



will avoid the possibility of any inconsistent disposition. In support of its request to withdraw the reference, MACC respectfully states as follows:

**Background**

1. On or about September 26, 2006, an involuntary petition for relief under chapter 11 of the Bankruptcy Code was filed against 1Point Solutions, LLC (“1Point”), along with an expedited motion for appointment of a chapter 11 trustee. An order granting the requested relief and directing the appointment of a chapter 11 trustee was entered on September 27, 2006. John C. McLemore was appointed as the chapter 11 trustee (the “Trustee”) on September 28, 2006. The Bankruptcy Court approved the Trustee’s appointment by order entered on September 29, 2006, and the Trustee continues in that capacity.

2. After his appointment in the 1Point case, the Trustee filed a complaint seeking substantive consolidation of 1Point and Barry R. Stokes (“Stokes”), the principal of 1Point. Upon agreement between the Trustee and Stokes, on October 13, 2006, the Bankruptcy Court entered an order for relief under chapter 11 of the Bankruptcy Code against Stokes individually. The Bankruptcy Court also consolidated the estates of 1Point and Stokes for purposes of administration and directed the appointment of a chapter 11 trustee in the Stokes case. Mr. McLemore was appointed as chapter 11 trustee in the Stokes case.

3. On August 16, 2007, a number of 401(k) savings plans brought suit against MACC in the District Court seeking to recover funds misappropriated by 1Point and Stokes. The Amended Complaint in that action brings claims alleging violations of ERISA, Tennessee common law and a claim under the Tennessee Securities Act (the “Plans’ Amended Complaint”) (copy attached hereto as Exhibit 1). That matter is pending as HERITAGE EQUITY GROUP 401(K)

SAVINGS PLAN ET. AL. VS. MID-ATLANTIC CAPITAL CORPORATION under Case Number 3:07-0841.

4. On or about August 20, 2007, the Trustee filed a complaint against Regions Bank (as successor in interest by merger to AmSouth Bank)(“Regions”) and MACC (the “Trustee’s Complaint”), also seeking to recover funds that were misappropriated by 1Point and Stokes. The Trustee’s Complaint seeks recovery not for the bankruptcy estate but for 401(k) savings plans, including the same 401(k) savings plans who are plaintiffs in the District Court action. Like the District Court action, the Trustee’s Complaint alleges various claims and theories under ERISA and under Tennessee common law. The Trustee’s claims are also predicated upon various federal regulatory statutes, which the Trustee purports apply to MACC’s actions as alleged in the Trustee’s Complaint. The Trustee’s Complaint admits that the proceeding is a non-core matter. *See* TRUSTEE’S COMPLAINT at ¶ 6.2 (copy attached hereto as Exhibit 2).

**Withdrawal of the Reference is Appropriate**

5. Section 157(d) of Title 28 compels a district court to withdraw a proceeding “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” 28 U.S.C. § 157(d). The Trustee’s Complaint is predicated upon ERISA and various statutes regulating financial institutions. Disposition of the Trustee’s claims necessarily requires consideration of these non-bankruptcy statutes. By the plain language of Section 157(d), withdrawal of the reference is mandatory.

6. Alternatively, permissive withdrawal is also warranted. Section 157(d) does not define "cause" for the district court to withdraw the reference of a proceeding to bankruptcy court. Several courts have held, however, that common or overlapping issues in a proceeding in

bankruptcy court with a case pending in district court constitute cause for withdrawal. *See e.g. Big Rivers Elec. Corp. v. Green River Coal Co., Inc.*, 182 B.R. 751, 755 (W.D. Ky. 1995). In this case, both actions involved the identical underlying factual scenario, make largely the same legal claims against MACC under ERISA and under state common law, and, remarkably, are even purportedly brought on behalf of many of the same parties.

7. Judicial efficiency and uniformity may also constitute cause where a non-core matter decided by the bankruptcy court would be subject to *de novo* review by the district court anyway. *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2nd Cir. 1993). Determination of the Trustee's claims is a non-core proceeding involving many factual and legal issues already before this Court in the Plans' Amended Complaint. If the reference is not withdrawn, MACC will incur the unnecessary cost of litigating essentially the same lawsuit in two different courts with potentially conflicting results. MACC may then, regardless of the outcome in the bankruptcy proceeding, incur the cost of a *de novo* review of the bankruptcy court's determination of the issues. Conceivably, these two intertwined cases could continue through the appeal process entirely separately at considerable expense to all parties and unnecessary use of judicial resources.

8. Withdrawal of the reference is also appropriate when the proceeding is the type of case regularly tried in the district courts, rather than one that is dependent on bankruptcy law and practice. *See In re NDEP Corp.*, 203 B.R. 905, 913 (D. Del. 1996)(reference withdrawn of an adversary proceeding brought by the bankruptcy debtor for an alleged breach of a supply contract in which the non-debtor defendant asserted a defense that the goods sold were defective and that the debtor had breached the contract in various other ways because suit was the type of

diversity case routinely tried in federal court and “somewhat removed from the bankruptcy court’s realm of expertise”).<sup>1</sup>

For all of these reasons, MACC respectfully submits that withdrawal of the reference pursuant to 28 U.S.C. § 157(d) is not only appropriate, it is mandatory.

WHEREFORE, MACC respectfully requests the Court withdraw the reference of this adversary proceeding under 28 U.S.C. § 157(d) and grant such other relief as may be necessary and appropriate.

Respectfully submitted,

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and

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<sup>1</sup> The courts and rule-drafters clearly intend that federal litigation proceed without waste of time or resources of the parties and the courts. *See* Fed. R. Civ. P. 42(a)(the court may consolidate actions or “make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay”). Withdrawal of the reference in this matter accomplishes that result.

HARWELL HOWARD HYNE  
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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served on the 2<sup>nd</sup> day of January, 2008, on all parties receiving electronic notice through the Bankruptcy Court's CM/ECF system, including, specifically, counsel for the Plaintiff/Trustee and counsel for Defendant Regions Bank.

s/ Barbara D. Holmes  
Barbara D. Holmes

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

HERITAGE EQUITY GROUP 401(k)	)	
SAVINGS PLAN, et al.,	)	
	)	No. 3:07-cv-841
Plaintiffs,	)	
	)	Judge Wiseman/Bryant
v.	)	
	)	
MID-ATLANTIC CAPITAL CORPORATION,	)	
and SUNGARD INSTITUTIONAL	)	
BROKERAGE, INC.,	)	
	)	
Defendants.	)	

**FIRST AMENDED COMPLAINT**

**A. PARTIES**

1. The Heritage Equity Group 401(k) Savings Plan (the “Plan”) is a 401(k) investment plan established under 29 U.S.C. § 1002(2)(A) for the purpose of providing retirement benefits to the employees of Beck/Arnley Worldparts Corp. (“Beck/Arnley”) and an affiliated corporation. The Plan was formerly known as the Beck/Arnley 401(k) Savings Plan and was established prior to the events giving rise to this lawsuit. Beck/Arnley is a corporation organized under the laws of Delaware and has its principal place of business in this judicial district. Beck/Arnley is a plan sponsor and fiduciary of the Plan. Max Dull is a Tennessee resident and is the trustee of the trust created to hold the assets of the Plan.

2. EFS, Inc. is a Georgia corporation with its principal place of business in Georgia. EFS, Inc. 401(k) Plan is a retirement benefit plan established for the benefit of the employees of EFS, Inc. Michael Egan is trustee of the trust created to hold the assets of this plan. Mr. Egan resides in Georgia.

3. Mastrapasqua Asset Management, Inc. is a Tennessee corporation with its principal place of business in Tennessee. Mastrapasqua Asset Management, Inc. 401(k) Plan is a retirement benefit plan established for the benefit of the employees of the company. Frank Mastrapasqua and Mauro Mastrapasqua are trustees of the trust created to hold the assets of this plan and both reside in Tennessee.

4. The Hamilton-Ryker Group, LLC is a Tennessee limited liability company with its headquarters in Tennessee. The Hamilton-Ryker Group, LLC 401(k) Plan is a retirement benefit plan established for the benefit of the company's employees. Wayne McCreight and Crawford Gallimore are residents of Tennessee and are trustees of the trust created to hold the assets of this plan.

5. Jimbo's Natural Family, Inc. is a California corporation with its principal place of business in California. Jimbo's Natural Family, Inc. 401(k) Plan is a retirement benefit plan established for the benefit of the employees the company. James Someck and Jo Ann Diehl are residents of California and are trustees of the trust created to hold the assets of this plan.

6. Colbert & Winstead, PC is a Tennessee limited liability professional company with its headquarters in Tennessee. The Colbert & Winstead, PC 401(k) Plan is a retirement benefit plan established for the benefit of the Colbert & Winstead's employees. Richard L. Colbert and Kurtis J. Winstead are residents of Tennessee and are trustees of the trust created to hold the assets of this plan.

7. Plaintiff Deborah Niedermeyer is a resident of the state of Washington.

8. Plaintiff Brian K. Allen is a resident of the state of Washington. Mr. Allen does business as Brian Allen Photographer, which is a sole proprietorship doing business in the state of Washington.

9. Abcow Services, Inc. is a California non-profit corporation with its principal place of business in California.

10. Defendant Mid-Atlantic Capital Corporation ("MACC") is a Pennsylvania corporation with its principal place of business in Pennsylvania.

11. Defendant SunGard Institutional Brokerage, Inc. ("SunGard"), is an Illinois corporation with its principal place of business in Illinois.

## **B. JURISDICTION AND VENUE**

12. Pursuant to 28 U.S.C. § 1332, this Court has subject matter jurisdiction over the claims of plaintiffs Heritage Equity Group 401(k), EFS, Inc. 401(k) Plan, Hamilton-Ryker Group, LLC 401(k) Plan, Jimbo's

Natural Family, Inc. 401(k) Plan, Colbert & Winstead PC 401(k) Plan, and the trustees of those plans, because the amount in controversy with respect to the claims of each of these plaintiffs exceeds \$75,000, exclusive of interest and costs, and there is complete diversity of citizenship. The Court also has subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1). The Court has supplemental jurisdiction over the claims of the remaining plaintiffs under 28 U.S.C. § 1367.

13. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events and omissions giving rise to plaintiffs' claims occurred in this judicial district.

### **C. FACTUAL ALLEGATIONS**

14. During all times material to this case, Barry Stokes of Dickson, Tennessee owned and operated a company called 1Point Solutions, LLC. 1Point Solutions purported to provide administrative and investment services to employee benefit plans. Mr. Stokes was a registered securities representative and an investment advisor representative.

15. Each of the plaintiffs in this case engaged Mr. Stokes and 1Point Solutions to provide various services for their employee benefit plan assets. Mr. Stokes and 1Point Solutions were engaged, among other things, to provide plaintiffs with securities in which to invest plan assets,

to facilitate those investments, and to provide administrative services to the employee benefit plans.

16. During the years 2002-2006, plaintiffs entrusted significant retirement plan assets to Mr. Stokes and 1Point Solutions.

17. Unknown to plaintiffs, at the time they engaged Mr. Stokes and 1Point Solutions, and on all occasions when plaintiffs entrusted funds to him and his company, Mr. Stokes did not intend to invest plaintiffs' assets appropriately and intended to misappropriate plaintiffs' funds and/or use them in an unauthorized and unlawful manner.

18. In the fall of 2006, plaintiffs learned that Mr. Stokes had stolen the money that plaintiffs transferred to him. Throughout some or all of the time that plaintiffs utilized his services, and unknown to plaintiffs, Mr. Stokes stole and utilized plaintiffs' assets for his own purposes. Mr. Stokes also created and sent to plaintiffs fictitious account statements reflecting alleged asset portfolios that did not exist.

19. Mr. Stokes and 1Point Solutions are now in bankruptcy. Mr. Stokes has been indicted and is in jail.

20. From September 2000 to 2006, another company controlled by Mr. Stokes, 1Point Administrative Services, had a brokerage agreement with defendant Mid-Atlantic Capital Corporation ("MACC").

21. MACC is a registered broker dealer and a member of the National Association of Securities Dealers. MACC is also registered as a

broker dealer with the state of Tennessee. MACC's website states that it provides a broad array of financial products and services.

22. Pursuant to the brokerage agreement between MACC and 1Point Administrative Services, MACC agreed, among other things, to accept and hold assets of employee benefit plans to which 1Point Administrative Services was providing services and to facilitate the investment of those assets. Under the agreement, MACC charged fees for its services.

23. The agreement between MACC and 1Point Administrative Services provided that MACC would accept and hold assets of employee benefit plans utilizing the services of 1Point Administrative Services only if an employee benefit plan executed a Confirmation of Authorization that authorized 1Point Administrative Services to receive, invest, and/or disburse the assets of the plan.

24. None of the plaintiffs ever executed or provided to MACC the Confirmation of Authorization required by the agreement between MACC and 1Point Administrative Services. Notwithstanding the absence of authorization, Mr. Stokes transferred the assets of plaintiffs into an account controlled by MACC. These transfers were as follows.

(a) In May of 2005, Mr. Stokes transferred more than \$6 million dollars of Heritage Equity Group 401(k) Savings Plan assets into the MACC account.

(b) In May of 2002, Mr. Stokes transferred more than \$146,000 of Jimbo's Natural Family, Inc. 401(k) Plan assets into the MACC account.

(c) In October 2002, Mr. Stokes transferred more than \$442,000 of EFS, Inc. 401(k) Plan assets into the MACC account.

(d) In May of 2003, Mr. Stokes transferred more than \$2,700 of Abcow Staffing 401(k) Plan assets into the MACC account.

(e) In January of 2005, Mr. Stokes transferred more than \$304,000 of The Hamilton-Ryker Group, LLC 401(k) Plan assets into the MACC account.

(f) In January of 2005, Mr. Stokes transferred \$25,000 of Mastrapasqua Asset Management, Inc. 401(k) Plan assets into the MACC account.

(g) In November 2005, Mr. Stokes transferred more than \$270,000 of Colbert & Winstead, PC 401(k) Plan assets into the MACC account.

(h) In June 2005, Mr. Stokes transferred more than \$16,000 of Deborah Niedermeyer Individual 401(k) Plan assets into the MACC account.

(i) In June 2005, Mr. Stokes transferred more than \$5,000 of Brian Allen Photo Individual 401(k) Plan assets into the MACC account.

25. The transfer documents that facilitated each of the above-referenced transfers of plaintiffs' assets made clear to MACC that the assets were to be held for the benefit of the particular employee benefit plan whose assets were transferred.

26. Thus, MACC was aware that it was receiving assets which belonged to plaintiffs and with respect to which Mr. Stokes owed fiduciary duties. Notwithstanding this knowledge, MACC commingled the assets of each plaintiff in a single account.

27. Furthermore, MACC improperly permitted Mr. Stokes to transfer amounts from the MACC account to an alleged entity called 1Point 401(k) Plan far in excess of the amounts that 1Point 401(k) Plan had deposited into the MACC account. Having “laundered” plaintiffs’ assets through the MACC account and into an account over which he had unfettered control, Mr. Stokes was then free to use plaintiffs’ assets as he chose.

28. MACC also permitted Mr. Stokes to transfer plaintiffs’ funds to entities that had either deposited no money into the MACC account or had deposited far less than Mr. Stokes transferred out.

29. The following transfers are examples of the numerous improper transactions that MACC permitted and facilitated:

(a) On 7-2-02, MACC transferred \$191,000 to a 1Point 401(k) Plan account at Raymond James. Prior to this transfer, the 1Point 401(k) Plan had transferred less than \$50,000 into the MACC account.

(b) On 7-10-02, MACC transferred \$292,299.05 to an unnamed account with United Missouri Bank. Previously, no amounts had been transferred from the United Missouri Bank account into the MACC account.

(c) On 8-2-02, MACC transferred \$34,000 to an account in the name of Seton Home Study School, an alleged entity that had not transferred any assets into the MACC account.

(d) On 8-14-02, MACC transferred \$38,000 to an account in the name of Cape Canaveral Volunteer Fire Department, an alleged entity that had not transferred any assets into the MACC account.

(e) On 8-15-02, MACC transferred \$191,000 to a 1Point 401(k) Plan account, even though 1Point 401(k) Plan had not previously transferred these funds into the MACC account.

(f) On 9-17-02, MACC transferred \$49,000 to an account in the name of Headwaters Group 401(k) Plan, an alleged entity that had not transferred any assets into the MACC account.

(g) On 10-23-02, MACC transferred \$192,000 to an account in the name of CDS Administrative Services Trust, an alleged entity that had not transferred any assets into the MACC account.

(h) On 1-15-03, Mr. Stokes transferred into the MACC account more than \$1.5 million for the benefit of the Crosslin Supply Plan. Immediately before this transfer, the MACC account had a negative balance. The following day, MACC transferred \$139,000 of the money that came from Crosslin Supply to an account in the name of 1Point 401(k) Plan. Over the next three months, MACC made a number of additional transfers of money that came from Crosslin Supply to an account in the name of 1Point 401(k) Plan.

(i) In October of 2003 and in June, July, August, and December of 2004, MACC sold assets in another account defendant had set up in the name of 1Point Administrative Services, transferred the proceeds to the commingled MACC account, and then allowed Mr. Stokes to transfer the funds to a 1Point 401(k) Plan account. The assets that had been sold, however, had not been purchased with money that was contributed by 1Point 401(k) Plan.

(j) On 8-26-04, MACC transferred to a 1Point 401(k) Plan account assets that came from another account that MACC had set up in the name of a company called Tatham.

(k) In January of 2005, the day after Hamilton-Ryker and Mastrapasqua plan assets were transferred into the MACC account, MACC transferred \$128,000 of the assets of these plaintiffs to a 1Point 401(k) Plan account.

(l) In May of 2005, shortly after over \$6 million in Heritage Equity Group plan assets were transferred into the MACC account, MACC transferred the majority of this money to Crosslin Supply, Greenpeace, Calvert Shareholder Services, and two art dealers from which Mr. Stokes purchased Japanese block prints.

(m) On 11-21-05, \$270,000 of Colbert & Winstead 401(k) Plan assets was transferred into the MACC account. The balance of the account prior to this transfer was less than \$5,000. Immediately after

the transfer, MACC transferred to a 1Point 401(k) Plan account \$271,000.

30. These and other transactions provided powerful notice to MACC that Mr. Stokes was breaching his fiduciary duties to plaintiffs and others and wrongfully converting assets. MACC facilitated and failed to prevent Mr. Stokes' improper transfers and his conversion of plaintiffs' funds. Mr. Stokes was clearly violating his fiduciary duties by transferring plaintiffs' funds to entities that had no right to the funds. In addition, as noted above, MACC had never received authorization from plaintiffs permitting Mr. Stokes to make transfers of plaintiffs' assets.

31. Furthermore, the assets of plaintiffs and other employee benefit plans sat for many months and/or years in the commingled MACC account without being invested in the manner in which employee benefit plans are invested. For this additional reason, it was obvious to MACC that Mr. Stokes handling of these fiduciary funds was improper.

32. The egregiousness of MACC's failure to prevent Mr. Stokes' unlawful conversion of plaintiffs' funds is compounded by the fact that Mr. Stokes' had a public record of other misconduct and financial problems. This record includes the following:

- (a) Mr. Stokes took bankruptcy in 1984.
- (b) A company owned by Mr. Stokes took bankruptcy in 1984.
- (c) In December 2000, Mr. Stokes was terminated by The Advisor Group because he failed to cooperate with the firm's investigation of Mr.

Stokes' receipt of funds from a client and provided The Advisor Group with falsified documentation.

(d) In March 2001, Mr. Stokes received a formal caution from the NASD because he had failed to disclose certain outside business activities to The Advisor Group as required by NASD rules.

33. Plaintiffs initially filed this action against MACC alone to recover the losses they have suffered as a result of the misconduct of Mr. Stokes and MACC. Since the filing of this lawsuit, MACC has taken the position that in October 2002, it transferred to SunGard MACC's contract with 1Point. MACC has asserted that following the transfer to SunGard, MACC has no liability with respect to the obligations imposed by its contract with 1Point. MACC has acknowledged, however, that after the contractual transfer to SunGard, MACC continued to take instructions from Mr. Stokes and to process transactions in the account into which plaintiffs' funds were transferred.

34. SunGard has taken the position that MACC is incorrect in asserting that MACC transferred to SunGard all its contractual rights and obligations under MACC's agreement with 1Point. SunGard has asserted that it acquired only the electronic processing functions with respect to MACC's relationship with 1Point.

35. Based on the assertions made by MACC, plaintiffs hereby bring claims against both MACC and SunGard. In exercising control over and transferring plaintiffs' assets under the circumstances set forth

above, both defendants acted in violation of industry customs and standards and in violation of state and federal law.

#### **D. STATE LAW CLAIMS**

##### **COUNT ONE – VIOLATION OF TENNESSEE SECURITIES ACT**

36. Plaintiffs incorporate herein paragraphs 1-35 above.

37. In connection with the offer and sale of securities, Barry Stokes intentionally and recklessly employed devices, schemes, and artifices to defraud, made material misrepresentations, failed to disclose material information, and engaged in acts, practices, and a course of business which operated as a fraud or deceit on the plaintiffs, all in violation of the Tennessee Securities Act (the “Act”), T.C.A. § 48-2-121, and actionable under T.C.A. § 48-2-122.

38. Plaintiffs reasonably relied on Mr. Stokes’ representations and were unaware of the true facts.

39. Plaintiffs have been damaged as a result of Mr. Stokes’ misconduct.

40. Defendants are liable under T.C.A. § 48-2-122(g) for the securities law violations of Mr. Stokes because defendants are broker dealers that materially aided Mr. Stokes in his violation of the Act. In addition, defendants had the power, directly or indirectly, to control the activities of Mr. Stokes that damaged plaintiffs.

41. Pursuant to T.C.A. § 48-2-122, plaintiffs are entitled to recover from defendants their lost principal, interest, and attorney's fees.

**COUNT TWO – AIDING AND ABETTING COMMON LAW FRAUD**

42. Plaintiffs incorporate herein paragraphs 1-35 above.

43. In connection with his dealings with plaintiffs, Barry Stokes intentionally and recklessly employed devices, schemes, and artifices to defraud, made material misrepresentations, failed to disclose material information, and engaged in acts, practices, and a course of business which operated as a fraud or deceit on the plaintiffs, all in violation of the common law of fraud.

44. Plaintiffs reasonably relied on Mr. Stokes' representations and were unaware of the true facts.

45. Plaintiffs have been damaged as a result of Mr. Stokes' misconduct.

46. Defendants knew that Mr. Stokes was mishandling and transferring plaintiffs' assets without authorization and that he was sending them to entities that had no right to plaintiffs' assets. Despite this knowledge, defendants provided material assistance to Mr. Stokes' fraudulent transfer of plaintiff's assets.

47. In addition, having accepted assets that it knew were owned by plaintiffs, defendants owed a duty to plaintiffs to exercise reasonable care to safeguard those assets. Defendants gave substantial assistance to Mr. Stokes' misconduct and defendants' own conduct, separately

considered, constituted a willful or negligent breach of duties owed to plaintiffs.

48. Defendants are therefore liable for the damages caused by Mr. Stokes' fraud.

49. Plaintiffs are entitled to recover from defendants compensation for all plaintiffs' losses, plus interest.

50. Plaintiffs are also entitled to recover punitive damages because of defendants' reckless and conscious disregard of plaintiffs' rights.

### **COUNT THREE – AIDING AND ABETTING CONVERSION**

51. Plaintiffs incorporate herein paragraphs 1-35 above.

52. Barry Stokes unlawfully converted assets owned by plaintiffs.

53. Plaintiffs have been damaged as a result of Mr. Stokes' misconduct.

54. Defendants knew that Mr. Stokes was transferring plaintiffs' assets without authorization and that he was sending them to entities that had no right to plaintiffs' assets. Despite this knowledge, defendants provided material assistance to Mr. Stokes' conversion of plaintiff's assets.

55. In addition, having accepted assets that it knew were owned by plaintiffs, defendants owed a duty to plaintiffs to exercise reasonable care to safeguard those assets. Defendants gave substantial assistance

to Mr. Stokes' misconduct and defendants' own conduct, separately considered, constituted a willful or negligent breach of duties owed to plaintiffs.

56. Defendants are therefore liable for the damages caused by Mr. Stokes' fraud.

57. Plaintiffs are entitled to recover from defendants compensation for all plaintiffs' losses, plus interest.

58. Plaintiffs are also entitled to recover punitive damages because of defendants' reckless and conscious disregard of plaintiffs' rights.

#### **COUNT FOUR – AIDING AND ABETTING FIDUCIARY BREACH**

59. Plaintiffs incorporate herein paragraphs 1-35 above.

60. In violation of his fiduciary duties, Barry Stokes unlawfully converted assets owned by plaintiffs.

61. Plaintiffs have been damaged as a result of Mr. Stokes' misconduct.

62. Defendants knew that Mr. Stokes was mishandling and transferring, without proper authorization, assets of clients to which he owed fiduciary duties and that he was sending the assets to entities that had no right to plaintiffs' assets. Despite this knowledge, defendants provided material assistance to Mr. Stokes' conversion of plaintiff's assets.

63. In addition, having accepted assets that it knew were owned by plaintiffs, defendants owed a duty to plaintiffs to exercise reasonable care to safeguard those assets. Defendant gave substantial assistance to Mr. Stokes' misconduct and defendant's own conduct, separately considered, constituted a willful or negligent breach of duties owed to plaintiffs.

64. Defendants are therefore liable for the damages caused by Mr. Stokes' fraud.

65. Plaintiffs are entitled to recover from defendants compensation for all plaintiffs' losses, plus interest.

66. Plaintiffs are also entitled to recover punitive damages because of defendants' reckless and conscious disregard of plaintiffs' rights.

#### **COUNT FIVE – NEGLIGENCE**

67. Plaintiffs incorporate herein paragraphs 1-35 above.

68. Having accepted assets that it knew were owned by plaintiffs, defendants owed a duty to plaintiffs to exercise reasonable care to safeguard those assets.

69. In violation of that duty of care, defendants allowed Mr. Stokes to transfer plaintiffs' assets without the authorization required by defendant's contract with Mr. Stokes and to transfer assets to entities that had no legal right to them.

70. Plaintiffs are entitled to recover from defendants compensation for all plaintiffs' losses, plus interest.

### **COUNT SIX - CONVERSION**

71. Plaintiffs incorporate herein paragraphs 1-35 above.

72. Defendants lacked proper authority to exercise dominion or control over plaintiff's assets.

73. In transferring plaintiffs' funds to other entities, defendants unlawfully converted plaintiffs' funds.

74. Plaintiffs are entitled to recover from defendants compensation for all plaintiffs' losses, plus interest.

75. Plaintiffs are also entitled to recover punitive damages because of defendants' reckless and conscious disregard of plaintiffs' rights.

### **E. ERISA CLAIMS**

76. Plaintiffs Heritage Equity Group 401(k) Savings Plan, Max Dull Trustee of the Heritage Equity Group 401(k) Savings Plan, EFS, Inc., EFS, Inc. 401 (k) Plan, Michael Egan, Trustee of the EFS, Inc. 401 (k) Plan, Mastrapasqua Asset Management, Inc., Mastrapasqua Asset Management, Inc. 401(k) Plan, Frank Mastrapasqua and Mauro Mastrapasqua, as Trustees of the Mastrapasqua Asset Management, Inc. 401(k) Plan, The Hamilton-Ryker Group, LLC, The Hamilton-Ryker Group, LLC 401(k) Plan, Wayne McCreight and Crawford Gallimore as

Trustees of the Hamilton Ryker Group, LLC, 401(k) Plan, Jimbo's Natural Family, Inc., Jimbo's Natural Family, Inc. 401 (k) Plan, James Someck and Jo Ann Diehl, as Trustees of Jimbo's Natural Family, Inc. 401(k) Plan, Colbert & Winstead, PC, The Colbert & Winstead, PC 401(k) Plan, Richard L. Colbert and Kurtis J. Winstead, as Trustees of Colbert & Winstead, PC 401(k) Plan, Abcow Services, Inc., as sponsor of the Abcow Staffing 401(k) Retirement Plan ("the ERISA plaintiffs") assert the following claims against defendants under the Employee Retirement Income Act of 1974 ("ERISA").

77. The ERISA plaintiffs incorporate herein paragraphs 1-35 above.

78. 29 U.S.C. § 1002(21)(A) provides that an entity is a fiduciary governed by the Employee Retirement Income Security Act to the extent that it exercises authority or control respecting management or disposition of the assets of an ERISA plan.

79. Knowing that they did not have proper authorization, defendants accepted, commingled, and then transferred plaintiffs' assets to entities that clearly had no right to plaintiffs' assets. Defendants thereby exercised control over the management and/or disposition of the funds of the ERISA plaintiffs. Defendants therefore acted as fiduciaries under ERISA.

80. Defendants' conduct violated the fiduciary duties imposed on defendants by ERISA § 404, 29 U.S.C. § 1104(a). Defendants failed to

act with reasonable care, skill, and diligence in their management and/or control of the ERISA plaintiffs' funds.

81. Defendants' conduct also violated the fiduciary duties imposed on defendants by ERISA § 405, 29 U.S.C. § 1105. Defendants knowingly participated in Mr. Stokes' breach of his ERISA duties under 29 U.S.C. § 1104(a) and 29 U.S.C. § 1106. Also, notwithstanding their knowledge of Mr. Stokes' fiduciary breach, defendants failed to make reasonable efforts to remedy the breach.

82. Thus, under ERISA § 409, 29 U.S.C. § 1109, plaintiffs are entitled to a judgment holding defendants personally liable for all losses sustained by the ERISA plaintiffs and for other appropriate remedial or equitable relief, including interest, attorney's fees, and litigation expenses.

83. The ERISA plaintiffs are empowered to bring this action by 29 U.S.C. § 1132(a)(2).

THEREFORE, plaintiffs respectfully request that the Court:

- (a) Award judgment in favor of each plaintiff and against defendants, jointly and severally, for all losses incurred by plaintiffs as a result of the misconduct set forth above.
- (b) Award prejudgment interest and attorneys' fees in favor of each plaintiff and against each defendant, jointly and severally.

- (c) Award punitive damages in favor of each plaintiff and against defendants in such amount as the jury deems proper.
- (d) Afford plaintiffs a trial by jury.
- (e) Provide such relief as the Court deems to be just and proper.

Respectfully submitted,

/s/ H. Naill Falls Jr.  
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John B. Veach III, BPR # 8994  
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Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I certify that this document has been filed with the Court's ECF system and will therefore be forwarded via email to Alex Fardon, Harwell Howard Hyne Gabbert & Manner, P.C., 315 Deaderick St., Suite 1800, Nashville, TN 37238, and David L. McClenahan, Kirkpatrick & Lockhart, 535 Smithfield St., Pittsburgh, PA 15222, this 5th day of November 2007.

H. Naill Falls Jr.



2. Regions Bank is the successor in interest by merger to AmSouth Bank. At all times relevant to this complaint, AmSouth maintained offices in this district, including one in Dickson, Tennessee, and one in Nashville, Tennessee. AmSouth continues to operate as a division of Regions Bank. Regions Bank's agent for service of process is Corporation Service Company, 2908 Poston Avenue, Nashville, Tennessee 37203. Regions Bank and AmSouth Bank are hereinafter referred to as Regions/AmSouth.

3. Mid-Atlantic Capital Corporation ("MACC") is a corporation organized under the laws of the state of Pennsylvania. It maintains a principal office at The Times Bldg 336 Fourth Ave, Pittsburgh, PA 15222. Service of process can be made on David J. Down, President and Director of Mid-Atlantic Capital Corporation, The Times Building, 336 Fourth Avenue, Pittsburgh, Pennsylvania 15222.

4. In his capacity as trustee in this Chapter 11 case, the Trustee has all of the rights of 1Point to possession of property and all of the power of 1Point to file suits to the same extent that 1Point had such rights and powers on the date of the petition in the bankruptcy case.

5. Most of the plans for which 1Point provided services are subject to the Employee Retirement Income Security Act, as amended, 29 U.S.C. § 1001, et seq ("ERISA"). The Trustee is a fiduciary within the meaning of 29 U.S.C. § 1002(21).

5.1. The Trustee has taken possession of assets of 1Point, including cash in banks and real and personal property. These assets were either directly property of plans subject to ERISA, or were purchased for the benefit of Stokes or 1Point with assets of plans subject to ERISA. The Trustee currently exercises discretionary control over assets of plans subject to ERISA. Therefore, the Trustee is functionally a fiduciary within the meaning of ERISA.

5.2. Pursuant to documents executed by the parties, or by the plan documents, or by agreement, or otherwise, 1Point and/or Stokes acted as fiduciaries for plans subject to ERISA. The Trustee has the rights and powers 1Point and/or Stokes held on the date of the filing of the petitions in their respective cases. These rights and powers are governed by ERISA.

5.3. Pursuant to documents executed by the parties, or by the plan documents, or by agreement, or otherwise, 1Point and/or Stokes acted as fiduciaries for plans subject to ERISA. The Trustee is a fiduciary for each of the plans, or is the successor fiduciary to the position of 1Point and/or Stokes as fiduciary for each of the plans.

6. This Court has jurisdiction over this matter.

6.1. This case arises in or is related to a case under Chapter 11 of the Bankruptcy. This Court has jurisdiction pursuant to 28 U.S.C. § 1334.

6.2. This is a non-core proceeding within the meaning of 28 U.S.C. §157(b).

7. Venue is proper pursuant to 28 U.S.C. § 1409.

## BACKGROUND

8. Stokes at all relevant times was the sole owner of 1Point.
9. 1Point was formed to act as a third party administrator (“TPA”) for employee plans established under federal statutes to provide tax-advantaged benefits to employees.
10. TPAs typically provide two kinds of services. Some TPAs provide only record-keeping services, including keeping track of employer and employee contributions, investments, loans, withdrawals and repayments, earnings and tax payments. In these cases, the customers make the required payments directly to the custodians or trustees of the funds, and notify the TPA when the contributions are made.
11. Other TPAs provide similar services, but also assist in transferring money. Employers who want this service authorize the TPA to prepare ACH transactions (a form of electronic funds transfer) from a specific account of the employer in the amount of aggregate employee and employer contributions and transfer the money directly to the Plan Trustee, usually a large financial firm.
12. Most TPAs do not handle money or securities themselves.
13. 1Point began its operations working for 401(k) plans. A 401(k) plan is a defined contribution pension plan in which employees may elect to defer a portion of their compensation into the plan on a pre-tax basis. In many 401(k) plans, the employer matches a certain percentage of employee contributions. With certain exceptions, an employee may not receive a distribution from his or her 401(k) account until he or she terminates employment or reaches age 59½.
14. If the 1Point customer had an established plan, it was instructed to liquidate the securities held by the plan and send the proceeds to an account in the name of 1Point at MACC. Generally, 401(k) plan customers of 1Point were instructed to send checks for their periodic 401(k) contributions to 1Point, which deposited them in accounts at Regions/AmSouth in the name of 1Point, usually an account named 1Point 401-K.
15. At the close of operations, 1Point was TPA for 52 401(k) plans (the “Depleted 401(k) Plans”). There was not enough money to pay the amount owed the Depleted 401(k) Plans.
16. 1Point also acted as TPA for FSAs (flexible spending accounts), HSAs (health spending accounts), HRAs (Health Reimbursement Arrangements) and DCAs (dependent care accounts). 1Point also acted as third party administrator for a few dental plans and transportation plans. All of these plans are collectively referred to as the “Cafeteria Plans.” 1Point also acted as TPA for COBRA plans, but these are not the subject of this Complaint.
17. Cafeteria Plans are ERISA plans which permit employees to accumulate pre-tax money for specified purposes. The pre-tax nature of the contributions to such plans makes them attractive.

17.1. Health Savings Accounts are like IRAs. They are designed to hold pre-tax funds withheld from the income of employees who have high deductible health insurance. The money in the account can be used to pay for qualified health care expenses. The account belongs to the employee. Money not used in any year continues to be held in the account, and when the employee reaches a certain age, the account is treated like an IRA.

17.2. Health Reimbursement Arrangements are accounts maintained by employers to pay for qualified medical expenses of employees. Funds are contributed by employers under written plans that operate somewhat like insurance arrangements. Unused funds are rolled over to the next year, and may be available on retirement or termination of employment.

17.3. Flexible Spending Accounts are similar to HRAs and HSAs in that they involve pre-tax deductions from the employee's paycheck. The money can be used for a similar range of expenses than the other two, but if the money is not used in any plan year plus a grace period, it is forfeited to the employer.

17.4. Dependent Care Accounts are similar to FSAs, except that they can only be used to pay for daily care for dependents, such as children or dependent parents. Funds not used within the plan year plus a grace period are forfeited to the employer.

18. At the outset, 1Point opened several bank accounts at Regions/AmSouth to hold Cafeteria Plan funds. These include accounts named 1Point FSA, 1Point FSA Depository Acct, 1Point HSA, and 1Point Solutions DCA. Stokes opened at least 58 bank accounts at Regions/AmSouth. 1Point customers were instructed to send all funds to 1Point, which deposited the funds into these accounts.

19. At the commencement of the case, 1Point was the TPA for 751 Cafeteria Plans. These are referred to hereinafter as the Depleted Cafeteria Plans. There was not enough money to pay the amount owed the Depleted Cafeteria Plans.

20. The Depleted 401(k) Plans and the Depleted Cafeteria Plans are hereinafter collectively referred to as the "Victim Plans".

## **THE REGULATORY FRAMEWORK**

### **ERISA**

21. In general, ERISA applies to all employee benefit plans maintained by any private employer or employee organization, including 401(k) plans and the Cafeteria Plans described in ¶ 18, supra. It applies to all customers of 1Point other than the governmental and church plans.

22. All plans covered by ERISA must be evidenced by written documents. The plan documents must designate fiduciaries to carry out the terms of the plan. Different fiduciaries can be designated to carry out the various duties in plan operation.

23. 29 U.S.C. § 1002(21)(A) provides as follows:

“A person is a fiduciary with respect to a plan 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,…”

24. All plans covered by ERISA must designate a person or entity as a trustee to hold the assets of the plan. 29 U.S.C. § 1103(a). Such trustee is a fiduciary within the meaning of ERISA, unless the trustee fits within certain exceptions. Neither MACC nor Regions/AmSouth met these exceptions.

25. ERISA sets out the duties of the fiduciaries. Pursuant to 29 U.S.C. § 1104(a)(1), 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 a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(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 of this chapter.

26. Under ERISA, a fiduciary is liable for another fiduciary’s breach under the following circumstances:

29 U.S.C. § 1105(a)(1): he or she “participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach.”

29 U.S.C. § 1105(a)(2): “if by his failure to comply with section 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.”

29 U.S.C. § 1105(a)(3): “if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.”

27. ERISA provides that participation by a fiduciary in certain prohibited transactions automatically results in a breach of fiduciary duty. It prohibits transactions between a plan and a party in interest, such as a service provider, and it prohibits self-dealing transactions between a plan and a fiduciary. 29 U.S.C. § 1106.

28. ERISA does not supersede other federal laws regulating the provision of services to covered plans. 29 U.S.C. § 1144(d). Thus, a fiduciary that provides securities brokerage or banking services is governed by the laws applicable to the persons in those industries.

### **REGULATION OF FINANCIAL INSTITUTIONS**

29. Banks and broker-dealers in securities are subject to the Bank Secrecy Act, certain provisions of the USA PATRIOT Act, and the U.S. criminal statutes for money laundering. Implementing regulations of the Bank Secrecy Act are promulgated and enforced by the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") often in collaboration with the Federal Functional Regulators. These regulations impose a range of anti-money laundering compliance requirements on the regulated institutions in the United States. Supervision and enforcement for these compliance efforts are undertaken by FinCEN and the functional regulators.

30. Banks and broker-dealers in securities are required to have implemented Customer Information Programs to adequately obtain and verify the identity of persons or entities that are opening accounts with them or establishing other on-going business relationships. Banks and broker-dealers in securities must design their programs to enable them to establish a "reasonable belief" that they know the true identity of the customer. Commensurate with its risk assessment, the bank or broker-dealer in securities must establish policies and procedures for Customer Due Diligence ("CDD") and Enhanced Due Diligence ("EDD") that is commensurate for the level of money laundering or terrorist financing risk posed by a particular customer or category of customers.

31. Banks and broker-dealers are required to implement policies and procedures to meet the record keeping requirements of the Bank Secrecy Act (e.g., the reporting of large currency transactions into or out of an account or the purchase of monetary instruments for \$3,000.00 or more). In addition to recording the information, these financial institutions must retain this documentation for a period of five years, and must determine, based on their risks posed by their customer base and the services provided, what type of ongoing monitoring to implement in order to detect and report unusual or suspicious activity.

32. Broker-dealers in securities and mutual funds are required by regulations issued by FinCEN and their primary functional regulator to file suspicious activity reports ("SARs") when the transactions involve or aggregate to at least \$5,000.00 and are (1) known or suspected criminal violations where the broker-dealer or mutual fund is either an actual or potential victim of a criminal violation, or the broker-dealer or mutual fund is used to facilitate a criminal transaction, or (2) involves transactions that: (a) involve funds derived from illegal activity intended or conducted to hide or disguise funds derived from such illegal activity...to violate or evade any federal law or regulation or to avoid any transaction reporting requirement under federal law or regulation; (b) designed, whether through structuring or other means, to evade the requirements of the Bank Secrecy Act; (c) appear to serve no business or apparent lawful purposes, and for which the broker-dealer or mutual fund know no reasonable explanation after examining the available facts relating to the transaction and the parties.

33. Suspicious activity reporting rules for banks are similar and require that any transaction conducted or attempted by, at or through the bank involving or aggregating \$5,000.00 or more in funds or other assets that the bank knows, suspects or has a reason to suspect: (a) involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities (including without limitation, the ownership, nature, source, location, or control of such funds or assets) as part of a plan to violate or evade any law or regulation or to avoid any money laundering regulation; (b) is designed to evade a money laundering regulation, for example, a cash reporting regulation; or (c) has no business or apparent lawful purposes or is not the sort in which a particular customer would normally be expected to engage and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction, must be reported.

34. The National Association of Securities Dealers has issued guidance for broker-dealers to help them determine whether a SAR is required. The following kinds of transactions, among others, should raise red flags, and should instigate further due diligence on the part of the broker-dealer to determine whether it should file a SAR:

34.1. The customer wishes to engage in transactions that lack business sense or apparent investment strategy, or are inconsistent with the customer's stated business strategy.

34.2. The customer exhibits a lack of concern regarding risks, commissions, or other transaction costs.

34.3. For no apparent reason, the customer has multiple accounts under a single name or multiple names, with a large number of inter-account or third-party transactions.

34.4. The customer's account has unexplained or sudden extensive wire activity, especially in accounts that had little or no previous activity.

34.5. The customer's account has a large number of wire transfers to unrelated third parties inconsistent with the customer's legitimate business purpose.

34.6. The customer makes a funds deposit followed by an immediate request that the money be wired out or transferred to a third party, or to another firm, without any apparent business purpose.

34.7. The customer makes a funds deposit for the purpose of purchasing a long-term investment followed shortly thereafter by a request to liquidate the position and transfer the proceeds out of the account.

34.8. The customer's account shows an unexplained high level of account activity with very low levels of securities transactions.

35. The Federal Financial Institutions Examination Council has provided a list of red flags for banks. These indicators point to situations in which the bank should perform additional due diligence to determine whether the bank should file a SAR. These include the following:

35.1. A customer who conducts a number of transactions, which individually do not meet reporting requirements, such as for currency transactions, but taken together, do reach such levels.

35.2. Numerous transactions are conducted in even dollar amounts.

35.3. Transactions not consistent with the customer's known business or income level.

35.4. A customer maintains multiple accounts at a bank for no apparent legitimate reason. Inter-account transfers are evidence of common control.

35.5. Accounts with a high volume of activity, which carry low balances or are frequently overdrawn, may be indicative of money laundering.

35.6. A customer may repeatedly buy a number of official bank checks with no apparent legitimate reason.

35.7. Frequent wire transfers may not be justified given the nature of the business of the customer.

35.8. The customer has a high volume of incoming and outgoing wire transfers but maintains low or overdrawn account balances.

35.9. There is a pattern of wire transfers of similar amounts both in and out of the customer's account on the same day or the next day.

36. All banks and broker-dealers are required to establish and maintain procedures and systems to enable them to comply with the FinCEN Laws, and the guidance provided by regulatory agencies. These systems require a group of people and automated computer monitoring. Computerized systems also include detection protocols for finding overdrafts, payments against uncollected funds, and potential Ponzi schemes, among other things, to enable users to protect themselves against fraud, and to guard against money laundering and other crimes.

36.1. On information and belief, the Trustee asserts that MACC had computer and other systems in place at all relevant times to assure its compliance with the FinCEN Laws.

36.2. On information and belief, the Trustee asserts that Regions/AmSouth had computer and other systems in place at all relevant times to assure its compliance with the FinCEN Laws. In addition, as of October, 2004, Regions/AmSouth was required by the terms of a consent order with the Federal Reserve Board to have such systems in place. Among other things, the consent order requires Regions/AmSouth to develop a management and reporting structure for its anti-money laundering compliance, customer

due diligence, and fraud detection programs appropriate for its size and complexity, and to insure that these departments are adequately staffed.

#### WHAT MACC KNEW AND DID

37. On or about September 5, 2001, 1Point entered into an Institutional Brokerage Agreement with MACC (the “MACC Agreement”). Exhibit 1. The MACC Agreement describes 1Point as a “TPP”, meaning third party provider. It acknowledges that 1Point acts as agent, trustee, or TPA for 401(k) plans.

38. The MACC Agreement requires 1Point to open one or more accounts for each of its customer plans.

39. The MACC Agreement requires that each of 1Point’s customer’s plans execute a Confirmation of Authorization that names the person authorized to direct investments in the account. The form of Confirmation of Authorization is attached to the MACC Agreement as Schedule A. That person will then give instructions to MACC for investments of plan assets in securities. Stokes executed one Confirmation of Authorization, on behalf of the 1Point 401(k) Plan. No other entity delivered to MACC a Confirmation of Authorization.

40. MACC maintained an account, # XXXXX4438, at Sky Bank. All deposits and payments were made from that account.

41. Deposits were identified to MACC customers by a “bin” number. In the case of 1Point, the deposits were credited to the account, with the reference number, 1Point bin. In this way, MACC was able to keep track of deposits by its customers. Employees of MACC were responsible for identifying every deposit to a specific bin number.

42. Twenty-five of the 401(k) Plan customers of 1Point already had functioning plans. Stokes told those clients to instruct their existing trustees to liquidate their portfolios and wire the money to the 1Point 401K account at MACC. Of these 401(k) Plans, 15 are Depleted 401(k) Plans, which deposited a total of \$8,633,854.28 at MACC. The remaining 401(k) Plans were repaid the total balances due to them. The primary source of repayment was funds from the Depleted 401(k) Plans.

43. After the initial transfer of existing funds to MACC, at least two Depleted 401(k) Plans regularly sent cash to MACC for employee and employer contributions. Most sent subsequent contributions to Regions/AmSouth. From December 1, 2001, to January 6, 2006, the total amount transferred to MACC by 401(k) Plan customers of 1Point was approximately \$13,800,000.00.

44. All transfers to MACC were made by funds transfer, either a wire transfer or ACH. Every transfer was evidenced by a document, either a wire advice or an ACH advice. Substantially all of these documents contained information sufficient to identify the Depleted 401(k) Plan whose funds were transferred. This document was delivered to employees of

MACC. This document was the only document MACC had to identify the bin number which was to be credited in the funds transfer.

45. The wire advices in each case demonstrate that the funds transferred were the property of a 401(k) plan. The only remittance advice, evidencing an ACH transaction, indicated that the payment was made from payroll, an indication that the money was not a payment to 1Point, but rather was a transfer for some other purpose.

46. All of those funds transferred by Depleted 401(k) Plans were directed to the 1Point 401K Account at MACC. All of those funds were deposited directly into the same bin at MACC, under the name "1Point 401Administrative Services".

47. Despite the requirement in the Institutional Brokerage Agreement, MACC did not have any Confirmation of Authorization from any of the 401(k) Plans which transferred money to MACC. This includes the Depleted 401(k) Plans. Without that document, MACC had no reason to believe that it had the right to accept instructions from 1Point as to the disposition of the money.

48. 1Point made its first deposit at MACC on December 12, 2001, a deposit of \$34,992.50. This was followed by a withdrawal of about half that amount, characterized as a loan.

49. On January 3, 2002, there was a deposit by wire transfer of \$262,833.10 from the "Briscoe Bros QRP" to bin # 1Point.

50. Money continued to flow into the 1Point bin over the next few weeks from new 401(k) plan customers of 1Point. By March 20, 2002, the cash balance in the account was \$930,076.42. On March 28, 2002, Stokes purchased securities in the 1Point bin for the first time. The aggregate amount of the purchase was \$771,374.01 that day, and an additional \$3,210.33 a few days later.

51. There were purchases of securities in the 1Point bin on May 21 and 23, 2002, in the total amount of \$102,024.40.

52. After a series of deposits into and wire transfers out of MACC, there was a purchase of securities on August 20, 2002. On that date, the aggregate net purchases of securities from the 1Point bin was \$978,079.59. After that purchase of securities, there were deposits into and wire transfers out of the 1Point bin at MACC; however, there was never another purchase of securities in that bin from that August 20, 2002, purchase until the bin was emptied in January, 2006.

53. Despite the requirement in the Institutional Brokerage Agreement that there be a separate account for each plan, only three separate accounts were created for customers of 1Point – one for ExpressPay, one for Tatham, and one for Greenpeace. Each was identified by a separate bin. None of these entities executed a Confirmation of Authorization.

54. Each of the three separate bins was opened with a transfer from the main 1Point account. None of the three separate bins held the amount of funds actually contributed by the customer, nor were funds invested as required by the owner. Each of the three bins was terminated by the

gradual sale of securities and the transfer of funds from the separate account back to the main 1Point bin.

55. There were two transfers of funds from the 1Point bin to the ExpressPay 401k Plan bin, one in September, 2002, and the other in November, 2002, totaling \$535,351.74. There were three purchases of securities, beginning October 3, 2002, and ending November 8, 2002, totaling \$431,317.62. There was an unexplained transfer of \$69,650.50 to a third party on November 14, 2002. There were no further purchases. The securities were gradually liquidated and the proceeds were all transferred to the 1Point 401(k) account at Regions/AmSouth by May, 2004.

56. On May 28, 2002, there was a transfer to the Tatham bin from the 1Point bin in the amount of \$701,238.29. Securities were purchased shortly thereafter in the amount of \$672,182.38. There was another purchase in the Tatham bin on August 20, 2002, in the amount of \$29,103.90.

57. In 2004, there were further transfers between the Tatham bin and the 1Point bin. There were purchases and sales of securities, with the last purchase in January, 2005. Then there were sales of securities, and all proceeds were transferred to the 1Point bin until the Tatham bin was exhausted in January, 2006.

58. Greenpeace wired to MACC a total of \$1,597,487.01 for its 401(k). The funds went into the 1Point Bin. The Greenpeace bin was opened in January, 2005, with a transfer from the 1Point bin of \$45,837.23. Of that, \$15,128.07 was used to purchase securities. There were no further purchases. The cash remaining in the Greenpeace bin was transferred to the 1Point bin in several transactions in February and March, 2005. The securities were liquidated around August 1, 2005, and the cash transferred to the 1Point bin shortly thereafter.

59. The total amount of securities purchased by 1Point for all accounts was \$2,234,682.03, less than 17% of the money that flowed through MACC from the 401(k) Plan.

60. The MACC Agreement contemplates that 1Point or the 401(k) Plans would receive certain payments on account of investments in mutual funds. 1Point's failure to invest most of the available funds meant that neither 1Point nor the plans received such payments.

61. The MACC Agreement contemplates that MACC will receive payments for its services. Among other things, MACC is allowed to keep all interest earned on uninvested funds. 1Point allowed large balances to remain uninvested for substantial periods of time, allowing MACC to retain unknown but apparently substantial interest income. For example, for the six months beginning January 15, 2003, through July 15, 2003, the average daily uninvested balance in the 1Point bin was in excess of \$1,005,000.00.

62. From the outset of the relationship between 1Point and MACC, neither dealt with the accounts in a normal, expected manner.

62.1. On August 22, 2002, MACC received a wire transfer of \$380,381.10 from ExpressPay. \$134,283.05 was transferred to the ExpressPay bin, and most of that was used to purchase securities. The balance remained at MACC uninvested. A portion was

wired to the account of another 401(k) Plan at a third party bank. On November 27, 2002, the balance was withdrawn from MACC. It was sent to the 1Point 401(k) account at Regions/AmSouth.

62.2. On October 23, 2002, MACC received \$440,641.03 from EFS, another 401(k) Plan customer. It went into the 1Point bin. On November 7, 2002, \$401,068.69 was transferred to the ExpressPay bin, and approximately 75% of that was used to purchase securities. By November 27, 2002, all money remaining from the EFS transfer in the 1Point bin at MACC had been withdrawn from MACC. Some was transferred to an account for another 401(k) plan, and some was transferred to the 1Point 401(k) account at Regions/AmSouth.

62.3. As of December 17, 2002, the 1Point bin at MACC was overdrawn. The negative balance was eliminated on January 15, 2003, when MACC received \$1,565,324.02 of Crosslin Supply 401(k) funds. None of the money was used to purchase securities. Within six weeks, \$663,755.48 had been withdrawn from the 1Point bin at MACC. By April 22, 2003, an additional \$637,091.43 had been withdrawn. It was all transferred to the 1Point 401(k) account at Regions/AmSouth.

62.4. On May 5, 2003, MACC received \$964,356.56 from Greenpeace. None of the money was used to purchase securities. In a month's time, \$563,925.17 had been withdrawn. By September, 2003, the balance of the incoming wires of January 15 and May 5 had been substantially withdrawn, as were a number of smaller incoming wires during the period. It was all transferred to the 1Point 401(k) account at Regions/AmSouth. The Greenpeace bin was not opened until January, 2005.

62.5. On April 16, 2004, MACC received \$145,896.34 also from Greenpeace. None of the money was used to purchase securities. All of the money was withdrawn within two months, along with other money wired in during the period. It was all transferred to the 1Point 401(k) account at Regions/AmSouth.

62.6. On January 4, 2005, MACC received two transfers from 1Point customers totaling \$329,176.46. None of the money was used to purchase securities. By February 16, 2005, all of the money had been withdrawn. It was all transferred to the 1Point 401(k) account at Regions/AmSouth.

62.7. On May 23 and 24, 2005, MACC received 20 wire transfers totaling \$6,085,035.59. All of this money came from the 401(k) Plan of Beck-Arnley. None of the money was used to purchase securities. By July 6, 2005, substantially all of the money had been withdrawn. \$1,648,702.07 was transferred to a trust account for the benefit of Greenpeace. \$2,297,738.01 was transferred to a trust account for the benefit of Crosslin Supply. \$449,628.75 was transferred to trust accounts for the benefit of the 401(k) plans of several other entities. \$163,027.00 was transferred to art galleries specializing in Japanese wood block prints. The balance was transferred to the 1Point 401(k) account at Regions/AmSouth.

**MACC KNEW OR SHOULD HAVE KNOWN  
THAT STOKES WAS STEALING MONEY FROM 401(K) PLANS**

63. MACC knew that 1Point was a TPA. In that capacity, 1Point was authorized to buy and sell securities for the benefit of various 401(k) plans. MACC knew that it was holding funds for the benefit of 401(k) plans, and that MACC was a trustee for those funds. MACC exercised authority or control over the management or disposition of the trust funds in its custody. MACC was a fiduciary with respect to those plans.

64. MACC knew or should have known that funds of many 401(k) plans were commingled into a single account, the 1Point 401(k) account. MACC knew or should have known that the transfers in and from the 4 bins operated by 1Point contained commingled funds and were used in a way that did not comport with the business of a TPA. This is inconsistent with the business of 1Point, and violated the MACC Agreement.

65. MACC knew or should have known that for long periods of time no securities were being purchased with funds in the 1Point account.

66. MACC knew that 1Point was indifferent to commissions, fees, and expenses.

67. MACC knew or should have known that the wiring activity in the 1Point account was unusual. It involved transfers to parties with no apparent connection to 1Point's business. The wires were sent in flurries. The wires often followed immediately upon the receipt of one or more wires from apparently unrelated third parties.

68. MACC knew or should have known that 1Point was supposed to be in the business of investing in securities on behalf of other people. MACC knew that substantial funds were deposited in the 1Point bin, but were not invested in securities. These transactions are not consistent with the activities of 401(k) plans, or with the normal activities of a TPA.

69. MACC knew or should have known that 1Point was making securities purchases in mutual funds, which should have been long-term investments, and then liquidating the positions in a short period of time and transferring the funds to other accounts. These transactions are not consistent with the activities of 401(k) plans, or with the normal activities of a TPA.

**WHAT REGIONS/AMSOUTH KNEW AND DID**

70. Regions/AmSouth knew that 1Point was a TPA, and that as part of its business, 1Point received contributions from employers and employees to be held as property of ERISA plans and distributed solely in furtherance of the purposes of the participants and beneficiaries of those plans.

71. 1Point was a large customer of Regions/AmSouth in Dickson, TN, depositing and withdrawing large sums of money each month. Stokes and his employees went to the Regions/AmSouth branch in Dickson, TN, almost every business day, depositing large numbers of checks, purchasing cashier's checks, and transferring money from one account to another.

72. Regions/AmSouth opened a number of accounts for 1Point with names that directly reference the business of 1Point as TPA, such as 1Point 401(k), 1Point FSA and 1Point HSA. Regions/AmSouth knew that the funds deposited in such accounts came from customers of 1Point, and that the funds did not belong to 1Point, but were held in trust to be used solely for the participants and beneficiaries of ERISA plans.

73. Each month, Regions/AmSouth received deposits by check or ACH from employers representing contributions to their 401(k) plans. Regions/AmSouth knew that these were deposits for such purpose, and that the funds did not belong to 1Point, but were held solely for the benefit of the plans and their participants. Depleted 401(k) Plans deposited in excess of \$5,700,000.00 at Regions/AmSouth. Cafeteria Plan customers sent an estimated \$45,000,000.00 to accounts opened by 1Point at Regions/AmSouth. An additional estimated \$1,400,000.00 was transferred from Fifth Third Bank, where 1Point briefly banked in early 2006, to 1Point accounts at Regions/AmSouth.

74. The transactions in the 1Point accounts at Regions/AmSouth triggered red flags under the FinCEN law and guidance. The red flags in turn triggered a duty on the part of Regions/AmSouth to investigate to determine whether it had further duties under the FinCEN laws, including the requirement that it file a SAR.

75. The 1Point accounts for Cafeteria Plans did not function as would be normal for Cafeteria Plans.

75.1. HSA accounts are by statute unique to each individual. None of the HSA accounts can be identified to an individual. Deposits to the 1Point HSA account were commingled with other 1Point accounts at Regions/AmSouth.

75.2. Accounts for other Cafeteria Plans are unique for each employer. Deposits to 1Point's accounts for such Cafeteria Plans were commingled. Substantially all deposits were made to a single account. Then some funds were transferred to other accounts, including accounts in the name of an employer, and to 1Point operating accounts.

75.3. TPAs typically do not have custody of customer funds. That 1Point did so is by itself outside the expected business of a TPA.

75.4. At random times, the 1Point 401(k) accounts at Regions/AmSouth received large infusions of cash. Wire advices for those infusions show that they were sent from the same source, MACC.

75.5. Checks were drawn on the 1Point 401(k) Plan account at Regions/AmSouth in small, odd dollar amounts typical of Cafeteria Plans, not the smaller number of larger, even dollar, irregular payments that would be expected in the bank account of a 401(k) Plan.

75.6. Funds in the 1Point accounts at Regions/AmSouth were regularly used to pay 1Point's business expenses. It is not normal to pay business expenses from accounts of Cafeteria Plans or 401(k) Plans.

76. On many occasions between January, 2003, and September, 2006, Stokes withdrew substantial sums from his business and personal accounts in the form of cashier's checks or cash in amounts which individually did not trigger the requirement for a Currency Transaction Report (\$10,000.00), but taken together did require such a report. For example, during the period October 1, 2003 to December 31, 2003, Stokes cashed 18 checks written on his personal account at Regions/AmSouth. Total cash exceeded \$125,000.00. Of these checks, eleven were cashed in amounts greater than \$9,000.00 but less than \$10,000.00. These transactions should have triggered Currency Transaction Reports, and should have been brought to the attention of responsible officers at Regions/AmSouth.

77. During the period October 1, 2003 to December 31, 2003, Stokes transferred over \$400,000.00 from the 1Point 401(k) account at Regions/AmSouth into his personal account at Regions/AmSouth. These transfers enabled him to withdraw cash and purchase cashier's checks from his personal account in excess of \$300,000.00.

78. On a number of occasions, Stokes withdrew funds from the Regions/AmSouth 1Point 401(k) account for his personal use. For example, on August 16, 2002, Stokes obtained a cashier's check from the 1Point 401(k) account in the amount of \$246,045.10 made payable to himself. On August 30, 2002, Stokes obtained a cashier's check from the 1Point 401(k) account in the amount of \$115,308.27 made payable to himself. On May 31, 2005, Stokes wired \$659,398.48 from MACC to the 1Point 401(k) account at Regions/AmSouth. That same day, he obtained a cashier's check in the amount of \$155,286.81 made payable to himself. Contemporaneously with each of these transfers, Stokes purchased real estate in Dickson, TN, in his own name using the cashier's checks.

79. Stokes regularly transferred money from one Regions/AmSouth bank account to another. These transfers took place by ACH, wire transfer, check, counter check, and telephone transfer. Many of these transfers took place to make up for overdrafts in the accounts.

80. Stokes regularly used money in the Regions/AmSouth accounts to pay 1Point's business and operating expenses and for personal purposes. Regions/AmSouth regularly withdrew its fees and analysis charges from the trust funds it held. The aggregate of such fees was in excess of \$500,000.00.

81. 1Point moved its accounts from Regions/AmSouth to Fifth Third Bank effective January 2, 2006. Almost immediately, the new accounts showed large overdrafts and related charges. Fifth Third closed most of the accounts in late March, 2006, for improper activity. 1Point moved back to Regions/AmSouth.

82. 1Point established at least 58 accounts at Regions/AmSouth, most of which were accounts in the names of 1Point customers, such as 1Point FSA Metro Government Account, A Helping Hand Adoption Agency, and State of Louisiana FSA. Money was transferred among accounts opened by 1Point. This was often done to make up for overdrafts.

**REGIONS/AMSOUTH KNEW OR SHOULD HAVE KNOWN THAT  
STOKES WAS STEALING MONEY FROM 401(K) PLANS AND CAFETERIA PLANS**

83. Regions/AmSouth knew that 1Point was a TPA. It knew that it was holding funds for the benefit of 401(k) plans and for the benefit of Cafeteria Plans. Regions/AmSouth knew that it was a trustee for those funds. Regions/AmSouth exercised authority or control over the management or disposition of the trust funds in its custody. Regions/AmSouth was a fiduciary with respect to those plans.

84. Regions/AmSouth knew or should have known that Stokes was withdrawing large sums of money in transactions which individually do not require a Currency Transaction Report, but taken together, do reach such levels. Regions/AmSouth knew or should have known that Stokes regularly withdrew cash in amounts just below the amount which would require a Currency Transaction Report.

85. Regions/AmSouth knew or should have known that Stokes was using cashier's checks and other transfers to withdraw substantial amounts of money from fiduciary accounts for his personal benefit.

86. Regions/AmSouth knew or should have known that Stokes was using wire transactions to send money from fiduciary accounts to accounts which were not related to the fiduciary business of the accounts.

87. Regions/AmSouth knew or should have known that Stokes was conducting a large number of transactions in even dollar amounts. Many of those transactions were for his personal benefit, or were sent to accounts which were not related to the fiduciary business of the accounts. Many of the transfers appear to have been structured to avoid the currency transfer reporting laws.

88. Regions/AmSouth knew or should have known that the transactions in its accounts were not consistent with the TPA business of 1Point.

89. Regions/AmSouth knew or should have known that the multiple accounts maintained by 1Point had no business purpose. The constant inter-account transfers evidence common control, and had no business purpose.

90. Regions/AmSouth knew that the accounts were overdrawn. It knew or should have known that there was a high volume of activity, but the collected funds and the average balances were low.

91. Regions/AmSouth knew or should have known that Stokes was buying an unusual volume of cashier's checks. There was no legitimate business purpose for such purchases.

92. There were a number of wire transfers from an account bearing a fiduciary name. Regions/AmSouth knew or should have known that the proceeds of those wire transfers were not used for fiduciary purposes, but for the ongoing business of 1Point.

93. Regions/AmSouth knew or should have known that there was an unreasonably high volume of wire transfers and cashier's checks, in connection with frequently over-drawn accounts.

94. Regions/AmSouth knew or should have known that there was a pattern of wire transfers followed by withdrawals or disbursements very shortly thereafter.

95. Regions/AmSouth collected a total of \$508,210.70 from 1Point in bank fees. Regions/AmSouth knew or should have known that the volume of the fees it was charging was unreasonable, given the nature of the accounts.

96. Regions/AmSouth knew or should have known that it was allowing fiduciary accounts to be commingled and overdrawn.

### **CAUSES OF ACTION AS TO MACC**

#### **COUNT ONE**

97. The allegations of paragraphs 1 through 96 are incorporated herein by reference.

98. MACC was in possession of assets of the Depleted 401(k) Plans. The Depleted 401(k) Plans were subject to ERISA. MACC knew that it was in possession of such assets. MACC was a fiduciary within the meaning of ERISA as to such funds.

99. MACC breached its fiduciary duties under 29 U.S.C. § 1104(a)(1) by the conduct described herein by, among other things: a) failing to act with the care, skill, prudence and diligence that a prudent person would use in administering the assets of a plan; b) by failing to invest the assets of plans so as to minimize the risk of large loss; c) by failing to act solely in the interest of plan participants and beneficiaries; d) by failing to act for the exclusive purpose of providing benefits to participants and beneficiaries; and e) by failing to discharge its duties in accordance with the documents and instruments governing the plans.

100. The above-described conduct violated the fiduciary duties owed by MACC to the Depleted 401(k) Plans and their participants. The Depleted 401(k) Plans and their participants have been harmed by these breaches of fiduciary duty.

101. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), MACC is liable to the Depleted 401(k) Plans and their participants to make good to the Depleted 401(k) Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Depleted 401(k) Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

## **COUNT TWO**

102. The allegations of paragraphs 1 through 101 are incorporated herein by reference.

103. MACC was a fiduciary within the meaning of ERISA with respect to the Depleted 401(k) Plans.

104. Barry Stokes and 1Point Solutions were parties-in-interest within the meaning of ERISA with respect to the Depleted 401(k) Plans.

105. MACC enabled Stokes and 1Point use the assets of the Depleted 401(k) Plans for their own purposes and interests.

106. MACC violated its fiduciary duties, including but not limited to those under 29 U.S.C. § 1106(a), by the conduct described herein by, among other things, knowingly causing the Plan to engage in transactions in which assets of the Depleted 401(k) Plans were transferred to, and used by, parties-in-interest with respect to the Depleted 401(k) Plans.

107. The above-described conduct violated the fiduciary duties owed to the Depleted 401(k) Plans and their participants. The Depleted 401(k) Plans and their participants have been harmed as a result of these breaches of fiduciary duty and involvement in prohibited transactions by MACC.

108. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), MACC is liable to the Depleted 401(k) Plans and their participants to make good to the Depleted 401(k) Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Depleted 401(k) Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

## **COUNT THREE**

109. The allegations of paragraphs 1 through 108 are incorporated herein by reference.

110. MACC was a fiduciary within the meaning of ERISA with respect to the Depleted 401(k) Plans.

111. MACC breached its fiduciary duties in violation of 29 U.S.C. § 1106(b)(1) by dealing with the assets of the Depleted 401(k) Plans in its own interest and for its own account, through its prohibited distributions to or for the benefit of Stokes and/or 1Point. These prohibited transactions were outside the scope of MACC's agreement with 1Point.

112. MACC breached its fiduciary duties in violation of 29 U.S.C. § 1106(b)(2) by engaging in transactions involving the Depleted 401(k) Plans for the benefit of Stokes and/or 1Point – parties whose interests were adverse to the interests of the Depleted 401(k) Plans and their participants.

113. MACC breached its fiduciary duties in violation of 29 U.S.C. § 1106(b)(3) by receiving consideration from Stokes and 1Point and from the assets of the Depleted 401(k) Plans in connection with its participation in Stokes' and 1Point's misconduct.

114. The above-described conduct violated the fiduciary duties owed to the Depleted 401(k) Plans and their participants. The Depleted 401(k) Plans and their participants have been harmed as a result of these breaches of fiduciary duty and involvement in prohibited transactions by MACC.

115. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), MACC is liable to the Depleted 401(k) Plans and their participants to make good to the Depleted 401(k) Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Depleted 401(k) Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

#### **COUNT FOUR**

116. The allegations of paragraphs 1 through 115 are incorporated herein by reference.

117. Stokes and 1Point were fiduciaries within the meaning of ERISA with respect to the Depleted 401(k) Plans. The Plaintiff is a fiduciary with respect to each of the Plans and is the successor fiduciary to Stokes and/or 1Point as fiduciary with respect to each of the Plans.

118. MACC was a fiduciary within the meaning of ERISA with respect to the Depleted 401(k) Plans.

119. The Trustee asserts that MACC knew that Stokes and 1Point were dealing with and using the assets of the Depleted 401(k) Plans for their own benefit, because Federal law requires MACC to have systems in place that would give MACC that knowledge.

120. MACC is liable for the breaches of fiduciary duties of Stokes and 1Point, pursuant to 29 U.S.C. § 1105(a)(1), because MACC participated knowingly in, and knowingly undertook to conceal, the acts or omissions of Stokes and 1Point, knowing that such acts or omissions were breaches.

121. MACC is liable for the breach of fiduciary duties of Stokes and 1Point pursuant to 29 U.S.C. § 1105(a)(2), because of its failure to comply with 29 U.S.C. § 1104(a)(1) in the administration of its fiduciary responsibilities to the Depleted 401(k) Plans and their participants which enabled Stokes and 1Point to commit breaches of their fiduciary responsibilities to the Depleted 401(k) Plans and their participants.

122. MACC is liable for the breaches of fiduciary duties of Stokes and 1Point, pursuant to 29 U.S.C. § 1105(a)(3), because MACC had knowledge of such breaches and did not make reasonable efforts under the circumstances to remedy the breaches.

123. The above-described conduct violated the fiduciary duties owed to the Depleted 401(k) Plans and their participants. The Depleted 401(k) Plans and their participants have been harmed by the breaches of fiduciary duty by MACC.

124. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), MACC is liable to the Depleted 401(k) Plans and their participants to make good to the Depleted 401(k) Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Depleted 401(k) Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

#### **COUNT FIVE**

125. The allegations of paragraphs 1 through 124 are incorporated herein by reference.

126. Stokes and 1Point were fiduciaries within the meaning of ERISA with respect to the Depleted 401(k) Plans. The Plaintiff is a fiduciary with respect to each of the Plans and is the successor fiduciary to Stokes and/or 1Point as fiduciary with respect to each of the Plans.

127. MACC is liable, in the alternative, as a non-fiduciary, pursuant to 29 U.S.C. § 1132(a)(3) for its participation in the breaches of fiduciary duties set out herein.

128. MACC knew or should have known of the circumstances involved in the breaches of fiduciary duties set out herein.

129. Pursuant to 29 U.S.C. § 1132(a)(3), the Plaintiff is entitled to obtain appropriate equitable relief to redress the violations, which could include restitution for the losses of the Depleted 401(k) Plans.

#### **COUNT SIX**

130. The allegations of paragraphs 1 through 129 are incorporated herein by reference.

131. MACC had actual knowledge that the funds it held in the 1Point bin were property of 401(k) plans. MACC regularly acts as trustee for 401(k) plans and has systems in place to enable it to act as trustee.

132. Among the documents used by MACC to enable it to carry out its duties as a trustee for 401(k) plans is the Confirmation of Authorization, a form attached to the MACC Agreement as Schedule A. That document states that each 401(k) plan which signs it authorizes MACC to follow instructions given by 1Point and Stokes. MACC did not have a Confirmation of Authorization from any of the Depleted 401(k) Plans. Even though MACC did not have actual authority from any of the Depleted 401(k) Plans to act on the instructions of 1Point and Stokes, MACC followed the instructions of 1Point and Stokes to transfer assets held for the benefit of the Depleted 401(k) Plans to or for the benefit of 1Point and Stokes.

133. 1Point and Stokes converted the assets of the Depleted 401(k) Plans for their own use and benefit. MACC knew or should have known that 1Point and Stokes were converting assets of the Depleted 401(k) Plans to their own use and benefit. Had MACC acted on its knowledge, it would have discovered the conversion of assets and would have been in a position to prevent 1Point and Stokes from further depletions. Its failure to act is a proximate cause to the injuries suffered by the Depleted 401(k) Plans.

134. MACC is liable in negligence for the losses of the Depleted 401(k) Plans, plus prejudgment interest, and such other damages as allowed by law.

#### **COUNT SEVEN**

135. The allegations of paragraphs 1 through 134 are incorporated herein by reference.

136. 1Point and Stokes committed fraud on the Depleted 401(k) Plans. MACC knew of the existence of the fraud. Without the actions of MACC, the fraud would not have occurred.

137. MACC's failure to act on its knowledge constituted aiding and abetting the conversion of the assets of the Depleted 401(k) Plans by 1Point and Stokes. MACC is liable for the losses of the Depleted 401(k) Plans, plus prejudgment interest, and such other damages as allowed by law.

#### **COUNT EIGHT**

138. The allegations of paragraphs 1 through 137 are incorporated herein by reference.

139. 1Point and Stokes were fiduciaries with respect to the Depleted 401(k) Plans. MACC was a fiduciary for the Depleted 401(k) Plans also. 1Point and Stokes breached their fiduciary obligations to the Depleted 401(k) Plans. MACC knowingly participated in the breach. The Depleted 401(k) Plans suffered damage as a result of the breach. The Trustee is a proper party to assert the claims of the Depleted 401(k) Plans.

140. MACC is liable under state law to the Depleted 401(k) Plans for aiding and abetting a breach of fiduciary duty. MACC is liable for the losses of the Depleted 401(k) Plans, plus prejudgment interest, and such other damages as allowed by law.

#### **CAUSES OF ACTION AS TO REGIONS/AMSOUTH**

#### **COUNT NINE**

141. The allegations of paragraphs 1 through 140 are incorporated herein by reference.

142. Regions/AmSouth was in possession of assets of the Victim Plans. The Victim Plans were subject to ERISA. Regions/AmSouth knew that it was in possession of assets belonging to plans subject to ERISA, including the Victim Plans. Regions/AmSouth was a fiduciary within the meaning of ERISA as to such funds.

143. Regions/AmSouth breached its fiduciary duties under 29 U.S.C. § 1104(a)(1) by the conduct described herein by, among other things: a) failing to act with the care, skill, prudence and diligence that a prudent person would use in administering the assets of a plan; b) by failing to invest the assets of plans so as to minimize the risk of large loss; c) by failing to act solely in the interest of plan participants and beneficiaries; d) by failing to act for the exclusive purpose of providing benefits to participants and beneficiaries; and e) by failing to discharge its duties in accordance with the documents and instruments governing the plans.

144. The above-described conduct violated the fiduciary duties owed by Regions/AmSouth to the Victim Plans and their participants. The Victim Plans and their participants have been harmed by these breaches of fiduciary duty.

145. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), Regions/AmSouth is liable to the Victim Plans and their participants to make good to the Victim Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Victim Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

#### **COUNT TEN**

146. The allegations of paragraphs 1 through 145 are incorporated herein by reference.

147. Regions/AmSouth was a fiduciary within the meaning of ERISA with respect to the Victim Plans.

148. Barry Stokes and 1Point Solutions were parties-in-interest within the meaning of ERISA with respect to the Victim Plans.

149. Regions/AmSouth enabled Stokes and 1Point use the assets of the Victim Plans for their own purposes and interests.

150. Regions/AmSouth violated its fiduciary duties, including but not limited to those under 29 U.S.C. § 1106(a), by the conduct described herein by, among other things, knowingly causing the Plan to engage in transactions in which assets of the Victim Plans were transferred to, and used by, parties-in-interest with respect to the Victim Plans.

151. The above-described conduct violated the fiduciary duties owed to the Victim Plans and their participants. The Victim Plans and their participants have been harmed as a result of these breaches of fiduciary duty and involvement in prohibited transactions by Regions/AmSouth.

152. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), Regions/AmSouth is liable to the Victim Plans and their participants to make good to the Victim Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Victim Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

#### **COUNT ELEVEN**

153. The allegations of paragraphs 1 through 152 are incorporated herein by reference.

154. Regions/AmSouth was a fiduciary within the meaning of ERISA with respect to the Victim Plans.

155. Regions/AmSouth breached its fiduciary duties in violation of 29 U.S.C. § 1106(b)(1) by dealing with the assets of the Victim Plans in its own interest and for its own account, through its prohibited distributions to or for the benefit of Stokes and/or 1Point. These prohibited transactions were outside the scope of Regions/AmSouth's agreement with 1Point.

156. Regions/AmSouth breached its fiduciary duties in violation of 29 U.S.C. § 1106(b)(2) by engaging in transactions involving the Victim Plans for the benefit of Stokes and/or 1Point parties whose interests were adverse to the interests of the Victim Plans and their participants.

157. Regions/AmSouth breached its fiduciary duties in violation of 29 U.S.C. § 1106(b)(3) by receiving consideration from Stokes and 1Point and from the assets of the Victim Plans in connection with its participation in Stokes' and 1Point's misconduct.

158. The above-described conduct violated the fiduciary duties owed to the Victim Plans and their participants. The Victim Plans and their participants have been harmed as a result of these breaches of fiduciary duty and involvement in prohibited transactions by Regions/AmSouth.

159. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), Regions/AmSouth is liable to the Victim Plans and their participants to make good to the Victim Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Victim Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

#### **COUNT TWELVE**

160. The allegations of paragraphs 1 through 159 are incorporated herein by reference.

161. Stokes and 1Point were fiduciaries within the meaning of ERISA with respect to the Victim Plans. The Plaintiff is a fiduciary with respect to each of the Plans and is the successor fiduciary to Stokes and/or 1Point as fiduciary with respect to each of the Plans.

162. Regions/AmSouth was a fiduciary within the meaning of ERISA with respect to the Victim Plans.

163. The Trustee asserts that Regions/AmSouth knew that Stokes and 1Point were dealing with and using the assets of the Victim Plans for Regions/AmSouth own benefit, because Federal law requires them to have systems in place that would give Regions/AmSouth that knowledge. Agents of Regions/AmSouth dealt with Stokes and 1Point on a daily basis. The business of 1Point was so important to Regions/AmSouth that it exempted the accounts when its predecessor, First American National Bank, sold its branch operations in Dickson, TN, so that it retained the accounts of 1Point. 1Point was a well-known business in Dickson, TN, and its operations were well known to Regions/AmSouth personnel in Dickson and in Nashville.

164. Regions/AmSouth is liable for the breaches of fiduciary duties of Stokes and 1Point, pursuant to 29 U.S.C. § 1105(a)(1), because Regions/AmSouth participated knowingly in, and knowingly undertook to conceal, the acts or omissions of Stokes and 1Point, knowing that such acts or omissions were breaches.

165. Regions/AmSouth is liable for the breach of fiduciary duties of Stokes and 1Point pursuant to 29 U.S.C. § 1105(a)(2), because of its failure to comply with 19 U.S.C. § 1104(a)(1), in the administration of its fiduciary responsibilities to the Victim Plans and their participants, which enabled Stokes and 1Point to commit breaches of their fiduciary responsibilities to the Victim Plans and their participants.

166. Regions/AmSouth is liable for the breaches of fiduciary duties of Stokes and 1Point, pursuant to 29 U.S.C. § 1105(a)(3) because Regions/AmSouth had knowledge of such breaches and did not make reasonable efforts under the circumstances to remedy the breaches.

167. The above-described conduct violated the fiduciary duties owed to the Victim Plans and their participants. The Victim Plans and their participants have been harmed as a result of these breaches of fiduciary duty and involvement in prohibited transactions by Regions/AmSouth.

168. Pursuant to 29 U.S.C. §§ 1109 and 1132(a)(2), Regions/AmSouth is liable to the Victim Plans and their participants to make good to the Victim Plans and their participants all losses resulting from its breaches of fiduciary duty, and to restore all profits which have been made through use of assets of the Victim Plans, and shall be subject to such other equitable or remedial relief as the court may deem appropriate.

### **COUNT THIRTEEN**

169. The allegations of paragraphs 1 through 168 are incorporated herein by reference.

170. Stokes and 1Point were fiduciaries within the meaning of ERISA with respect to the Victim Plans. The Plaintiff is a fiduciary with respect to each of the Plans, and is the successor fiduciary to Stokes and/or 1Point as fiduciary with respect to each of the Plans.

171. Regions/AmSouth is liable, in the alternative, as a non-fiduciary, pursuant to 29 U.S.C. § 1132(a)(3) for its participation in the breaches of fiduciary duties set out herein.

172. Regions/AmSouth knew or should have known of the circumstances involved in the breaches of fiduciary duties set out herein.

173. Pursuant to 29 U.S.C. § 1132(a)(3), the Plaintiff is entitled to obtain appropriate equitable relief to redress the violations, which could include restitution for the losses of the Victim Plans.

#### **COUNT FOURTEEN**

174. The allegations of paragraphs 1 through 173 are incorporated herein by reference.

175. Regions/AmSouth had actual knowledge that the funds it held in the 1Point accounts were property of 401(k) plans and other employee benefit plans.

176. 1Point and Stokes converted the assets of the Victim Plans for their own use and benefit. Regions/AmSouth knew or should have known that 1Point and Stokes were converting assets of the Victim Plans to their own use and benefit. Had Regions/AmSouth acted on its knowledge, it would have been in a position to prevent 1Point and Stokes from further deprecations. Its failure to act is a proximate cause to the injuries suffered by the Victim Plans.

177. Regions/AmSouth is liable in negligence for the losses of the Victim Plans, plus prejudgment interest, and such other damages as allowed by law.

#### **COUNT FIFTEEN**

178. The allegations of paragraphs 1 through 177 are incorporated herein by reference.

179. 1Point and Stokes committed fraud on the Victim Plans. Regions/AmSouth knew of the existence of the fraud. Without the actions of Regions/AmSouth, the fraud would not have occurred.

180. Regions/AmSouth's failure to act on its knowledge constituted aiding and abetting the conversion of the assets of the Victim Plans by 1Point and Stokes. Regions/AmSouth is liable for the losses of the Victim Plans, plus prejudgment interest, and such other damages as allowed by law.

#### **COUNT SIXTEEN**

181. The allegations of paragraphs 1 through 180 are incorporated herein by reference.

182. 1Point and Stokes were fiduciaries with respect to the Victim Plans. Regions/AmSouth was a fiduciary for the Victim Plans also. 1Point and Stokes breached their fiduciary obligations

to the Victim Plans. Regions/AmSouth knowingly participated in the breach. The Victim Plans suffered damage as a result of the breach. The Trustee is a proper party to assert the claims of the Victim Plans.

183. Regions/AmSouth is liable under state law to the Victim Plans for aiding and abetting a breach of fiduciary duty. Regions/AmSouth is liable for the losses of the Victim Plans, plus prejudgment interest, and such other damages as allowed by law.

**WHEREFORE**, the Plaintiff respectfully requests that the Court:

1. Award judgment in favor of the Plaintiff and against each of the Defendants for all losses incurred.
2. Award prejudgment interest, attorney's fees, and discretionary costs to the Plaintiff.
3. Provide such other legal, equitable and remedial relief as justice allows.

This 20<sup>th</sup> day of August, 2007.

By: /s/ Robert M. Garfinkle  
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Attorney for Trustee

OPENAP

**U.S. Bankruptcy Court  
Middle District of Tennessee (Nashville)  
Adversary Proceeding #: 3:07-ap-00283  
Internal Use Only**

*Assigned to:* Keith M Lundin  
*Related BK Case:* 06-05400  
*Related BK Title:* 1Point Solutions, LLC  
*Related BK Chapter:* 11  
*Demand:* \$10000000  
*Nature[s] of Suit:* 11 Recovery of money/property - 542  
turnover of property

*Date Filed:* 08/20/07

**Plaintiff**  
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V.

**Defendant**  
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**Mid-Atlantic Capital Corporation**  
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Filing Date	#	Docket Text
08/20/2007	<a href="#">1</a>	Adversary case 3:07-ap-00283. <b>Complaint by JOHN C MCLEMORE, TRUSTEE</b> against Regions Bank, Successor by Merger to AmSouth Bank, Mid-Atlantic Capital Corporation Fee Amount is \$250.00. Adversary Fee Will be Paid In Full Electronically at the Time of Filing JOHN C MCLEMORE, TRUSTEE. (Attachments: # <a href="#">1</a> Exhibit MACC Agreement) Nature of Suit: (11 (Recovery of money/property - 542 turnover of property)) (GARFINKLE, ROBERT) (Entered: 08/20/2007)
08/20/2007	<a href="#">2</a>	Adversary Cover Sheet Filed on the behalf of: Plaintiff JOHN C MCLEMORE, TRUSTEE (RE: related document(s) <a href="#">1</a> ). (GARFINKLE, ROBERT) (Entered: 08/20/2007)
08/21/2007	<a href="#">3</a>	Summons Issued to Plaintiff for Service on Mid-Atlantic Capital Corporation ; Regions Bank, Successor by Merger to AmSouth Bank Answer due by 9/20/2007.If applicable: U.S. Governmental Agency Answer due by 9/25/2007. Pretrial Conference set for 10/15/2007 at 01:30 PM at Courtroom 2 2nd Floor Customs House 701 Broadway Nashville TN 37203. (related documents <a href="#">1</a> ). (mbr, ) (Entered: 08/21/2007)
08/21/2007	<a href="#">4</a>	Notice of Appearance and Request for Notice by ROBERT J MENDES Filed on the behalf of: Interested Party MGLAW, PLLC. (MENDES, ROBERT) (Entered: 08/21/2007)
08/23/2007	<a href="#">5</a>	BNC Certificate of Mailing - PDF Document. Service Date 08/23/2007. (Admin.) (Entered: 08/24/2007)
08/27/2007	<a href="#">6</a>	Certificate of Service Regions Bank, as Successor in Interest by Merger to AmSouth Bank c/o Corporation Service Company 2908

		Poston Avenue, Nashville, TN 37203 Filed on the behalf of: Plaintiff JOHN C MCLEMORE, TRUSTEE (RE: related document(s) <a href="#">3</a> ). (GARFINKLE, ROBERT) (Entered: 08/27/2007)
08/27/2007	<a href="#">7</a>	Certificate of Service David J. Down, President and Director, Mid-Atlantic Capital Corporation The Times Building, 336 Fourth Avenue, Pittsburgh, PA 15222 Filed on the behalf of: Plaintiff JOHN C MCLEMORE, TRUSTEE (RE: related document(s) <a href="#">3</a> ). (GARFINKLE, ROBERT) (Entered: 08/27/2007)
09/14/2007	<a href="#">8</a>	Joint Motion to Continue Pretrial Conference <i>and Extend Time to Answer Complaint</i> <b>Certificate of Service mailed on 09/14/2007.</b> Filed on the behalf of: Defendant Regions Bank, Successor by Merger to AmSouth Bank. (TEITENBERG, JOHN) (Entered: 09/14/2007)
09/14/2007	<a href="#">9</a>	Submitted Order <i>on Joint Motion to Continue Pretrial Conference and Extend Time to Answer Complaint</i> Filed on the behalf of: Defendant Regions Bank, Successor by Merger to AmSouth Bank (RE: related document(s) <a href="#">8</a> ). (TEITENBERG, JOHN) (Entered: 09/14/2007)
09/14/2007	<a href="#">10</a>	Notice of Appearance and Request for Notice by CRAIG VERNON GABBERT JR Filed on the behalf of: Defendant Mid-Atlantic Capital Corporation. (GABBERT, CRAIG) (Entered: 09/14/2007)
09/18/2007	<a href="#">11</a>	Order To Continue Pretrial Conference - <i>all Defendants shall file responsive pleadings by 10/15/2007.</i> (RE: Related Doc#: <a href="#">8</a> ). Pretrial Conference set for 11/19/2007 at 01:30 PM at Courtroom 2 2nd Floor Customs House 701 Broadway Nashville TN 37203. Signed on 9/18/2007. (bmp, ) (Entered: 09/18/2007)
09/20/2007	<a href="#">12</a>	BNC Certificate of Mailing - PDF Document. Service Date 09/20/2007. (Admin.) (Entered: 09/21/2007)
09/24/2007	<a href="#">13</a>	Motion for <i>David L. McClenahan, Matthew J. Fader, and Ryan D. DeMotte</i> to Appear pro hac vice. (Attachments: # <a href="#">1</a> Collective Exhibit 1--Certificates of Good Standing) <b>Certificate of Service mailed on 9/24/2007.</b> Filed on the behalf of: Defendant Mid-Atlantic Capital Corporation. (GABBERT, CRAIG) (Entered: 09/24/2007)
09/24/2007	<a href="#">14</a>	Submitted Order <i>Granting Motion for Admission Pro Hac Vice of David L. McClenahan, Matthew J. Fader, and Ryan D. DeMotte</i> Filed on the behalf of: Defendant Mid-Atlantic Capital Corporation (RE: related document(s) <a href="#">13</a> ). (GABBERT, CRAIG) (Entered: 09/24/2007)

09/26/2007	<a href="#">15</a>	Order Granting Motion to Appear Pro Hac Vice (Related Doc # <a href="#">13</a> ) of <i>David L. McClenahan, Matthew J. Fader, and Ryan D. DeMotte</i> . BY THE COURT: Judge Keith M. Lundin. (bmp, ) (Entered: 09/26/2007)
09/28/2007	<a href="#">16</a>	BNC Certificate of Mailing - PDF Document. Service Date 09/28/2007. (Admin.) (Entered: 09/29/2007)
10/01/2007	<a href="#">17</a>	Notice of Appearance and Request for Notice by JOHN R WINGO Filed on the behalf of: Defendant Regions Bank, Successor by Merger to AmSouth Bank. (WINGO, JOHN) (Entered: 10/01/2007)
10/15/2007	<a href="#">18</a>	Motion to Dismiss Adversary Proceeding <i>Against Mid-Atlantic Capital Corporation</i> <b>Certificate of Service mailed on October 15, 2007</b> . Filed on the behalf of: Defendant Mid-Atlantic Capital Corporation. (HOLMES, BARBARA) (Entered: 10/15/2007)
10/15/2007	<a href="#">19</a>	Brief in Support of <i>Defendant Mid-Atlantic Capital Corporation's Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted</i> (Attachments: # <a href="#">1</a> Exhibit 1 - Heritage Equity Group, et al v. Mid-Atlantic Capital Corp Complaint# <a href="#">2</a> Exhibit 2 - Westlaw Case Plassman v. City of Wauseon# <a href="#">3</a> Exhibit 3 - Westlaw Case Kloots v. American Express Tax & Business Services, Inc.) Filed on the behalf of: Defendant Mid-Atlantic Capital Corporation (RE: related document(s) <a href="#">18</a> ). (HOLMES, BARBARA) (Entered: 10/15/2007)
10/15/2007	<a href="#">20</a>	Motion to Dismiss Adversary Proceeding <b>Certificate of Service mailed on 10/15/2007</b> . Filed on the behalf of: Defendant Regions Bank, Successor by Merger to AmSouth Bank. (WINGO, JOHN) (Entered: 10/15/2007)
10/15/2007	<a href="#">21</a>	ENTRY of Disclosure of Corporate Affiliations Filed on the behalf of: Defendant Regions Bank, Successor by Merger to AmSouth Bank. (WINGO, JOHN) (Entered: 10/15/2007)
10/15/2007	<a href="#">22</a>	Defendant's Memorandum <i>in Support of Motion to Dismiss</i> (Attachments: # <a href="#">1</a> Exhibit A# <a href="#">2</a> Exhibit B# <a href="#">3</a> Exhibit C# <a href="#">4</a> Exhibit D) Filed on the behalf of: Defendant Regions Bank, Successor by Merger to AmSouth Bank (RE: related document(s) <a href="#">20</a> ). (WINGO, JOHN) (Entered: 10/15/2007)
11/15/2007	<a href="#">23</a>	Joint Pretrial Statement Filed on the behalf of: Plaintiff JOHN C MCLEMORE, TRUSTEE. (GARFINKLE, ROBERT) (Entered: 11/15/2007)
11/19/2007	24	Memo of Proceedings: Decision:TRIAL SET FOR WEEK OF 10-27-08. Order to be Submitted by: Court (RE: related documents(s) <a href="#">3</a> (mbr) (Entered: 11/19/2007)

11/20/2007	 <a href="#">25</a>	PreTrial Order Re: <i>terms &amp; guidelines</i> Trial date set for 10/27/2008 at 09:00 AM at Courtroom 2 2nd Floor Customs House 701 Broadway Nashville TN 37203. Signed on 11/20/2007. (pgs, ) (Entered: 11/20/2007)
11/22/2007	 <a href="#">26</a>	BNC Certificate of Mailing - PDF Document. Service Date 11/22/2007. (Admin.) (Entered: 11/23/2007)
01/02/2008	 <a href="#">27</a>	Motion for Withdrawal of Reference -- <i>Motion to Withdraw the Reference</i> --. Fee Amount is \$150.00 (Attachments: # <a href="#">1</a> Exhibit 1-First Amended Complaint# <a href="#">2</a> Exhibit 2 Trustee's Complaint) <b>Certificate of Service mailed on 1/2/08</b> . Filed on the behalf of: Defendant Mid-Atlantic Capital Corporation. (HOLMES, BARBARA) (Entered: 01/02/2008)
01/02/2008	28	Receipt of Motion for Withdrawal of Reference(3:07-ap-00283) [motion,mwdref] ( 150.00) Filing Fee. Receipt number 2392018. Fee amount \$ 150.00. (U.S. Treasury) (Entered: 01/02/2008)