29 U.S.C. § 1103(a) and 29 U.S.C. § 1002(21) with regard to the 2013 ESOP Transaction when:

- (a) GreatBanc was the discretionary trustee under the terms of the 2013 ESOP Trust Agreement, as amended;
- (b) GreatBanc's fiduciary responsibilities were listed in the 2013 ESOP Trust Agreement, as amended;
- (c) The 2013 Plan Document recognized that a trustee to the Plan would be a fiduciary;
- (d) GreatBanc executed the Contribution Agreement on behalf of the ESOP;
- (e) GreatBanc executed the Assignment and Assumption Agreement;
- (f) GreatBanc hired Stern Brothers as a service provider to the ESOP;
- (g) GreatBanc had the authority to appoint and remove fiduciaries to the ESOP;
- (h) GreatBanc had the authority to appoint members of the MS Management Board of Directors; and
- (i) GreatBanc had the authority to appoint members of the MS Capital Board of Directors.

**ANSWER: GreatBanc admits Plaintiffs cite 29 U.S.C. § 1103 and 1002 and certain documents, refers to those statutes and documents for their exclusive terms,**



**and denies any allegations in paragraph 375 inconsistent with their complete terms. GreatBanc further admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 375 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 375.**

376. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that paragraph 376 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 376 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 376 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 376. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

377. The documents governing the Plan, including the 2013 ESOP Trust Agreement, as amended, and the 2013 Plan Document, as amended, required GreatBanc to comply with ERISA's stringent fiduciary standards.

**ANSWER: GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2013 Plan Documents and their amendments, refer to those documents for**

**their exclusive terms, and deny any allegations in paragraph 377 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA.**

378. As a fiduciary of the Plan, GreatBanc was required to strictly apply ERISA's fiduciary duties in carrying out their fiduciary responsibilities with regard to the 2013 ESOP Transaction. *See supra* ¶ 323.

**ANSWER: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 378 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 378 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 378. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

379. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and**

**denies all allegations in paragraph 379 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 379 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 379. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

380. GreatBanc breached its fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D) when it:

- (a) Caused the Plan to exchange MS Companies, Inc. stock with MS Capital for MS Capital stock for less than adequate consideration;
- (b) Failed to make a good faith determination of adequate consideration of MS Companies, Inc. stock and MS Capital stock;
- (c) Failed to prevent the execution of the Contribution Agreement;
- (d) Failed to prevent the execution of the Assignment and Assumption Agreement;
- (e) Failed to appoint independent members of the Board of Directors of MS Management;
- (f) Failed to ensure that Stern Brothers was independent from MS Management, MS Capital, Eilermann, and Arri;
- (g) Failed to hire an independent investment bank for the benefit of the Plan;
- (h) Failed to prevent Eilermann and Arri from setting in motion the 2013 ESOP Transaction;
- (i) Failed to remove Eilermann and Arri as members of the Board of Directors of MS Management;
- (j) Failed to remove MS Management, Eilermann, and Arri as fiduciaries to the ESOP;
- (k) Failed to prevent the conversion of MS Companies, Inc. to a limited liability company;
- (l) Failed to prevent Eilermann and Arri receiving Class B Units of MS Companies, LLC;

- (m) Failed to prevent Stern Brothers from providing a faulty and inadequate opinion of value;
- (n) Failed to prevent the 2013 ESOP Transaction from being for the benefit of anyone other than the ESOP;
- (o) Failed to determine that the 2013 ESOP Transaction was in the best interests of the ESOP;
- (p) Failed to prevent the dilution of value of MS Capital stock after the 2013 ESOP Transaction;
- (q) Failed to prevent the loss in value to the ESOP described in the Loss of Value from 2013 to 2017;
- (r) Failed to prevent the synthetic equity paid to Eilermann, Arri, Schindler, Berger, and Todt;
- (s) Failed to prevent Eilermann and Arri from controlling the value of MS Capital stock inside the ESOP;
- (t) Failed to prevent indemnification provisions that could result in the reduction of value to the ESOP;
- (u) Failed to ensure MS Management, Eilermann, and Arri provided truthful information;
- (v) Failed to ensure the governing plan documents were followed;
- (w) Failed to ensure that committees required by the governing plan documents were created;
- (x) 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; and
- (y) Failed to inform participants about the loss to the ESOP and the improper benefit to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc denies the allegations in paragraph 380.**

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

**ANSWER: GreatBanc denies the allegations in paragraph 381.**

382. 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: GreatBanc admits that paragraph 382 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 382 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 382 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 382.**

383. GreatBanc, is personally 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: GreatBanc denies the allegations in paragraph 383.**

384. 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: GreatBanc denies the allegations in paragraph 384.**

#### **COUNT IV**

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

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

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

386. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 386 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 386 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 386 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 386.**

387. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 387 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 387 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 387 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 387. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

388. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 388 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 388 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 388 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 388. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

389. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 389 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 389 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 389 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 389. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

390. MS Management, 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 2013 ESOP Transaction when:

- (a) MS Management was the named fiduciary of the Plan as defined in 29 U.S.C. § 1102(a) under the terms of the 2013 Plan Document;
- (b) MS Management 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;
- (c) 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;
- (d) Article 17.12 of 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;
- (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 Management Board of Directors for the relevant time period for the SAC prior to and including December 31, 2013;
- (g) Eilermann and Arri, as Directors, carried out all acts of MS Management in its role as named fiduciary and plan administrator to the Plan for the relevant time period for the SAC prior to and including December 31, 2013;
- (h) GreatBanc recognized the fiduciary role of MS Management 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 Management Board of Directors;
- (j) Eilermann and Arri executed the Contribution Agreement on behalf of MS Management;
- (k) Eilermann and Arri executed the Assignment and Assumption Agreement on behalf of MS Management;
- (l) MS Management, Eilermann, and Arri had the authority to appoint and remove fiduciaries to the ESOP;
- (m) MS Management, Eilermann, and Arri had the authority to remove GreatBanc as trustee;
- (n) Eilermann executed the December 27, 2013 ESOP Trust Agreement as a Director of MS Management; and



- (o) MS Management, Eilermann, and Arri provided information to GreatBanc and Stern Brothers for consideration as part of the 2013 ESOP Transaction.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs cite 29 U.S.C. § 1102 and 1002 and 29 C.F.R. § 2509.75-8, as well as certain documents, refers to those statutes and regulation and documents for their exclusive terms, and denies any allegations in paragraph 390 inconsistent with their complete terms. GreatBanc denies the allegations in sub-paragraph (h), and states it lacks knowledge or information sufficient to form a belief as to the purported actions of third-parties and the potential effect they had on whether they “were fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies any factual allegations of wrongdoing against it in paragraph 390.**

391. As a fiduciaries of the Plan, MS Management, 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 391 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 391 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further,**

**GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

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

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2013 Plan Documents and their amendments, refer to those documents for their exclusive terms, and deny any allegations in paragraph 392 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 392 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 392.**

393. As a fiduciaries of the Plan, MS Management, Eilermann, and Arri were required to strictly apply ERISA's fiduciary duties in carrying out their fiduciary responsibilities with regard to the 2013 ESOP Transaction. *See supra* ¶ 323.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as "fiduciaries." Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 393 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 393. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

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

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 394 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 394. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

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

- (a) Caused the Plan to exchange MS Companies, Inc. stock with MS Capital for MS Capital stock for less than adequate consideration;
- (b) Failed to make a good faith determination of adequate consideration of MS Companies, Inc. stock and MS Capital stock;
- (c) Failed to prevent the execution of the Contribution Agreement;
- (d) Failed to prevent the execution of the Assignment and Assumption Agreement;
- (e) Failed to appoint independent members of the Board of Directors of MS Management;
- (f) Failed to ensure that Stern Brothers was independent from MS Management, MS Capital, Eilermann, and Arri;
- (g) Failed to hire an independent investment bank for the benefit of the Plan;
- (h) Failed to prevent Eilermann and Arri from setting in motion the 2013 ESOP Transaction;
- (i) Failed to remove Eilermann and Arri as members of the Board of Directors of MS Management;

- (j) Failed to remove GreatBanc, MS Management, Eilermann, and Arri as fiduciaries to the ESOP;
- (k) Failed to prevent the conversion of MS Companies, Inc. to a limited liability company;
- (l) Failed to prevent Eilermann and Arri receiving Class B Units of MS Companies, LLC
- (m) Failed to prevent Stern Brothers from providing a faulty and inadequate opinion of value;
- (n) Failed to prevent the 2013 ESOP Transaction from being for the benefit of anyone other than the ESOP;
- (o) Failed to determine that the 2013 ESOP Transaction was in the best interests of the ESOP;
- (p) Failed to prevent the dilution of value of MS Capital stock after the 2013 ESOP Transaction;
- (q) Failed to prevent the loss in value to the ESOP described in the Loss of Value from 2013 to 2017;
- (r) Failed to prevent the synthetic equity paid to Eilermann, Arri, Schindler, Berger, and Todt;
- (s) Failed to prevent Eilermann and Arri from controlling the value of MS Capital stock inside the ESOP;
- (t) Failed to prevent indemnification provisions that could result in the reduction of value to the ESOP;
- (u) Failed to ensure provide truthful information to GreatBanc and Stern Brothers;
- (v) Failed to ensure the governing plan documents were followed;
- (w) Failed to ensure that committees required by the governing plan documents were created;
- (x) 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; and
- (y) Failed to inform participants about the loss to the ESOP and the improper benefit to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 395.**

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

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 396.**

397. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 397 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 397 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 397 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 397.**

398. MS Management, 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 398.**

399. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 399.**

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

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

401. 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: GreatBanc admits that paragraph 401 purports to cite 29 U.S.C. § 1105. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 401 that are inconsistent with the full text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of**

**ERISA. To the extent paragraph 401 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 401.**

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

**ANSWER: GreatBanc admits that paragraph 402 cites 29 U.S.C. § 1105.**

**GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 402 that are inconsistent with the full text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 402 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 402. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 325-327 of the SAC.**

*GreatBanc*

403. GreatBanc was a fiduciary to the Plan as described in paragraphs 339 and 375 of the SAC.

**ANSWER: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 403 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 403 contains factual allegations of wrongdoing against**

**GreatBanc, GreatBanc denies the allegations in paragraph 403. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 339 and 375 of the SAC.**

404. GreatBanc knowingly participated in the breaches of MS Capital, Eilermann, and Arri in Count II and Count IV when they performed the actions described in the 2013 ESOP Transaction, Count I, and Count III including but not limited to the breaches and failures described in paragraph 380.

**ANSWER: GreatBanc denies the allegations in paragraph 404.**

405. GreatBanc enabled the breaches of MS Management, Eilermann, and Arri in Count II and Count IV by their own breaches of ERISA when they committed the breaches of fiduciary duty described in Count I and Count III.

**ANSWER: GreatBanc denies the allegations in paragraph 405.**

406. GreatBanc knew of the breaches of MS Capital, Eilermann, and Arri in Count II and Count IV and failed to make reasonable efforts to remedy as described in the 2013 ESOP Transaction, Count I, and Count III including but not limited to the breaches and failures described in ¶ 380.

**ANSWER: GreatBanc denies the allegations in paragraph 406.**

*MS Management*

407. MS Management was a fiduciary to the Plan as described in paragraphs 355 and 390 of the SAC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 407, and answering further, incorporates by reference and fully restates its responses to the referenced paragraphs 355 and 390 of the SAC.**

408. MS Management knowingly participated in (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of Eilermann and Arri in Count II and Count IV when they performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.



**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 408.**

409. MS Management enabled (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of Eilermann and Arri in Count II and Count IV by their own breaches of ERISA when they committed the breaches of fiduciary duty described in Count II and Count IV.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 409.**

410. MS Management knew of (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of Eilermann and Arri in Count II and Count IV and failed to make reasonable efforts to remedy it when they performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 410.**

*Eilermann*

411. Eilermann was a fiduciary to the Plan as described in paragraphs 355 and 390 of the SAC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 411, and answering further, incorporates by reference and fully restates its responses to the referenced paragraphs 355 and 390 of the SAC.**

412. Eilermann knowingly participated in (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of MS Management and Arri in Count II and Count IV when he

performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 412.**

413. Eilermann enabled (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of MS Management and Arri in Count II and Count IV by his own breaches of ERISA when he committed the breaches of fiduciary duty described in Count II and Count IV.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 413.**

414. Eilermann knew of (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of MS Management and Arri in Count II and Count IV and failed to make reasonable efforts to remedy it when he performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 414.**

*Arri*

415. Arri was a fiduciary to the Plan as described in paragraphs 355 and 390 of the SAC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 415, and answering further, incorporates by reference and fully restates its responses to the referenced paragraphs 355 and 390 of the SAC.**

416. Arri knowingly participated in (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of MS Management and Eilermann in Count II and Count IV when he performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 416.**

417. Arri enabled (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of MS Management and Eilermann in Count II and Count IV by his own breaches of ERISA when he committed the breaches of fiduciary duty described in Count II and Count I.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 417.**

418. Arri knew of (1) the breaches of GreatBanc in Count I and Count III and (2) the breaches of MS Management and Eilermann in Count II and Count IV and failed to make reasonable efforts to remedy it when he performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 418.**

419. 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: GreatBanc admits that paragraph 419 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 419 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of**

**ERISA. To the extent paragraph 419 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 419.**

420. GreatBanc, MS Management, 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: GreatBanc denies the allegations in paragraph 420.**

421. 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: GreatBanc denies the allegations in paragraph 421.**

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

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

423. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 423 purports to cite 29 U.S.C. § 1132. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 423 that are inconsistent with the full text of 29 U.S.C. § 1132,**

**and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 423 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 423.**

424. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 424 purports to cite 29 U.S.C. § 1132 and a case. GreatBanc refers to that statute and case for their exclusive terms, denies all allegations in paragraph 424 that are inconsistent with the full text of 29 U.S.C. § 1132 and that case, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 424 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 424.**

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

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 425 purports to cite 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 425 that are inconsistent with the full text of 29 U.S.C. § 1002, and denies that it breached any fiduciary duties or provisions of ERISA. To**

**the extent paragraph 425 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 425.**

426. As a result of the fiduciary breaches and prohibited transactions described in Counts I through V, (1) MS Capital, Eilermann, and Arri received ownership, control, and the benefit of MS Companies, Inc. stock as a result of the 2013 ESOP Transaction that otherwise would have been Plan assets to be used exclusively for the benefit of the Plan participants and beneficiaries, and (2) Eilermann and Arri received the compensation and benefits described in the Loss of Value from 2013 to 2017.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 426.**

427. MS Capital, Eilermann, and Arri had actual knowledge of the circumstances that made the transactions unlawful in Counts I through V, when they performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 427.**

428. Despite knowledge of these the circumstances, MS Capital, Eilermann, and Arri proceeded to knowingly participate in the breaches described in Counts I through V, when they performed the actions described in the 2013 ESOP Transaction, Count II, and Count IV including but not limited to the breaches and failures described in paragraph 395.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 428.**

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

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 429.**

430. 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 Companies, Inc. stock and consideration to be restored to the Plan, or to be subject to other appropriate equitable relief.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 430.**

#### **COUNT VII**

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

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

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

432. 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: GreatBanc admits that paragraph 432 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 432 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 432 contains factual allegations of**

**wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 432.**

433. 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: GreatBanc admits that paragraph 433 purports to reference 29 U.S.C.**

**§ 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 433 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 433 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 433. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

434. 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: GreatBanc admits that paragraph 434 purports to reference 29 U.S.C.**

**§ 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 434 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 434 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 434. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

435. 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: GreatBanc admits that paragraph 435 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 435 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 435 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 435. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

436. GreatBanc, as the Plan's discretionary trustee, was a fiduciary under 29 U.S.C. § 1103(a) and 29 U.S.C. § 1002(21) with regard to the Loss of Value from 2013 to 2017 when:

- (a) GreatBanc was the discretionary trustee under the terms of the 2013 ESOP Trust Agreement, as amended;
- (b) GreatBanc's fiduciary responsibilities were listed in the 2013 ESOP Trust Agreement, as amended;
- (c) The 2013 Plan Document recognized that a trustee to the Plan would be a fiduciary;
- (d) The 2017 Plan Document recognized that a trustee to the Plan would be a fiduciary;
- (e) GreatBanc executed the Contribution Agreement on behalf of the ESOP;
- (f) GreatBanc executed the Assignment and Assumption Agreement;
- (g) GreatBanc had the authority to appoint and remove fiduciaries to the ESOP;
- (h) GreatBanc had the authority to appoint members of the MS Management Board of Directors; and
- (i) GreatBanc had the authority to appoint members of the MS Capital Board of Directors.

**ANSWER: GreatBanc admits Plaintiffs cite 29 U.S.C. § 1103 and 1002 and certain documents, refers to those statutes and documents for their exclusive terms, and denies any allegations in paragraph 436 inconsistent with their complete terms. GreatBanc further admits that the extent of its services and fiduciary**

**responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 436 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 436.**

437. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that paragraph 437 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 437 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 437 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 437. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

438. 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 GreatBanc to comply with ERISA's stringent fiduciary standards.

**ANSWER: GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2013 and 2017 Plan Documents and their amendments, refer to those documents for their exclusive terms, and deny any allegations in paragraph**

**438 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA.**

439. As a fiduciary of the Plan, GreatBanc was required to strictly apply ERISA's fiduciary duties in carrying out their fiduciary responsibilities with regard to Loss of Value from 2013 to 2017. *See supra* ¶ 323.

**ANSWER: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 439 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 439 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 439. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

440. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 440 inconsistent with the complete terms of**

**the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 440 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 440. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

441. GreatBanc breached its fiduciary duties under 29 U.S.C. §§ 1104(a)(1)(A), (B), and (D) when it:

- (a) Caused the Plan to exchange MS Companies, Inc. stock with MS Capital for MS Capital stock for less than adequate consideration;
- (b) Failed to prevent the execution of the Contribution Agreement;
- (c) Failed to prevent the execution of the Assignment and Assumption Agreement;
- (d) Failed to appoint independent members of the Board of Directors of MS Capital;
- (e) Failed to ensure that Stern Brothers was independent from MS Management, MS Capital, Eilermann, and Arri;
- (f) Failed to prevent Eilermann and Arri from paying themselves the excessive compensation described in the Loss of Value from 2013 to 2017;
- (g) Failed to prevent the value of MS Capital stock from being valued below fair market value;
- (h) Failed to remove Eilermann and Arri as members of the Board of Directors of MS Capital;
- (i) Failed to remove MS Capital, Eilermann, and Arri as fiduciaries to the ESOP;
- (j) Failed to file a derivative suit against officers and directors of MS Capital and MS Companies, LLC. Such derivative claims would have been successful and would have recovered damages on behalf of the Plan;
- (k) Failed to prevent the conversion of MS Companies, Inc. to a limited liability company;
- (l) Failed to prevent Eilermann and Arri receiving Class B Units of MS Companies, LLC

- (m) Failed to prevent Stern Brothers from providing faulty and inadequate opinions of value;
- (n) Failed to prevent the compensation paid as described in the Loss of Value from 2013 to 2017 from being for the benefit of Eilermann, Arri, Schindler, Berger, and Todt;
- (o) Failed to protect the best interests of the ESOP;
- (p) Failed to prevent the dilution of value of MS Capital stock;
- (q) Failed to prevent the loss in value to the ESOP described in the Loss of Value from 2013 to 2017;
- (r) Failed to prevent the synthetic equity paid to Eilermann, Arri, Schindler, Berger, and Todt;
- (s) Failed to prevent Eilermann and Arri from controlling the value of MS Capital stock inside the ESOP;
- (t) Failed to prevent indemnification provisions that could result in the reduction of value to the ESOP;
- (u) Failed to ensure MS Capital, Eilermann, and Arri provided truthful information;
- (v) Failed to ensure the governing plan documents were followed;
- (w) Failed to ensure that committees required by the governing plan documents were created;
- (x) 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; and
- (y) Failed to inform participants about the loss to the ESOP and the improper benefit to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc denies the allegations in paragraph 441.**

442. GreatBanc has caused losses to the Plan and Eilermann, Arri, Schindler, Berger, and Todt have profited by the breaches of fiduciary duty described in this count in an amount to be proved specifically at trial.

**ANSWER: GreatBanc denies the allegations in paragraph 442.**

443. 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: GreatBanc admits that paragraph 443 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 443 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 443 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 443.**

444. GreatBanc, is personally 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: GreatBanc denies the allegations in paragraph 444.**

445. 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: GreatBanc denies the allegations in paragraph 445.**

### **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. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

447. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 447 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 447 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 447 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 447.**

448. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 448 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 448 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 448 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 448. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

449. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 449 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 449 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 449 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 449. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

450. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 450 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 450 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 450 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 450. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**



451. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 § 1002(16)(A), and 29 U.S.C. § 1002(21) with regard to the Loss of Value from 2013 to 2017 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 executed the Contribution Agreement on behalf of MS Management;
- (k) Eilermann and Arri executed the Assignment and Assumption Agreement on behalf of MS Management;
- (l) MS Capital, Eilermann, and Arri had the authority to appoint and remove fiduciaries to the ESOP;
- (m) MS Capital, Eilermann, and Arri had the authority to remove GreatBanc as trustee;

- (n) Eilermann executed the December 27, 2013 ESOP Trust Agreement as a Director of MS Management;
- (o) Eilermann and Arri executed Amendment Number One to the December 27, 2013 ESOP Trust Agreement;
- (p) MS Capital, Eilermann, and Arri provided information to GreatBanc and Stern Brothers for consideration as part of the 2013 ESOP Transaction; and
- (q) 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs cite 29 U.S.C. § 1102 and 1002 and 29 C.F.R. § 2509.75-8, as well as certain documents, refers to those statutes and regulation and documents for their exclusive terms, and denies any allegations in paragraph 451 inconsistent with their complete terms. GreatBanc denies the allegations in sub-paragraph (h), and states it lacks knowledge or information sufficient to form a belief as to the purported actions of third-parties and the potential effect they had on whether they “were fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies any factual allegations of wrongdoing against it in paragraph 451.**

452. As 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 452 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 452 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

453. 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 Capital, Eilermann, and Arri to comply with ERISA’s stringent fiduciary standards.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2013 and 2017 Plan Documents and their amendments, refer to those documents for their exclusive terms, and deny any allegations in paragraph 453 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 453 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 453.**

454. As 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 Loss of Value from 2013 to 2017. *See supra* ¶ 323.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 454 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 454. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

455. As fiduciaries of the Plan, MS Management, Eilermann, and Arri were required to strictly apply ERISA’s fiduciary duties in ensuring the Plan received no less than adequate consideration for any Plan assets sold or exchanged. *See supra* ¶ 324.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 455 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 455. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

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

- (a) Caused the Plan to exchange MS Companies, Inc. stock with MS Capital for MS Capital stock for less than adequate consideration;
- (b) Failed to prevent the execution of the Contribution Agreement;

- (c) Failed to prevent the execution of the Assignment and Assumption Agreement;
- (d) Failed to appoint independent members of the Board of Directors of MS Capital;
- (e) Failed to ensure that Stern Brothers was independent from MS Management, MS Capital, Eilermann, and Arri;
- (f) Failed to prevent Eilermann and Arri from paying themselves the excessive compensation described in the Loss of Value from 2013 to 2017;
- (g) Failed to prevent the value of MS Capital stock from being valued below fair market value;
- (h) Failed to remove Eilermann and Arri as members of the Board of Directors of MS Capital;
- (i) Failed to remove GreatBanc, MS Capital, Eilermann, and Arri as fiduciaries to the ESOP;
- (j) Failed to file a derivative suit against officers and directors of MS Capital and MS Companies, LLC. Such derivative claims would have been successful and would have recovered damages on behalf of the Plan;
- (k) Failed to prevent the conversion of MS Companies, Inc. to a limited liability company;
- (l) Failed to prevent Eilermann and Arri receiving Class B Units of MS Companies, LLC
- (m) Failed to prevent Stern Brothers from providing faulty and inadequate opinions of value;
- (n) Failed to prevent the compensation paid as described in the Loss of Value from 2013 to 2017 from being for the benefit of Eilermann, Arri, Schindler, Berger, and Todt;
- (o) Failed to protect the best interests of the ESOP;
- (p) Failed to prevent the dilution of value of MS Capital stock;
- (q) Failed to prevent the loss in value to the ESOP described in the Loss of Value from 2013 to 2017;
- (r) Failed to prevent the synthetic equity paid to Eilermann, Arri, Schindler, Berger, and Todt;
- (s) Failed to prevent Eilermann and Arri from controlling the value of MS Capital stock inside the ESOP;

- (t) Failed to prevent indemnification provisions that could result in the reduction of value to the ESOP;
- (u) Failed to ensure MS Capital, Eilermann, and Arri provided truthful information;
- (v) Failed to ensure the governing plan documents were followed;
- (w) Failed to ensure that committees required by the governing plan documents were created;
- (x) 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; and
- (y) Failed to inform participants about the loss to the ESOP and the improper benefit to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 456.**

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

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 457.**

458. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 458 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations**

**in paragraph 458 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 458 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 458.**

459. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 459.**

460. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 460.**

### **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. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

462. 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: GreatBanc admits that paragraph 462 purports to cite 29 U.S.C. § 1105. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 462 that are inconsistent with the full text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 462 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 462.**

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

**ANSWER: GreatBanc admits that paragraph 463 cites 29 U.S.C. § 1105. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 463 that are inconsistent with the full text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 463 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 463. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 325-327 of the SAC.**

*GreatBanc*

464. GreatBanc was a fiduciary to the Plan as described in paragraph 436 of the SAC.

**ANSWER: GreatBanc admits that the extent of its services and fiduciary responsibilities are outlined in the Employee Stock Ownership Plan and Trust**



**Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 464 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 464 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 464. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 436 of the SAC.**

465. GreatBanc knowingly participated in the breaches of MS Capital, Eilermann, and Arri in Count VIII when they performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VII including but not limited to the breaches and failures described in paragraph 441.

**ANSWER: GreatBanc denies the allegations in paragraph 465.**

466. GreatBanc enabled the breaches of MS Capital, Eilermann, and Arri in Count VIII by their own breaches of ERISA when they committed the breaches of fiduciary duty described in Count VII.

**ANSWER: GreatBanc denies the allegations in paragraph 466.**

467. GreatBanc knew of the breaches of MS Capital, Eilermann, and Arri in Count VIII and failed to make reasonable efforts to remedy it when they performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VII including but not limited to the breaches and failures described in paragraph 441.

**ANSWER: GreatBanc denies the allegations in paragraph 467.**

*MS Capital*

468. MS Capital was a fiduciary to the Plan as described in paragraph 451 of the SAC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required,**

**GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 468, and answering further, incorporates by reference and fully restates its responses to the referenced paragraph 451 of the SAC.**

469. MS Capital knowingly participated in (1) the breaches of GreatBanc in Count VII and (2) the breaches of Eilermann and Arri in Count VIII when they performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 469.**

470. MS Capital enabled (1) the breaches of GreatBanc in Count VII and (2) the breaches of Eilermann and Arri in Count VIII by their own breaches of ERISA when they committed the breaches of fiduciary duty described in Count VIII.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 470.**

471. MS Capital knew of (1) the breaches of GreatBanc in Count VII and (2) the breaches of Eilermann and Arri in Count VIII and failed to make reasonable efforts to remedy it when they performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 471.**

*Eilermann*

472. Eilermann was a fiduciary to the Plan as described in paragraph 451 of the SAC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 472, and answering further, incorporates by reference and fully restates its responses to the referenced paragraph 451 of the SAC.**

473. Eilermann knowingly participated in (1) the breaches of GreatBanc in Count VII and (2) the breaches of MS Capital and Arri in Count VIII when he performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 473.**

474. Eilermann enabled (1) the breaches of GreatBanc in Count VII and (2) the breaches of MS Capital and Arri in Count VIII by his own breaches of ERISA when he committed the breaches of fiduciary duty described in Count VIII.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 474.**

475. Eilermann knew of (1) the breaches of GreatBanc in Count VII and (2) the breaches of MS Capital and Arri in Count VIII and failed to make reasonable efforts to remedy it when he performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 475.**

*Arri*

476. Arri was a fiduciary to the Plan as described in paragraph 451 of the SAC.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 476, and answering further, incorporates by reference and fully restates its responses to the referenced paragraph 451 of the SAC.**

477. Arri knowingly participated in (1) the breaches of GreatBanc in Count VII and (2) the breaches of MS Capital and Eilermann in Count VIII when he performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 477.**

478. Arri enabled (1) the breaches of GreatBanc in Count VII and (2) the breaches of MS Capital and Eilermann in Count VIII by his own breaches of ERISA when he committed the breaches of fiduciary duty described in Count VIII.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 478.**

479. Arri knew of (1) the breaches of GreatBanc in Count VII and (2) the breaches of MS Capital and Eilermann in Count VIII and failed to make reasonable efforts to remedy it when he performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 479.**

480. 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: GreatBanc admits that paragraph 480 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 480 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 480 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 480.**

481. 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: GreatBanc denies the allegations in paragraph 481.**

482. 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: GreatBanc denies the allegations in paragraph 482.**

### **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. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

484. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 484 purports to cite 29 U.S.C. § 1132. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 484 that are inconsistent with the full text of 29 U.S.C. § 1132, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 484 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 484.**

485. 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 485 purports to cite 29 U.S.C. § 1132 and a case. GreatBanc refers to that statute and case for their exclusive terms, denies all allegations in paragraph 485 that are inconsistent with the full text of 29 U.S.C. § 1132 and that case, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 485 contains factual allegations of**

**wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 485.**

486. Eilermann and Arri were both parties in interest to the Plan under 29 U.S.C. § 1002(14).

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 486 purports to cite 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 486 that are inconsistent with the full text of 29 U.S.C. § 1002, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 486 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 486.**

487. As a result of the fiduciary breaches and prohibited transactions described in Count VII, Count VIII, and Count IX, Eilermann, and Arri received excessive compensation and benefits described in the Loss of Value from 2013 to 2017 including excessive compensation, excessive incentive pay, excessive reimbursement of expenses, excessive perquisites, excessive awards of additional Class B Units, awards of synthetic equity in MS Capital, the conversion of synthetic equity into Class B Units, excessive distributions as Class B Units holders, preferential rights as Class B Units holders, and excessive redemption of Class B Units that otherwise would have been Plan assets to be used exclusively for the benefit of the Plan participants and beneficiaries.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 487.**

488. Eilermann and Arri had actual knowledge of the circumstances that made the transactions unlawful in Counts VII through IX, when they performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 488.**

489. Despite knowledge of these the circumstances, Eilermann and Arri proceeded to knowingly participate in the breaches described in Counts VII through IX, when they performed the actions described in the 2013 ESOP Transaction, the Loss of Value from 2013 to 2017, and Count VIII including but not limited to the breaches and failures described in paragraph 456.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 489.**

490. Eilermann and Arri have profited from the fiduciary breaches described in Counts VII through IX in an amount to be proven at trial, and upon information and belief, they remain in possession of some or all of the assets and consideration that belong to the Plan.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 490.**

491. By knowingly participating in these breaches and violations 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 Plan assets and consideration to be restored to the Plan, or to be subject to other appropriate equitable relief.

**ANSWER: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies the allegations in paragraph 491.**

#### **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. Plaintiffs incorporate the preceding paragraphs as though set forth herein.



**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

493. 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: GreatBanc admits that paragraph 493 purports to cite 29 U.S.C. § 1106. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 493 that are inconsistent with the full text of 29 U.S.C. § 1106, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 493 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 493. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 328-333 of the SAC.**

494. GreatBanc, as the Plan’s discretionary trustee, was a fiduciary under 29 U.S.C. § 1103(a) and 29 U.S.C. § 1002(21) with regard to the 2017 ESOP Transaction when:

- (a) GreatBanc was the discretionary trustee under the terms of the 2013 ESOP Trust Agreement, as amended;
- (b) GreatBanc’s fiduciary responsibilities were listed in the 2013 ESOP Trust Agreement, as amended;
- (c) The 2017 Plan Document recognized that a trustee to the Plan would be a fiduciary;
- (d) GreatBanc executed the Redemption Agreement on behalf of the ESOP;
- (e) GreatBanc had the authority to appoint and remove fiduciaries to the ESOP;
- (f) GreatBanc had the authority to appoint members of the MS Management Board of Directors; and
- (g) GreatBanc had the authority to appoint members of the MS Capital Board of Directors.

**ANSWER: GreatBanc admits Plaintiffs cite 29 U.S.C. § 1103 and 1002, refers to those statutes for their exclusive terms, and denies any allegations in paragraph 494 inconsistent with their complete terms. GreatBanc further admits that the extent of its services and fiduciary responsibilities with regard to the 2017 Transaction are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 494 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 494 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 494.**

495. GreatBanc 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: GreatBanc admits that paragraph 495 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 495 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 495.**

496. GreatBanc caused the ESOP to sell property of the Plan, MS Capital stock, to MS Capital. The Plan received less than adequate consideration for this exchange.

**ANSWER: GreatBanc denies the allegations in paragraph 496.**

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

**ANSWER: GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 497 inconsistent with its complete terms, denies that it breached any fiduciary duties or other provisions of ERISA, and denies the remaining allegations in paragraph 497.**

498. GreatBanc 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: GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 498 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 498.**

499. GreatBanc (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: GreatBanc denies the allegations in paragraph 499.**

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

**ANSWER: GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 500 inconsistent with its complete terms, denies that it breached any fiduciary**

**duties or other provisions of ERISA, and denies the remaining allegations in paragraph 500.**

501. GreatBanc caused the Plan to engage in a prohibited transaction 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)(2).

**ANSWER: GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 501 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining allegations in paragraph 501.**

502. GreatBanc, 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 GreatBanc, as a fiduciary to the Plan, was required to act in the best interests of the Plan.

**ANSWER: GreatBanc denies the allegations in paragraph 502**

503. GreatBanc has caused losses to the Plan and MS Capital, Eilermann, Arri, Schindler, and Todt have profited by the prohibited transactions described in this count in an amount to be proved specifically at trial.

**ANSWER: GreatBanc denies the allegations in paragraph 503.**

504. 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: GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 504 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 504 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 504.**

505. GreatBanc, is personally 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: GreatBanc denies the allegations in paragraph 505.**

506. 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: GreatBanc denies the allegations in paragraph 506.**

## 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: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that Plaintiffs purport to cite 29 U.S.C. § 1106. GreatBanc**

**refers to that statute for its exclusive terms, denies all allegations in paragraph 508 that are inconsistent with the full text of 29 U.S.C. § 1106, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 508 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 508. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 328-333 of the SAC.**

509. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 § 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs cite 29 U.S.C. § 1102 and 1002 and 29 C.F.R. § 2509.75-8, as well as certain documents, refers to those statutes and regulation and documents for their exclusive terms, and denies any allegations in paragraph 509 inconsistent with their complete terms. GreatBanc denies the allegations in sub-paragraph (h), and states it lacks knowledge or information sufficient to form a belief as to the purported actions of third-parties and the potential effect they had on whether they “were fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies any factual allegations of wrongdoing against it 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 510 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 510 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that Plaintiffs purport to reference the “party in interest” definition in 29 U.S.C. § 1002. GreatBanc refers to 29 U.S.C. § 1002 for its exclusive terms and requirements, denies all allegations in paragraph 512 inconsistent with its complete terms, denies that it breached any fiduciary duties or other provisions of ERISA, and denies the remaining 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 513 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 513 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 516 purports to cite 29 U.S.C. § 1106, refers to that statute for its exclusive terms, denies all allegations in paragraph 516 that are inconsistent with the full text of 29 U.S.C. § 1106, denies that it breached any fiduciary duties or provisions of ERISA, and denies the remaining 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 521 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 521 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 521 contains factual allegations of wrongdoing against GreatBanc, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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. Plaintiffs incorporate the preceding paragraphs as though set forth herein.

**ANSWER: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

525. 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: GreatBanc admits that paragraph 525 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 525 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 525 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 525.**

526. 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: GreatBanc admits that paragraph 526 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 526 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 526 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 526. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

527. 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: GreatBanc admits that paragraph 527 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 527 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 527 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 527. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

528. 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: GreatBanc admits that paragraph 528 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 528 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 528 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 528. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

529. GreatBanc, as the Plan's discretionary trustee, was a fiduciary under 29 U.S.C. § 1103(a) and 29 U.S.C. § 1002(21) with regard to the 2017 ESOP Transaction when:

- (a) GreatBanc was the discretionary trustee under the terms of the 2013 ESOP Trust Agreement, as amended;
- (b) GreatBanc's fiduciary responsibilities were listed in the 2013 ESOP Trust Agreement, as amended;
- (c) The 2017 Plan Document recognized that a trustee to the Plan would be a fiduciary;

- (d) GreatBanc executed the Redemption Agreement on behalf of the ESOP;
- (e) GreatBanc had the authority to appoint and remove fiduciaries to the ESOP;
- (f) GreatBanc had the authority to appoint members of the MS Management Board of Directors; and
- (g) GreatBanc had the authority to appoint members of the MS Capital Board of Directors.

**ANSWER: GreatBanc admits Plaintiffs cite 29 U.S.C. § 1103 and 1002, refers to those statutes for their exclusive terms, and denies any allegations in paragraph 529 inconsistent with their complete terms. GreatBanc further admits that the extent of its services and fiduciary responsibilities with regard to the 2017 Transaction are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc’s Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 529 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 529 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 529.**

530. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that paragraph 530 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 530 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of**

**ERISA. To the extent paragraph 530 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 530. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

531. The documents governing the Plan, including the 2013 ESOP Trust Agreement, as amended, and the 2017 Plan Document, as amended, required GreatBanc to comply with ERISA's stringent fiduciary standards.

**ANSWER: GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2017 Plan Documents and their amendments, refer to those documents for their exclusive terms, and deny any allegations in paragraph 531 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA.**

532. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that the extent of its services and fiduciary responsibilities with regard to the 2017 Transaction are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 532 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 532 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 532. Answering further, GreatBanc incorporates by**



**reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

533. As a fiduciary of the Plan, GreatBanc was 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: GreatBanc admits that the extent of its services and fiduciary responsibilities with regard to the 2017 Transaction are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 533 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 533 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 533. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

534. GreatBanc breached its 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 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;

- (d) Failed to engage in a thorough level of due diligence prior to arriving at a sale price;
- (e) Failed to obtain an updated valuation report from an independent and qualified valuation expert before agreeing on a sale price;
- (f) Failed 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;
- (g) Failed to request or receive third party bids to determine the fair market value of MS Capital stock;
- (h) Failed to hire an independent investment banker that would act on behalf of the Plan to explore alternative purchasers;
- (i) Failed to consider MS Enterprise projections that called for increased revenues in 2017 and beyond in agreeing on a below fair market value sale price;
- (j) Failed to consider that the liquidation value of MS Capital would be higher than the consideration the ESOP would receive;
- (k) Failed to 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;
- (l) Failed to engage in a thorough level of due diligence prior to arriving at a sale price;
- (m) Failed to obtain an updated valuation report from an independent and qualified valuation expert before agreeing on a sale price;
- (n) Failed 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;
- (o) Failed to request or receive third party bids to determine the fair market value of MS Capital stock;
- (p) Failed to hire an independent investment banker that would act on behalf of the Plan to explore alternative purchasers;
- (q) Failed to consider MS Enterprise projections that called for increased revenues in 2017 and beyond in agreeing on a below fair market value sale price;
- (r) Failed to consider that the liquidation value of MS Capital would be higher than the consideration the ESOP would receive;
- (s) Failed to prevent the execution of the Redemption Agreement;

- (t) Failed to prevent execution of the Unanimous Written Consent of the Board of Directors of MS Capital dated November 30, 2017;
- (u) Failed to prevent the execution of the November 28, 2017 subscription agreement between MS Capital and Eilermann;
- (v) Failed to prevent the execution of the November 28, 2017 subscription agreement between MS Capital and Arri;
- (w) Failed to appoint independent members of the Board of Directors of MS Capital;
- (x) Failed to ensure that Stern Brothers was independent from MS Capital, MS Companies, LLC, Eilermann, and Arri;
- (y) Failed to hire an investment bank for the benefit of the Plan;
- (z) Failed to prevent Eilermann and Arri from setting in motion the 2017 ESOP Transaction;
- (aa) Failed to remove Eilermann and Arri as members of the Board of Directors of MS Capital;
- (bb) Failed to remove MS Capital, Eilermann, and Arri as fiduciaries to the ESOP;
- (cc) Failed to prevent Stern Brothers from providing a faulty and inadequate opinion of value;
- (dd) Failed to prevent the value of MS Capital stock from being valued below fair market value;
- (ee) Failed to prevent the 2017 ESOP Transaction from being for the benefit of anyone other than the ESOP;
- (ff) Failed to determine that the 2017 ESOP Transaction was in the best interests of the ESOP;
- (gg) Failed to prevent the dilution of value of MS Capital stock after the 2013 ESOP Transaction;
- (hh) Failed to prevent the loss in value to the ESOP described in the Loss of Value from 2013 to 2017;
- (ii) Failed to prevent the synthetic equity paid to Eilermann, Arri, Schindler, Berger, and Todt;
- (jj) Failed to prevent Eilermann and Arri from controlling the value of MS Capital stock inside the ESOP;

- (kk) Failed to prevent indemnification provisions that could result in the reduction of value to the ESOP;
- (ll) Failed to ensure MS Capital, Eilermann, and Arri provided truthful information;
- (mm) Failed to ensure the governing plan documents were followed;
- (nn) Failed to ensure that committees required by the governing plan documents were created;
- (oo) 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;
- (pp) Failed to inform the ESOP participants that Eilermann, Arri, Schindler, and Todt already owned 42.7% of the McBride Enterprise; and
- (qq) Failed to inform participants about the loss to the ESOP and the improper benefit to Eilermann, Arri, Schindler, Berger, and Todt.

**ANSWER: GreatBanc denies the allegations in paragraph 534.**

535. GreatBanc has 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: GreatBanc denies the allegations in paragraph 535.**

536. 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: GreatBanc admits that paragraph 536 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 536 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 536 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 536.**

537. GreatBanc, is personally 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: GreatBanc denies the allegations in paragraph 537.**

538. 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: GreatBanc denies the allegations in paragraph 538.**

#### **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: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 540 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 540 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 540 contains factual allegations of wrongdoing against GreatBanc, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 541 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 541 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 541 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 541. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 542 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 542 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 542 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 542. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 543 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 543 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 543 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 543. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC.**

544. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 § 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs cite 29 U.S.C. § 1102 and 1002 and 29 C.F.R. § 2509.75-8, as well as certain documents, refers to those statutes and regulation and documents for their exclusive terms, and denies any allegations in paragraph 544 inconsistent with their complete terms. GreatBanc denies the allegations in sub-paragraph (h), and states it lacks knowledge or information sufficient to form a belief as to the purported actions of third-parties and the potential effect they had on whether they “were fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies any factual allegations of wrongdoing against it 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 545 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 545 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA.**

**GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2017 Plan Documents and their amendments, refer to those documents for their exclusive terms, and deny any allegations in paragraph 546 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 546 contains factual allegations of wrongdoing against GreatBanc, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 547 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in**

**paragraph 547. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as "fiduciaries." Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 548 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 548. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 324 of the SAC**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 551 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 551 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To**

**the extent paragraph 551 contains factual allegations of wrongdoing against GreatBanc, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

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:** GreatBanc admits that paragraph 555 purports to cite 29 U.S.C. § 1105. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 555 that are inconsistent with the full text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 555 contains factual allegations of wrongdoing against GreatBanc, GreatBanc 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:** GreatBanc admits that paragraph 556 cites 29 U.S.C. § 1105. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 556 that are inconsistent with the full text of 29 U.S.C. § 1105, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 556 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 556. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 325-327 of the SAC.

*GreatBanc*

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

**ANSWER:** GreatBanc admits that the extent of its services and fiduciary responsibilities with regard to the 2017 Transaction are outlined in the Employee Stock Ownership Plan and Trust Agreements and GreatBanc's

**Engagement Agreements and their corresponding amendments, as well as ERISA, refers to the Plan and those Trust and Engagement agreements and ERISA for their exclusive terms, and denies all allegations in paragraph 557 inconsistent with the complete terms of the Plan and those agreements and ERISA. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 557 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 557. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 494 and 529 of the SAC.**

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: GreatBanc 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: GreatBanc 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: GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 561, and answering further, incorporates by reference and fully restates its responses to the referenced paragraphs 509 and 544 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 565, and answering further, incorporates by reference and fully restates its responses to the referenced paragraphs 509 and 544 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 569, and answering further, incorporates by reference and fully restates its responses to the referenced paragraphs 509 and 544 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc 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: GreatBanc admits that paragraph 573 purports to cite 29 U.S.C. § 1109. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 573 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 573 contains factual allegations of wrongdoing against GreatBanc, GreatBanc 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: GreatBanc 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: GreatBanc 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: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 577 purports to cite 29 U.S.C. § 1132. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 577 that are inconsistent with the full text of 29 U.S.C. § 1132, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 577 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 578 purports to cite 29 U.S.C. § 1132 and a case. GreatBanc refers to that statute and case for their exclusive terms, denies all allegations in paragraph 578 that are inconsistent with the full text of 29**

**U.S.C. § 1132 and that case, denies that they are the only authorities on the matter, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 578 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 579 purports to cite 29 U.S.C. § 1002. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 579 that are inconsistent with the full text of 29 U.S.C. § 1002, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 579 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 586 purports to cite 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 586 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 586 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 587 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 587 that are inconsistent with the full text of 29 U.S.C. § 1104,**



**and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 587 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 587. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 588 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 588 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 588 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 588. Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

589. MS Capital, Eilermann, and Arri were fiduciaries under 29 U.S.C. § 1102(a), 29 § 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs cite 29 U.S.C. § 1102 and 1002 and 29 C.F.R. §**

**2509.75-8, as well as certain documents, refers to those statutes and regulation and documents for their exclusive terms, and denies any allegations in paragraph 589 inconsistent with their complete terms. GreatBanc denies the allegations in sub-paragraph (h), and states it lacks knowledge or information sufficient to form a belief as to the purported actions of third-parties and the potential effect they had on whether they “were fiduciaries.” Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA, and denies any factual allegations of wrongdoing against it 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 590 purports to reference 29 U.S.C. § 1104. GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 590 that are inconsistent with the full text of 29 U.S.C. § 1104, and denies that it breached any fiduciary duties or provisions of ERISA. GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as “fiduciaries.” Answering further, GreatBanc incorporates by reference and fully restates its responses to the referenced paragraphs 312-322 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits Plaintiffs reference the 2013 ESOP Trust Agreement and 2017 Plan Documents and their amendments, refer to those documents for their exclusive terms, and deny any allegations in paragraph 591 inconsistent with their complete terms. Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 591 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc states it lacks knowledge or information sufficient to form a belief as to the purported status of third-parties as "fiduciaries." Answering further, GreatBanc denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 592 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies the allegations in paragraph 592. GreatBanc further incorporates by reference and fully restates its responses to the referenced paragraph 323 of the SAC.**

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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc admits that paragraph 595 purports to cite 29 U.S.C. § 1109.**

**GreatBanc refers to that statute for its exclusive terms, denies all allegations in paragraph 595 that are inconsistent with the full text of 29 U.S.C. § 1109, and denies that it breached any fiduciary duties or provisions of ERISA. To the extent paragraph 595 contains factual allegations of wrongdoing against GreatBanc, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc states that the allegations in this paragraph are not directed to it, and therefore no answer is required. To the extent an answer is required, GreatBanc denies 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: GreatBanc admits Plaintiffs purport to bring this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b). GreatBanc denies that a class action is appropriate under the Federal Rules of Civil of Procedure or under ERISA § 502(a).**

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: GreatBanc admits that Form 5500s were submitted for 2015 and 2016, and denies all allegations in paragraph 599 inconsistent with the complete terms of the final 2015 and 2016 Form 5500s. GreatBanc lacks knowledge or information sufficient to form a belief as to what is "unknown to Plaintiffs," denies the remaining allegations in paragraph 599, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

600. Questions of law and fact common within the Class as a whole include, but are not limited to, the following:

- (i) 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;
- (ii) Whether GreatBanc, MS Management, MS Capital, Eilermann, and Arri were ERISA fiduciaries of the Plan;
- (iii) 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;
- (iv) 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;

- (v) 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;
- (vi) 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;
- (vii) Whether MS Capital, Eilermann, and Arri, as parties in interest, knowingly participated in prohibited transactions and fiduciary breaches;
- (viii) 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.
- (ix) Whether MS Capital, Eilermann, and Arri breached their fiduciary duties in failing to remove GreatBanc as trustee;
- (x) The proper valuation of the Plan's holdings in stock;
- (xi) 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;
- (xii) 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
- (xiii) The appropriate relief for Defendants' violations of ERISA.

**ANSWER: GreatBanc denies the allegations in paragraph 600, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

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: GreatBanc denies the allegations in paragraph 601, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

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: GreatBanc admits that Plaintiffs have retained counsel. GreatBanc denies the remaining allegations in paragraph 602, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

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: GreatBanc denies the allegations in paragraph 603, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

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: GreatBanc denies the allegations in paragraph 604, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

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: GreatBanc denies the allegations in paragraph 605, and denies that a class action is appropriate under the Federal Rules of Civil Procedure or under ERISA § 502(a).**

**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: GreatBanc denies 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: GreatBanc denies 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: GreatBanc denies that Plaintiffs are entitled to any of the relief requested in their Prayer for Relief.**

**AFFIRMATIVE DEFENSES**

GreatBanc incorporates by reference and fully restates its responses to the preceding paragraphs of the SAC. For its Affirmative Defenses, GreatBanc further states as follows:

**FIRST AFFIRMATIVE DEFENSE – ERISA § 408 Exemptions**

Plaintiffs’ ERISA § 406 prohibited transaction claims fail in whole or in part because the prohibited transaction rules in ERISA § 406 do not apply. The challenged transactions satisfy the exemptions set forth in ERISA § 408(e) and/or § 408(b)(12). The Plan received at least adequate consideration and fair market value, which GreatBanc determined in good faith following a prudent investigation prior to approving or allowing the challenged transactions. The amount of compensation paid to GreatBanc for its fiduciary services as trustee was also at all times reasonable, satisfying the exemptions set forth in ERISA § 408(b)(2) and/or ERISA § 408(c)(2).

**SECOND AFFIRMATIVE DEFENSE – Prudent Process**

Plaintiffs’ claims against GreatBanc related to or arising out of the 2013 Reorganization and 2017 Transaction are barred in whole or in part because GreatBanc acted in good faith following a prudent investigation, and at all times acted solely in the best interests of the Plan and its participants.

**THIRD AFFIRMATION DEFENSE – Lack of Intent**

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.” 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. Plaintiffs have not alleged and cannot establish that GreatBanc had any “subjective intent to benefit” any party in interest, and therefore the ERISA § 406 prohibited transaction claims fail in whole or in part.

**FOURTH AFFIRMATIVE DEFENSE –  
Lack of Standing and/or Subject Matter Jurisdiction**

Plaintiffs’ claims against GreatBanc 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 2017 Transaction. Absent an injury in fact, Plaintiffs lack standing to sue for harm to the Plan, and the Court lacks subject matter jurisdiction.

**FIFTH AFFIRMATIVE DEFENSE – Waiver**

Plaintiffs’ claims related to the 2017 Transaction are barred in whole or in part by the doctrine of waiver because, pursuant to section 14.1 of the Plan, the participants voted approximately 87% of all allocated shares in favor of the transaction after being fully informed of all material details (and only approximately 2% of all allocated shares against, with approximately 11% not voting/abstaining). Additionally, all Participants as of November 2017 were entitled to vote their shares in the ESOP against the terms of the 2017 Transaction, including the share price, but Plaintiff Debra Ann Kopinski did not vote her shares against the 2017 Transaction, and has therefore waived her claims asserted in the matter.

**SIXTH AFFIRMATIVE DEFENSE – Estoppel**

Plaintiffs’ claims related to the 2017 Transaction are barred in whole or in part by the doctrine of estoppel because, pursuant to section 14.1 of the Plan, the participants voted

approximately 87% of all allocated shares in favor of the transaction after being fully informed of all material details (and only approximately 2% of all allocated shares against, with approximately 11% not voting/abstaining). Additionally, all Participants as of November 2017 were entitled to vote their shares in the ESOP against the terms of the 2017 Transaction, including the share price, but Plaintiff Debra Ann Kopinski did not vote her shares against the 2017 Transaction, and is therefore estopped from asserting her claims in the matter.

**SEVENTH AFFIRMATIVE DEFENSE – Ratification, Acquiescence, and/or Consent**

Plaintiffs' claims related to the 2017 Transaction are barred in whole or in part by the doctrines of ratification, acquiescence, and/or consent because, pursuant to section 14.1 of the Plan, the participants voted approximately 87% of all allocated shares in favor of the transaction after being fully informed of all material details (and only approximately 2% of all allocated shares against, with approximately 11% not voting/abstaining).

**EIGHTH AFFIRMATIVE DEFENSE – Failure to State a Claim**

Plaintiffs' claims against GreatBanc fail in whole or in part for failure to state a claim pursuant to Federal Rule of Civil Procedure Rule 12(b)(6).

**NINTH AFFIRMATIVE DEFENSE – Additional Defenses**

GreatBanc reserves the right to assert any additional affirmative defenses that may be discovered or disclosed during the course of additional investigation and discovery.

**PRAYER FOR RELIEF**

Wherefore, GreatBanc requests the following relief:

- a) That Plaintiffs' Second Amended Complaint be dismissed, with prejudice, and that Plaintiffs recover nothing;
- b) That GreatBanc be awarded its costs, expenses, and reasonable attorney fees; and

c) That GreatBanc be awarded such further relief as the Court deems just and proper.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on September 17, 2020, I caused true and correct copies of the foregoing to be filed electronically using the Court's CM/ECF system and to thereby be served upon all registered participants identified in the Notice of Electronic Filing in this matter on this date. This document is available for viewing and downloading on the CM/ECF system.

*/s/ Michael L. Scheier* \_\_\_\_\_

Michael L. Scheier

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