

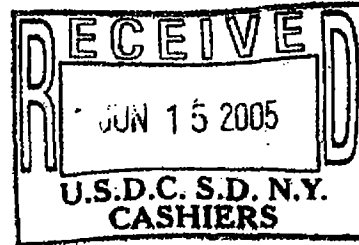
**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**In Re Marsh ERISA Litigation**

**Master File No.: 04 cv 8157 (SWK)**

**This Document Relates to:**

**All Actions**



**CONSOLIDATED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE  
EMPLOYEE RETIREMENT INCOME SECURITY ACT**

**KELLER ROHRBACK L.L.P.**

Lynn Lincoln Sarko  
Ron Kilgard  
Margaret E. Wetherald  
Erin M. Riley  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Tel: (206) 623-1900  
Fax: (206) 623-3384  
*Lead Counsel/Chair of Executive Committee*

**SCHATZ & NOBEL, P.C.**

Robert IZard  
Wayne Boulton  
Eric Palmquist  
One Corporate Center  
20 Church Street  
Hartford, CT 06103  
Tel: (800) 797-5499  
Fax: (860) 493-6290  
*Member of Executive Committee*

**COHEN MILSTEIN HAUSFELD & TOLL,  
P.L.L.C.**

Marc Machiz  
Bruce Rinaldi  
Cohen, Milstein, Hausfeld & Toll, P.L.L.C.  
1 South Broad Street, Suite 1850  
Philadelphia, PA 19107  
Tel: (215) 825-4010  
Fax: (215) 825-4001  
*Member of Executive Committee*

**GOODKIND, LABATON  
RUDOFF & SUCHAROW LLP**

Lynda Grant  
Stacey Fishbein  
100 Park Avenue  
New York, NY 10017  
Tel: (212) 907-0700  
Fax: (212) 818-0477  
*Liaison Counsel/Member of Executive  
Committee*

For their Consolidated Class Action Complaint for Violations of the Employee Retirement Income Security Act (the “Complaint”), Plaintiffs allege as follows:

## I. INTRODUCTION

1. This is a class action brought by participants in the Marsh & McLennan Companies Stock Investment Plan (the “Plan”) pursuant to §§ 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plan for the violations of ERISA.

2. The Plan is a retirement plan sponsored by the Marsh & McLennan Companies (“MMC” or the “Company”).

3. Plaintiffs’ claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan’s assets during the period July 1, 2000 to January 31, 2005 (the “Class Period”).

4. Specifically, Plaintiffs allege in Count I that the Defendants who were responsible for the investment of the assets of the Plan breached their fiduciary duties to Plaintiffs in violation of ERISA by failing to prudently and loyally manage the Plan’s investment in MMC stock. In Count II, Plaintiffs allege that the Defendants who were responsible for communicating with participants regarding the Plan’s assets failed to provide participants with complete and accurate information regarding MMC stock sufficient to advise participants of the true risks of investing their retirement savings in MMC stock. In Count III, Plaintiffs allege that the Defendants who were responsible for the selection, removal, and, thus, monitoring of the Plan’s other fiduciaries failed to properly monitor the performance of their fiduciary appointees and remove and replace those whose performance was inadequate. In Count IV, Plaintiffs allege that Defendants

breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, complete and accurate communications, and adequate monitoring. Finally, in Count V, Plaintiffs state a claim against MMC for knowing participation in the fiduciary breaches alleged below.

5. As more fully explained below, during the Class Period, Defendants imprudently permitted the Plan to hold and acquire hundreds of millions of dollars in MMC stock. They did so despite the fact that Defendants knew or should have known that MMC and/or its wholly-owned subsidiaries were engaging in activities such as bid rigging and price fixing, which were risky, illegal, and artificially inflated the value of MMC stock. As a result, MMC stock no longer was a prudent and appropriate investment for participants' retirement savings. Defendants' breaches caused the Plan to incur enormous losses.

6. This action is brought on behalf of the Plan and seeks losses to the Plan for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Plaintiffs seek other equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, equitable tracing, and other monetary relief.

7. As a matter of substantive law, ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. An appropriate procedural vehicle to assert such claims is a class action pursuant to Fed. R. Civ. P. 23, and Plaintiffs bring this action as a class action on behalf of all participants and beneficiaries of the Plan during the Class Period.

8. In addition, because the information and documents on which Plaintiffs' claims are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs' allegations are by necessity upon information and belief. At such time as Plaintiffs have had the opportunity to conduct discovery, Plaintiffs will, to the extent necessary and appropriate, amend this Complaint, or, if required, seek leave to amend, to add such other additional facts as are discovered that further support their claims.

## II. JURISDICTION AND VENUE

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

10. **Personal Jurisdiction.** ERISA provides for nation-wide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All of the Defendants are either residents of the United States or subject to service in the United States and this Court therefore has personal jurisdiction over them. This Court also has personal jurisdiction over them pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in the State of New York.

11. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and/or some Defendants reside and/or transact business in this district.

## III. PARTIES

### A. Plaintiffs

12. **Plaintiff Donald Hundley (“Hundley ”)** is a resident of Virginia. He worked for a subsidiary of MMC from April, 1980 through June, 2000 and is a current participant of the Plan.

During the Class Period, as a result of his and the Company's contributions, Hundley held shares of MMC stock in his Plan account.

13. **Plaintiff Conrad Simon ("Simon")** is a resident of Virginia. He worked for a subsidiary of MMC from July 1991 through November 1997 and is a current participant of the Plan. During the Class Period, as a result of his and the Company's contributions, Simon held shares of MMC stock in his Plan account.

14. **Plaintiff Leticia Hernandez ("Hernandez")** is a resident of Florida. She worked for Johnson & Higgins, Inc. from 1987 until it was acquired by a subsidiary of MMC in 1997 and continued working for the subsidiary until August 2003. She began participation in the Plan effective January 1, 1999. During the Class Period, as a result of her and the Company's contributions, Hernandez held and acquired shares of MMC stock in her Plan account.

## **B. Defendants**

15. The Defendants are identified in paragraphs 16 to 31 below. All of the Defendants are fiduciaries of the Plan within the meaning of ERISA, as is explained below in Section V. ("Defendants' Fiduciary Status"), and all of them breached their fiduciary duties in various ways as is explained in Section IX. ("Causes of Action").

16. **Defendant MMC.** MMC is a Delaware corporation with its principal place of business in New York, New York. MMC is a professional services firm with origins dating from 1871 which provides analysis, advice, and transactional capabilities to its clients through its subsidiaries and affiliates. MMC is the parent company of three major subsidiaries: Marsh Inc. ("Marsh"), a risk and insurance services firm; Putnam Investments LLC ("Putnam"), an investment management company; and Mercer Inc. ("Mercer"), a provider of consulting services. Marsh is the core, traditional business of MMC, and it has the largest market share of

any insurance broker in the world. Of the three MMC subsidiaries, Marsh is by far the largest; its revenues are one and a half times as large as those of Putnam and Mercer combined.

**17. Defendant Jeffrey W. Greenberg (“Greenberg”).** During the Class Period up to October, 2004, Defendant Greenberg was the Chief Executive Officer and Chairman of the Board of MMC.

**18. Board of Directors and Its Members.** The MMC Board of Directors is the governing body of MMC under its charter, its bylaws, and applicable Delaware law. In addition to Defendant Greenberg, the members of the Board during the Class Period included:

(a) **Defendant Lewis Bernard (“Bernard”)** served as a director of the Company from 1992 to the present, and served on the Executive Committee and as chair of the Compensation Committee during the Class Period.

(b) **Defendant Frank Borelli (“Borelli”)** served as a director of the Company from 1988 to October, 2000.

(c) **Defendant Mathis Cabiallavetta (“Cabiallavetta”)** served as a director of the Company from 2000 to 2004, and served as Vice Chairman of MMC, Chairman of MMC Global Development and a member of MMC's international advisory board during the Class Period.

(d) **Defendant Zachary W. Carter (“Carter”)** served as a director of the Company from 2004 to the present, and served on the Audit Committee during the Class Period;

(e) **Defendant Michael Cherkasky (“Cherkasky”)** served as a director of the Company from 2004 to the present, replaced Defendant Greenberg as Chairman and CEO of the Company in October, 2004, and served as Chairman and Chief Executive Officer of Marsh.

(f) **Defendant Peter Coster (“Coster”)** served as a director of the Company from 1988 to 2004, and served as President of Mercer during the Class Period.

(g) **Defendant Charles A. Davis (“Davis”)** served as a director of the Company from 2000 to 2004, and served as Vice Chairman of MMC, and President, Chairman, and Chief Executive Officer of MMC Capital during the Class Period.

(h) **Defendant Robert F. Erburu (“Erburu”)** served as a director of the Company from 1996 to the present, and during the Class Period, served on the Compensation Committee and as the Chairman of the Directors & Governance Committee.

(i) **Defendant Oscar Fanjul (“Fanjul”)** served as a director of the Company from 2001 to the present, and served on the Audit Committee, and Compensation Committee during the Class Period.

(j) **Defendant Ray J. Groves (“Groves”)** served as a director of the Company from 1994 to 2004, and, during the Class Period, served as Chairman and Chief Executive Officer, President, and Chief Operating Officer of Marsh.

(k) **Defendant Stephen R. Hardis (“Hardis”)** served as a director of the Company from 1998 to the present, also serving on the Executive Committee, and as chair of the Audit Committee during the Class Period.

(l) **Defendant Gwendolyn S. King (“King”)** served as a director of the Company from 1998 to the present, and served on the Audit Committee, and the Directors & Governance Committee during the Class Period.

(m) **Defendant Lawrence J. Lasser (“Lasser”)** served as a director of the Company from 1987 to 2003, and served as President and Chief Executive Officer of Putnam during the Class Period.

(n) **Defendant Rt. Hon. Lord Lang of Monkton (“Lord Lang”)** served as a director of the Company from 1997 to the present, serving on the Executive Committee, the Compensation Committee, and the Directors & Governance Committee, during the Class Period.

(o) **Defendant David A. Olsen (“Olsen”)** served as a director of the Company from 1997 to the present, and served on the Audit Committee during the Class Period.

(p) **Defendant John D. Ong (“Ong”)** served as a director of the Company from 1998 to 2002.

(q) **Defendant Morton O. Schapiro (“Schapiro”)** served as a director of the Company from 2002 to the present, serving on the Compensation Committee, and the Directors & Governance Committee, during the Class Period.

(r) **Defendant Adele Simmons (“Simmons”)** served as a director of the Company from 1978 to the present, and served on the Executive Committee, and the Audit Committee, during the Class Period.

(s) **Defendant John T. Sinnott (“Sinnott”)** served as a director of the Company from 1992 to 2003, and, during the Class Period, served as Chairman and Chief Executive Officer of Marsh, and as Vice Chairman and Chief Executive Officer of J&H Marsh & McLennan, Inc.

(t) **Defendant A.J.C. Smith (“Smith”)** served as a director of the Company from 1977 to 2004, served on the Executive Committee during the Class Period, served as Chairman of Putnam during the Class Period, while prior to the Class Period, he served as Chairman and Chief Executive Officer of MMC.

19. As is explained in more detail below, the Board had certain appointment and oversight responsibilities with respect to the Plan. The Board and its members listed above, including Defendant Greenberg, are referred to as the “Director Defendants.”

**20. Defendant Investment Committee and Its Members** According to MMC’s Employee Benefit Plan Guidelines, dated May 15, 1986, Doc. Nos. MMC-NY-ER 00676-78 (the “1986 Guidelines”),<sup>1</sup> MMC established an Investment Committee (the “Investment Committee”) which, as explained in more detail below, had responsibility for all aspects of investment management and performance. At all relevant times, the members of the Investment Committee were, upon information and belief, all employees, officers, or directors of MMC.

21. Upon information and belief, in 2003 the Investment Committee was renamed the “Benefits Investment Committee” pursuant to the Employee Benefit Plan Guidelines Effective as of September 18, 2003, Doc. Nos. MMC-NY-ER 0831-834 (the “2003 Guidelines”),<sup>2</sup> and the Benefit Plan Governance Committee Structure, Doc. Nos. MMC-NY-ER 00682 (the “Governance Committee Structure”).<sup>3</sup>

22. The Plan documents, which are more fully described below in paragraphs 35 to 38, do not specifically refer to the Investment Committee until 2003. *See* Marsh & McLennan Companies Stock Investment Plan, dated April 5, 1999, amended December 20, 2000, Doc. Nos. MMC-NY-ER 00475-583 (the “1999 Plan Document”)<sup>4</sup>; Marsh & McLennan Companies Stock Investment Plan, effective January 1, 2001, signed March 8, 2002, Doc. Nos. MMC-NY-ER 00584-675 (the “2001 Plan Document”)<sup>5</sup>; Marsh & McLennan Companies Stock Investment

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<sup>1</sup> Copy attached as Exhibit A.

<sup>2</sup> Copy attached as Exhibit B.

<sup>3</sup> Copy attached as Exhibit C.

<sup>4</sup> Copy attached as Exhibit D.

<sup>5</sup> Copy attached as Exhibit E.

Plan, effective August 1, 2003, signed April 5, 2004, Doc. Nos. MMC-NY-ER 00110-196 (the “2003 Plan Document”).<sup>6</sup> The 1999 and 2001 Plan Documents refer only to a “Committee.” Upon information and belief, in the period before 2003 the Investment Committee was either a subset or a delegee of this Committee.

23. Upon information and belief, Plaintiffs allege that the following individuals were members of the Investment Committee during the Class Period:

- (a) **Defendant Matthew B. Bartley (“Bartley”).** During the Class Period, Defendant Bartley also served as Treasurer of MMC
- (b) **Defendant Alan Beiler (“Beiler”).**
- (c) **Defendant Francis N. Bonsignore (“Bonsignore”).** Defendant Bonsignore was the Senior Vice President, Executive Resources and Development for MMC.
- (d) **Defendant Charles A. Davis (“Davis”).**
- (e) **Defendant Richard Goldman (“Goldman”).**
- (f) **Defendant William L. Rosoff (“Rosoff”).** During the Class Period, Defendant Rosoff also served as Senior Vice President and General counsel of MMC. Rosoff signed MMC’s Form 5500 for the fiscal year ended June 30, 2001, on behalf of MMC as the “Plan Administrator” of the MMC Plan.
- (g) **Defendant Thomas Sansone (“Sansone”).**
- (h) **Defendant Smith.**

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<sup>6</sup> Copy attached as Exhibit F.

- (i) **Defendant Sandra S. Wijnberg (“Wijnberg”).** During the Class Period Defendant Wijnberg also served as Senior Vice President and Chief Financial Officer of MMC. Wijnberg signed the MMC Plan’s Form 11-K Annual Report on December 13, 2002, on behalf of MMC and the Plan. She also signed the Company’s 2001 Form S-8 on behalf of the Company as Chairman of the “Plan Committee.”
- (j) **John and Jane Does 1-10.** Plaintiffs do not currently know the identity of all the Investment Committee members during the Class Period. Therefore, some of the members of the Investment Committee are named fictitiously, as Defendants John and Jane Does 1-10. Once their true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

24. The Investment Committee and its members (Bartley, Beiler, Bonsignore, Davis, Goldman, Rosoff, Sansone, Smith, Wijnberg and John and Jane Does 1-10) are referred to as the “Investment Committee Defendants.”

25. **Defendant Administrative Committee and Its Members.** According to the 1986 Guidelines, MMC established an Administrative Committee which, as explained in more detail below, had general responsibility for the management of the Plan, including especially Plan communications. In 2003, pursuant to the 2003 Guidelines, the Governance Committee Structure, and the 2003 Plan Document, MMC renamed the Administrative Committee the Benefits Administration Committee. These two committees are referred to collectively as the “Administrative Committee.” At all relevant times, the members of the Administrative Committee were, upon information and belief, all employees, officers, or directors of MMC.

26. The Plan documents, which are more fully described below in paragraphs 35 to 38, do not specifically refer to the Administrative Committee until 2003. *See* 1999 Plan Document; 2001 Plan Document; 2003 Plan Document. The 1999 and 2001 Plan Documents refer only to a “Committee.” Upon information and belief, in the period before 2003 the Administrative Committee was either a subset or a delegee of this Committee.

27. Upon information and belief, Plaintiffs allege that the following individuals were members of the Administrative Committee during the Class Period:

- (a) **Defendant Bartley.**
- (b) **Defendant Bieler.**
- (c) **Defendant Bonsignore.**
- (d) **Defendant Pattie Duca (“Duca”).**
- (e) **Defendant Patricia Haverland (“Haverland”).**
- (f) **Defendant Marguerite Heilman (“Heilman”).**
- (g) **Defendant Caroly Kaminsky (“Kaminsky”).**
- (h) **Defendant Linda Markeloff (“Markeloff”).**
- (i) **Defendant Rosoff.**
- (j) **Defendant Sansone.**
- (k) **Defendant Alexander P. Voitovich (“Voitovich”).**
- (l) **Defendant Winjberg.**
- (m) **John and Jane Does 11-20.** Plaintiffs do not currently know the identity of all the Administrative Committee members during the Class Period. Therefore, some of the members of the Administrative Committee are named fictitiously, as Defendants John and Jane Does 11-20. Once their

true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

28. The Administrative Committee and its members (Defendants Bartley, Bieler, Bonsignore, Duca, Heilman, Haverland, Kaminsky, Markeloff, Rosoff, Sansone, Voitovich, Wijnberg, and John and Jane Does 11-20) are referred to as the “Administrative Committee Defendants.”

29. **Defendant Oversight Committee and Its Members.** The Global Benefits Oversight Committee (“Oversight Committee”) is an MMC committee, formally created on September 18, 2003, but which, upon information and belief, had existed as a practical matter at least since 2001. As is explained in more detail below, the Oversight Committee had the responsibility to oversee the overall investment strategy of the Plan, and appointed members to the Administrative Committee and Investment Committee. *See* 2003 Plan Document at MMC-NY-ER 00172, and Governance Committee Structure at MMC-NY-ER 00682. Upon information and belief, the members of which are all employees, officers, or directors of MMC.

30. Upon information and belief, Plaintiffs allege that the following individuals were members of the Oversight Committee during the Class Period:

- (a) **Defendant Bartley.**
- (b) **Defendant Bonsignore.**
- (c) **Defendant Cabiallavetta.**
- (d) **Defendant Davis.**
- (e) **Defendant Greenberg.**
- (f) **Defendant Rosoff.**
- (g) **Defendant Smith.**

- (h) **Defendant Wijnberg.**
- (i) **Defendants John and Jane Does 21-30.** Plaintiffs currently do not know the identity of all of the Oversight Committee members during the Class Period. Therefore, the members of the Oversight Committee are named fictitiously, as Defendants John and Jane Does 21-30. Once their true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

31. The Oversight Committee and its members (Bartley, Bonsignore, Cabiallavetta, Davis, Greenberg, Rosoff, Smith, Wijnberg, and John and Jane Does 21-30 are referred to as the “Oversight Committee Defendants.”

#### **IV. THE PLAN**

##### **A. Nature of the Plan**

32. The Plan is an “employee pension benefit plan” within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Further, it is an “eligible individual account plan” within the meaning of ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3), and also a “qualified cash or deferred arrangement” within the meaning of I.R.C. § 401(k), 26 U.S.C. § 401(k). While the Plan is not a party to this action, pursuant to ERISA, the relief requested in this action is for the benefit of the Plan pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).

33. At all relevant times, the Plan had two separate components: (1) a contributory portion, which consisted of participant contributions; and (2) a matching component, which consisted entirely of employer contributions.

34. Under the Plan, salaried employees who are at least 18 years of age in the United States, as well as any subsidiary or affiliate of MMC other than Putnam Investments are eligible to contribute to the Plan.

**B. The Plan Documents**

35. An employee benefit plan, including the Plan here, must be “established and maintained pursuant to a written instrument.” ERISA § 402(a)(1), 29 U.S.C. 1102(a)(1). During the Class Period the Plan was maintained under three instruments:

- the 1999 Plan Document (attached as Ex. D);
- the 2001 Plan Document (attached as Ex. E); and
- the 2003 Plan Document (attached as Ex. F).

36. ERISA requires that every participant in an employee benefit plan be given a Summary Plan Description (“SPD”). The SPD currently in force for the Plan is the Stock Investment Plan Benefits Handbook, dated January 1, 2004 (the “2004 SPD”); its predecessor is the Stock Investment Plan Administration Description as of October 31, 2003 (the “2003 SPD”). The 2003 and 2004 SPDs are attached as Exhibits G and H.

37. ERISA and the Internal Revenue Code require that plans file an Annual Report, Form 5500, with the Department of Labor and the Department of the Treasury. The most recent such Annual Report for the Plan is the 2002 Form 5500, for the Plan year ending June 30, 2003 (the “2003 Form 5500”), copy attached as Exhibit I.

38. The assets of an employee benefit plan, such as the Plan, must be “held in trust by one or more trustees.” ERISA § 403(a), 29 U.S.C. § 1103(a). During the Class Period the assets of the Plan were held in trust by Bankers Trust Company and its successors, Deutsche Bank Trust Company Americas and State Street Bank and Trust Company, pursuant to a Trust

Agreement dated October 1, 1999, and an Assignment Agreement dated March 4, 2003 (collectively, the “Trust Agreement”), copy attached as Exhibit J.

**C. Investment Options**

**1. Participant Contributions**

39. With respect to employee contributions, prior to August 1, 2003, MMC stock was the sole investment option available to Plan participants, unless they were near retirement and/or met certain age and plan participation requirements, in which case investment options other than MMC stock were available to Plan participants for the diversification of the investment of such contributions.

40. Effective August 1, 2003, Plan participants could switch out of one-third of their MMC stock holdings during a year. Thus, on August 1, 2003, participants were allowed to choose new investments for up to one-third of this balance. The remaining two-thirds of that balance endured in the MMC Stock Fund until July 30, 2004, at which time the balance in that account was divided in half. Effective August 2, 2004, participants were allowed to diversify up to one-half of that balance. The other half was to remain in the MMC Stock Fund until August 1, 2005, at which time participants would then be able to diversify the remaining portion of their balance that was held in the MMC Stock Fund.

41. Plan participants were also permitted to make rollover contributions or trust-to-trust transfers to the Plan. With respect to such rollover contributions or transfers, at all times relevant to the Complaint, investment options other than MMC stock were available to Plan participants. Prior to August 1, 2003, if the Plan participants elected to invest in MMC stock, they were required to invest at least 10% of such contributions or transfers.

42. With respect to the quarterly dividends on MMC stock allocated to Plan participants' accounts, participants could elect on a quarterly basis to receive a direct cash dividend payment or to reinvest the cash dividends in MMC stock.

## **2. Employer Contributions**

43. Throughout most of the Class Period, MMC matched up to the first 6% of participants' contributions to the Plan in the following percentages:

- 71-2/3% for each participant who elects to receive dividends on their MMC shares as cash payments each quarter (100% for those participants age 55 or whose age plus years of plan participation equals at least sixty-five.)
- 66-2/3% for each plan participant who elects not to receive the cash dividends (95% for those participants age 55 or whose age plus years of plan participation equals at least sixty-five).

44. As of January 1, 2003, MMC matched up to the first 6% of participants' contributions to the Plan in the following percentages:

- 100% for those participants age 55 or older or whose age plus years of plan participation equals at least 65.
- 71-2/3% in all other cases.

45. Prior to August 1, 2003, the Plan provided that all accrued and future matching employer contributions were required to be invested in the MMC Stock Fund, unless they were near retirement and/or met certain age and plan participation requirements.

46. If they were near retirement and/or met certain age and plan participation requirements, the Plan participants were eligible to diversify the first 71-2/3% of their accrued and future matching contributions. The remaining 28-1/3% of the matching contribution was required to be invested in the MMC Stock Fund.

47. Effective August 1, 2003, the Plan was modified for Plan participants near retirement and/or who met certain age and plan participation requirement: these participants were no longer required to invest a portion (28-1/3%) of their matching contributions in the MMC Stock Fund. All other participants, however, continued to be required to invest their matching contributions in the MMC Stock Fund.

### **3. The October 19, 2004 Announcement**

48. Notwithstanding these diversification timetables, on October 19, 2004, following the announcement that the State of New York was suing MMC for a bid-rigging kickback scheme with insurers on a massive scale, MMC posted to its website a notice stating that MMC stock in the Plan, both employer contributions and participant contributions, could be diversified effective October 25, 2004.

### **4. The MMC Stock Fund**

49. The MMC Stock Fund holds the Plan's shares of MMC stock. The MMC Stock Fund was designed to invest primarily, not exclusively in MMC stock, and expressly allows investment in cash and other short-term investment options.

50. Throughout the Class Period, and before, the Plan's assets were heavily invested in the MMC Stock Fund, as follows:

<b>Date</b>	<b>Total Assets</b>	<b>MMC Stock</b>	<b>Percent in MMC Stock</b>	<b>Reference</b>
6/30/1998	\$1,098,745,512	\$745,717,466	67.9%	1999 Form 11-K
6/30/1999	\$2,081,874,679	\$988,266,522	47.4%	2000 Form 11-K
6/30/2000	\$2,529,262,111	\$1,354,834,894	53.6%	2001 Form 11-K
6/30/2001	\$2,282,221,955	\$1,335,120,212	58.5%	2001 Form 5500
6/30/2002	\$2,152,669,552	\$1,315,391,574	61.1%	2002 Form 5500
6/30/2003	\$2,470,588,145	\$1,478,910,238	59.9%	2002 Form 5500

#### **D. The Plan's ESOP Status**

51. In addition to being an “employee pension benefit plan,” as defined by ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), the Plan purports to be an Employee Stock Ownership Plan (“ESOP”). *See* 2003 Plan Document at MMC-NT-ER 00119. An ESOP is an ERISA plan that invests primarily in “qualifying employer securities.” 29 U.S.C. § 1107(d)(6)(A). For a plan to qualify as an ESOP, the plan must meet numerous requirements set forth in both ERISA and the Internal Revenue Code. Based on documents reviewed to date, it is not apparent that the Plan did qualify as an ESOP, especially since at least by August 1, 2003, the Plan was no longer “designed to invest primarily in qualifying employer securities.” Even if the Plan qualifies as an ESOP, Plan fiduciaries may not invest in employer securities regardless of the circumstances. On the contrary, while the duty to diversify does not apply to company stock investments per se in an ESOP, the fiduciaries remain bound by the other core ERISA fiduciaries duties, including the duties to act loyally, prudently, and for the exclusive purpose of providing benefits to plan participants.

#### **V. DEFENDANTS' FIDUCIARY STATUS**

52. ***Named Fiduciaries.*** ERISA requires every plan to provide for one or more named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the “administrator” in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

53. ***De Facto Fiduciaries.*** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary functions. Thus, a person is a fiduciary to the extent “(i) he exercises any discretionary authority

or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.” ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

54. Each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and its participants under ERISA in the manner and to the extent set forth in the Plan’s documents, through their conduct, and under ERISA.

55. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) to manage and administer the Plan, and the Plan’s investments solely in the interest of the Plan’s participants and beneficiaries and 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.

56. The 2003 SPD confirms the standard to which Plan fiduciaries are held: “The people who operate this Plan, called “fiduciaries,” have a duty to do so prudently and in the best interest of you and other Plan participants and beneficiaries.” 2003 SPD at MMC-NY-ER 00066.

57. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan’s management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them, and, as further set forth below, the claims against each Defendant are based on such specific discretion and authority.

58. Instead of delegating all fiduciary responsibility for the Plan to external service providers, MMC chose to comply with the requirement of ERISA § 402(a)(1) by assigning the appointment and removal of fiduciaries to its CEO, Board of Directors and at least by 2003 to an Oversight Committee appointed by the Board of Directors. These persons and entities in turn selected MMC officers, employees, and agents to perform most relevant fiduciary functions. Although the Plan had an institutional trustee unrelated to MMC, the Trust Agreement required the trustee to take directions from MMC personnel.

59. ERISA permits the fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3), but insider fiduciaries must still in fact act solely in the interest of participants and beneficiaries, not in the interest of the sponsor. Moreover, all Plan fiduciaries were obliged, when wearing their fiduciary hat(s) to act independently of MMC which had no authority under the governing Plan documents to direct the conduct of any of them with respect to the Plan, its investments, or the disclosure of information between and among fiduciaries or from fiduciaries to the participants.

#### **A. MMC's Fiduciary Status**

60. The success of MMC's pervasive, deceptive and unlawful method of doing business, described in more detail in section VI. below, required that MMC as an entity prevent any action by MMC officers and employees that would lead to the disclosure of MMC's business practices, for these practices could not be continued were they to become widely known. Accordingly, on information and belief, MMC, directly and through the subsidiaries that it controlled, exercised tight control over all those, including individuals assigned fiduciary authority pursuant to the documents and instruments governing the Plan who, by necessity or

happenstance became aware of MMC's deceptive and unlawful business practices. On information and belief, through the express and/or implied use of its power to compensate, demote and discharge individuals working for MMC or its subsidiaries, MMC made it clear to all those who both served the Plan in a fiduciary capacity and became aware of the deceptive and unlawful business practices pursued by MMC that taking any steps on behalf of the Plan, its participants and beneficiaries or otherwise that would jeopardize the success of these business practices was unacceptable and would lead to dire consequences for any individual who acted as a fiduciary to protect the Plan and its participants and beneficiaries, thereby precluding any action by any designated plan fiduciary. Such steps would have included efforts to limit the Plan's investment in MMC stock, disclosure of MMC's business practices to fellow fiduciaries who were unaware of them or only partly aware of them, disclosure to Plan participants and beneficiaries or disclosure to the United States Department of Labor. By intimidating designated Plan fiduciaries and/or forbidding them from taking action, MMC itself became a de facto fiduciary of the Plan by in fact exercising discretionary authority and control over its administration and the investment and disposition of its assets.

61. Further, on information and belief, the designated fiduciaries of the Plan understood that their separate designation as Plan fiduciaries with defined functions under the documents and instruments governing the Plan was, in large measure, a formality, and that in fact decisions concerning the Plan's investments and the extent of disclosures between and among fiduciaries and to participants and beneficiaries were made on a routine basis by MMC's regular chain of command. By making such decisions through the MMC chain of command rather than in the designated fiduciary committees, MMC became a de facto fiduciary of the

Plan by in fact exercising discretionary authority and control over its administration and the investment and disposition of its assets.

62. MMC is also a fiduciary of the Plan by virtue of its power to appoint and remove the trustee pursuant to Article X of the Trust Agreement.

63. Consequently, in light of the foregoing duties, responsibilities, and actions MMC was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that it exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

#### **B. Defendant Greenberg's Fiduciary Status as CEO**

64. From at least 1999 through September, 2003, as CEO, Defendant Greenberg had the responsibility to appoint, and hence to monitor, the members of the Administrative Committee and the Investment Committee. This power is explicitly spelled out in the 1986 Guidelines (at MMC-NY-ER 00676-77). In addition, pursuant to the 1999 and 2001 Plan Documents (at MMC-NY-ER 00546, 00646), he, along with the Board, had the authority to appoint the "Committee." Upon information and belief, and based on the provisions of the 1986 Guidelines and the Trust Agreement, this Committee comprised the Administrative Committee and the Investment Committee.

65. From September, 2003, through to his departure from the Company in October, 2004, as CEO, Defendant Greenberg had the responsibility to appoint, and hence monitor, the members of the Oversight Committee. *See* 2003 Guidelines at MMC-NY-ER 0832 ("The Chief Executive Officer will carry out this responsibility [appointing a Global Benefits Oversight

Committee] consistent with the fiduciary duty owed to plan participants under ERISA. The Chief Executive Officer’s authority extends to replacing committee members from time to time subject to this same standard.”); Governance Committee Structure at MMC-NY-ER 00682 and 2003 Plan Document at MMC-NY-ER 00127.

66. Consequently, in light of the foregoing duties, responsibilities, and actions, Greenberg, as the Company’s CEO, was a fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in the Class Period in that he exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

**C. Director Defendants’ Fiduciary Status (Including Greenberg as Director)**

67. Under Delaware law and MMC’s charter and bylaws, the Board had the authority to manage the business and affairs of MMC. Because MMC was, as alleged above, a fiduciary of the Plan during the Class Period, so, necessarily, was the Board and its members, which had the ultimate authority for the affairs of MMC. In particular, MMC, as alleged above in paragraph 62, had the authority to appoint and remove the trustee, and this authority could only be exercised by the Board.

68. In addition, from at least 1999 through September, 2003, the Board had various specific responsibilities with respect to the Plan. Board approval was required for any “material change in the operation of the plans.” 1986 Guidelines at MMC-NY-ER 00676. The Board had the additional duty to review the reports of the Administrative and Investment Committees, which were to be given to the Board “at least annually” (1986 Guidelines at MMC-NY-ER 00678-79). Pursuant to the 1999 and 2001 Plan Documents the Board, along with the CEO, had

the authority to appoint the “Committee.” Upon information and belief, and based on the provisions of the 1986 Guidelines and the Trust Agreement, this Committee comprised the Administrative Committee and the Investment Committee. The Board exercised this appointment power by delegating the task to the CEO through the 1986 Guidelines (at MMC-NY-ER 00676-77). In addition, the Board required that the Investment Committee members include the CFO and the Treasurer, thereby appointing them.

69. From September, 2003 through the present, the Board had the duty (a) to oversee the Oversight Committee, *see* 2003 Guidelines at MMC-NY-ER 0831 and Governance Committee Structure at MMC-NY-ER 00682, and (b) to review MMC management reports on “any material employee benefits plan issues.” *See* 2003 Guidelines at MMC-NY-ER 0831.

70. Consequently, in light of the foregoing duties, responsibilities, and actions, the Director Defendants were fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

#### **D. Investment Committee Defendants**

71. From at least May, 1986 through the present, the Investment Committee has consisted of three or more persons. *See* 1986 Guidelines at MMC-NY-ER at 00676; 2003 Guidelines at MMC-NY-ER 00681; 1999 Plan Document at MMC-NY-ER 00546; 2001 Plan Document at MMC-NY-ER 00646; 2003 Plan Document at MMC-NY-ER 00172. Starting in at least May, 1986, the members of the Investment Committee were appointed by the Company’s CEO and the Board, which adopted guidelines requiring that the Investment Committee include

the CFO and the Treasurer, thereby effectively appointing them to the Investment Committee by directing that the CEO appoint them. *See* 1986 Guidelines at MMC-NY-ER at 00676. After September, 2003, the members of the Administrative Committee were appointed by the Oversight Committee. *See* 2003 Plan Document at MMC-NY-ER 00172; 2003 Guidelines at MMC-NY-ER 00681.

72. From at least May, 1986 through the present, the Investment Committee has been the “named fiduciary” for investment purposes for the Plan as that term is defined under ERISA. *See* 1986 Guidelines at MMC-NY-ER 00677; 2003 Guidelines at MMC-NY-ER 00681; 2003 Plan Document at MMC-NY-ER 00174.

73. Under the Trust Agreement, the trustee takes direction on investment matters from a “named fiduciary.” Trust Agreement at MMC-NY-ER at 00352. The Company is obligated to identify the persons authorized to act as this named fiduciary. *Id.* at MMC-NY-ER 00369. Based on the provisions of the 1986 and 2003 Guidelines, this named fiduciary is Investment Committee.

74. Starting in at least May, 1986, the Investment Committee had the responsibility for the “selection of institutions and/or parties to provide investment management, custodial, record-keeping, audit, asset allocation and performance monitoring” for the Plan. 1986 Guidelines at MMC-NY-ER 00677. Additionally, starting in at least May, 1986 the Investment Committee had the responsibility to meet with Plan investment managers at least semi-annually to review their investment results, and review interim reports submitted by such investment managers at least quarterly. *Id.*

75. Similarly, according to the 2003 plan instruments, the Investment Committee had the duty to “monitor the investment performance of plan assets to ensure that plan assets are used

effectively in connection with the provision of employee benefits.” 2003 Guidelines at MMC-NY-ER 00681. Pursuant to the 2003 documents, the Investment Committee had the following Plan-related responsibilities: approving, and monitoring compliance with, investment policies for the Plan; appointing, monitoring, and terminating investment managers and/or selecting investments; appointing, monitoring, and terminating plan trustees and other key investment service providers; and monitoring legal and regulatory issues applicable to investment policy. Governance Committee Structure at MMC-NY-ER 00682. Additionally, according to the 2003 Plan Document, the Investment Committee had the responsibility for “making appropriate provision for and selecting and reviewing the appropriateness of alternative investment vehicles to the MMC Stock Fund to the extent that diversification rights are provided....” *Id.* at MMC-NY-ER 00173. Finally, upon information and belief, the Investment Committee had the responsibility to provide complete and accurate information to participants about the investment offerings in the Plan, either directly or by communicating that information to the Administrative Committee.

76. Consequently, in light of the foregoing duties, responsibilities, and actions, the Investment Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and de facto fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

**E. Administrative Committee Defendants**

77. From at least May, 1986 through the present, the Administrative Committee has consisted of three or more persons. *See* 1986 Guidelines at MMC-NY-ER at 00676; 2003 Guidelines at MMC-NY-ER 00681; 1999 Plan Document at MMC-NY-ER 00546; 2001 Plan Document at MMC-NY-ER 00646; 2003 Plan Document at MMC-NY-ER 00172. At least from 1999 to September, 2003, the members were appointed by the Company’s CEO or the Board of Directors. 1999 Plan Document at MMC-NY-ER 00546; 2001 Plan Document at MMC-NY-ER 00646. After September, 2003, the members of the Administrative Committee were appointed by the Oversight Committee. *See* 2003 Plan Document at MMC-NY-ER 00172; 2003 Guidelines at MMC-NY-ER 00681.

78. From at least May, 1986 through the present, the Administrative Committee has been the “named fiduciary” for administrative purposes for the Plan as that term is defined under ERISA. *See* 1986 Guidelines at MMC-NY-ER 00676; 2003 Guidelines at MMC-NY-ER 00681; 2003 Plan Document at MMC-NY-ER 00174. Additionally, from September, 2003 through the present, the Administrative Committee has served as the “Plan Administrator” as that term is defined under ERISA. *See* 2003 Guidelines at MMC-NY-ER 00681.

79. Pursuant to the plan instruments, the Administrative Committee had the duty to ensure that the Plan “was maintained and administered solely in the best interest of the participants.” 1986 Guidelines at MMC-NY-ER 00676. At all relevant times, the Administrative Committee had the “full power and authority to administer the Plan, [in] the exercise of which it has complete discretion.” *See* 1999 Plan Document at MMC-NY-ER 00546; 2001 Plan Document at MMC-NY-ER 00646; 2003 Plan Document at MMC-NY-ER 00172. Pursuant to the Plan documents, the Administrative Committee had “all powers and discretion it

shall determine to be necessary or helpful for the carrying out of its responsibilities...and the decision or action of the Committee in good faith...shall be conclusive and binding upon all parties concerned.” *See* 1999 Plan Document at MMC-NY-ER 00547; 2001 Plan Document at MMC-NY-ER 00647.

80. Additionally, the Administrative Committee was responsible for the following fiduciary duties concerning the Plan: to make and enforce rules for efficient administration of the Plan; to interpret the Plan; to direct payment by the trustee of amounts due to Participants under the Plan; to delegate authority to agents and other persons to carry out the provisions and administration of the Plan; and to determine all questions relating to benefits or the Plan. *See* 1999 Plan Document at MMC-NY-ER 00546-47; 2001 Plan Document at MMC-NY-ER 00646-47; 2003 Plan Document at MMC-NY-ER 00172-73.

81. Moreover, upon information and belief, in order to comply with ERISA, during at least part of the Class Period the Administrative Committee Defendants exercised responsibility for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner, by means of the Plan’s SPDs. *See* ERISA § 101(a)(1) (requiring the plan administrator to furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description). These SPDs incorporated by reference MMC’s Securities and Exchange Commission (“SEC”) filings, thus converting such materials into fiduciary communications.

82. Consequently, in light of the foregoing duties, responsibilities, and actions, the Administrative Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and de facto fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or

discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

**F. Oversight Committee Defendants**

83. As stated above, the Oversight Committee was formally created effective September, 2003, and consists of three or more members. 2003 Guidelines at MMC-NY-ER 0832.

84. The Oversight Committee appoints and oversees the Investment and Administrative Committees. Governance Committee Structure at MMC-NY-ER 00682; 2003 Guidelines at MMC-NY-ER 0832. The Investment and Administrative Committees report to the Oversight Committee on a periodic basis, in a manner sufficient for the Oversight Committee to determine that the Investment and Administrative Committees have carried out their assigned responsibilities for the applicable reporting period. 2003 Guidelines at MMC-NY-ER 0832-33. The Oversight Committee meets to review the reports from the Investment and Administrative Committees on a semi-annual basis. Governance Committee Structure at MMC-NY-ER 00682.

85. The Oversight Committee approves and regularly reviews the Plan's overall investment strategy, including asset allocation (*id.* and 2003 Guidelines at MMC-NY-ER 0832), as well as reviews the Plan's investment performance. Governance Committee Structure at MMC-NY-ER 00682.

86. Additionally, the Oversight Committee is directly responsible, and provides annual reports, to the Board of Directors with respect to ERISA fiduciary responsibilities. *Id.*

87. The Oversight Committee is also responsible for approving the nominations of plan trustees. 2003 Guidelines at MMC-NY-ER 0832.

88. Consequently, in light of the foregoing duties, responsibilities, and actions, the Oversight Committee Defendants were fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

## **VI. FACTS BEARING ON FIDUCIARY BREACH**

### **A. MMC's Stock Became an Imprudent Investment When Marsh Embarked on its Illegal Bid Rigging and Contingent Commission Fee Scheme.**

89. Marsh, MMC's largest and most significant subsidiary, is the largest insurance broker in the world. As an insurance broker, Marsh's core business is the representation of corporate clients in the insurance marketplace. Marsh's clients relied on Marsh to determine the type and amount of coverage needed and to find that coverage in the marketplace at the lowest cost. Based on the broker's fiduciary duty to its clients, Marsh's clients assumed that Marsh was their loyal advocate and champion at all times. Instead, quite the opposite was true. Marsh served only its own financial interests in breach of its fiduciary duties to its clients, its own stated rules and operating principles, its agreement with The Risk and Insurance Management Society, Inc., a special order of the New York State Insurance Department, and state and federal law.

90. On October 14, 2004, the Attorney General for New York, Eliot Spitzer, filed a complaint ("Spitzer Complaint") against Marsh alleging an extensive bid rigging and contingent commission fee scheme. The allegations revealed that the illegal scheme was widespread and integral to Marsh's business plan and that the scheme dictated the way Marsh conducted its brokerage business. The Spitzer Complaint laid bare Marsh's betrayal of hundreds of thousands of clients and its massive failure to disclose accurate financial information to the public and its employees.

91. At its heart, Marsh's story is one of telling everyone it was doing one thing, while doing quite another. One striking element in Marsh's story is that Marsh went to great lengths to tell its clients and the public that it *knew* the ethical requirements of the business and how it was supposed to conduct itself as a broker. In reality, the public pronouncements were a smokescreen for widespread illegal business practices that violated each of the principles Marsh outlined.

92. Marsh admitted its illegal and unethical conduct and settled the New York Attorney General's claims for \$850 million. The settlement included Marsh's agreement to a series of reforms which dramatically changed Marsh's business model and the manner in which Marsh is compensated as a broker. Greenberg, Marsh's Chairman and CEO, was forced to step down, at least eleven other senior executives were fired or otherwise removed from their posts, and three Marsh senior managers plead guilty to charges of Class E felonies and will go to jail. Disclosure of the illegal scheme has drawn at least fourteen individual and class action suits filed by former clients against Marsh seeking compensation for anti-trust, RICO and unfair trade practices violations. Shareholders sued for securities violations. The scandal has plunged Marsh into a web of expensive and time consuming litigation that will take years to resolve.

93. Marsh's scheme created an unduly risky operating environment that imperiled the company, and, as a result, MMC's employees' retirement savings, much of which MMC had long required to be invested in company stock. There was no way Marsh's core business practice based on illegal bid rigging and contingent commissions could be sustained indefinitely. Multiple state and federal regulators, competitors, clients, journalists, watchdog groups and insurance carriers had obligations, incentives and motives to uncover and reveal the illegal conduct.

94. Under these circumstances, MMC company stock was far too imprudent an investment for the Plan, and continuing to hold and acquire large quantities of MMC stock in the Plan was a recipe for disaster.

## **B. Marsh's Unique Role in the Insurance Marketplace**

95. For most corporations, the purchase of insurance is extremely complex. A large manufacturing company may need some or all of the following types of coverage:

- (a) Property coverage on all facilities;
- (b) Comprehensive general liability (“CGL”) coverage;
- (c) Directors & Officers (“D&O”) coverage;
- (d) Fiduciary liability coverage;
- (e) Employee theft and crime coverage;
- (f) Multiple employee benefit coverages;
- (g) Specialized policies for equipment and data;
- (h) Specialized coverage for licensed and professional employees;
- (i) Specialized coverage for transportation services;
- (j) Performance and security bonds;
- (k) Pollution legal liability coverage, and
- (l) Workers’ Compensation coverage.

Each corporate sector requires a different array of insurance products. Coverage may need to be purchased as primary, umbrella or excess policies. Policies may be occurrence based or claims made. And there are many other variables.

96. Managing appropriate insurance coverage for a middle market or large corporation likely requires the full time effort of an in-house risk management department. Even with in-house insurance specialists, corporations traditionally rely on an insurance broker to help determine the types and amounts of coverage required, the most appropriate insurance products and the carriers that will provide the best service. Even more important, a corporate client relies on its broker to accurately represent the client’s insurance requirements to prospective carriers and to obtain a selection of quotes from various carriers for the policy terms and coverage levels the client needs. Carriers understand they are competing against each other to quote the most favorable terms for the lowest cost. Clients will likely purchase the best policy for its needs for

the lowest price. Skilled brokers have highly specialized knowledge on which most corporations have little choice but to rely. Most corporations are not able to access insurance markets effectively without using a broker.

97. Traditionally, an insurance broker represents the client corporation in its search for coverage. This relationship is contrasted with that of an agent, who typically represents the carrier, and not the insured. The broker's search for coverage and the client's purchase of insurance is called the "placement" of coverage. If the broker puts together a complex array of primary and excess policies, it is referred to as "placement of an insurance program."

98. A broker owes a fiduciary duty to its client to act on behalf of the client solely in the client's best interest. This fiduciary relationship is the basis on which the client gives the broker the right and opportunity to act on behalf of the client. Traditionally, the broker is compensated by commission, which is deducted by the broker from the premium the client pays the carrier when it purchases the policy. In this way, the carrier pays the commission out of the amount the client pays for the policy.

99. Marsh was well versed in the fundamental principle that the client's sole purpose in retaining Marsh was to have Marsh act on the client's behalf and in the client's best interest. Throughout the class period, Marsh's marketing materials included the "Code of Conduct for Insurance Transactions" ("CCIT") which Marsh published on its website. Marsh told each of its clients that it would adhere strictly to the CCIT principles:

#### **Code of Conduct for Insurance Transactions**

The following code of conduct with respect to insurance transactions applies to all Marsh colleagues. This code of conduct codifies the principles the company follows in the execution of our responsibilities and augments our professional standards and MMC's (Marsh & McLennan Companies) Code of Business Conduct & Ethics.

**Clients First** – Marsh represents our clients. All decisions will be made or actions taken with the client's objectives or best interests in mind.

**Level Playing Field** – Qualified insurers will be provided opportunities to offer an initial proposal if a client retains Marsh to obtain competitive alternatives, without regard to Marsh’s revenue considerations.

**Bidding Integrity** – The terms and conditions of competing quotations will not be shared among insurers. It is understood that for layered or quota share placements, sharing of insurer terms may be necessary for completion of the placement. Further, we expect all parties to the transaction to maintain the confidentiality of proprietary information.

**Completeness** – All competitive and valid quotes will be presented to the client. Clients will also be advised of any carrier who received a submission and declined to provide a quote; did not offer competitive terms; or did not respond in a timely manner.

**No Inducements** – Marsh colleagues will not seek entertainment or gifts for themselves or others from anyone with whom Marsh does business, and will not accept entertainment or gifts that could influence, or appear to influence, any Company decisions. Unsolicited and infrequent gifts and business courtesies, including meals and entertainment, are permissible if they are: customary and commonly accepted, of minimal value, and accepted without an express or implied understanding of obligations associated with the acceptance of the gift or courtesies. Gifts of cash or cash equivalents are not permitted.

100. The first paragraph of the CCIT states that the client’s interests are paramount. The fact that Marsh’s bid rigging and contingent commission fee scheme required Marsh to abandon these principles was an obvious red flag that such a course was highly risky and inappropriate. The secrecy and knowing deception with which Marsh proceeded should have been an equally clear signal.

### **C. Marsh’s Development and Use of Undisclosed Contingent Commission Fee Agreements**

101. Just as client corporations need brokers to navigate the complexities of corporate insurance placement, carriers rely on brokers as the conduit to prospective insureds. Carriers have incentive to curry favor with brokers by providing additional compensation in the form of gifts, special opportunities, advances, loans or additional commission fees to encourage brokers to provide carriers with more opportunities to sell policies. Given the broker’s fiduciary obligation to its client, however, the broker steps into a direct conflict of interest if it accepts undisclosed additional payments from carriers. Such payments create the potential that the

broker will forsake the clients' best interest for his or her own interest in receiving the additional compensation.

102. The twin temptations on the part of brokers to demand more than a standard, disclosed commission and on the part of carriers to pay more are not new in the history of the insurance business in the United States. Marsh's CCIT and similar governing principles exist to prevent brokers and carriers from dealing in illicit additional compensation. What the Spitzer Complaint revealed was that Marsh, as the world's largest broker, had developed and adopted a core business plan specifically designed to maximize revenues by focusing on undisclosed, additional compensation and illegally manipulating the market place.

103. Contingent commission fee agreements came in two general forms at Marsh: Management Services Agreements ("MSAs"), which were entered into by regional offices, and Placement Services Agreements ("PSAs"), which were national in scope. A basic contingent commission fee agreement provided for compensation by the carrier to the broker in addition to the standard, per policy commission. Under a contingent commission fee agreement, the carrier paid the broker based on the broker's performance on an entire line of coverage. The carrier's payment to the broker might be based on a combination of factors, including: (a) the number of policies purchased by the broker's clients, (b) the number of policies renewed by the broker's clients, and/or (c) the level of claims experienced by the broker's clients.

104. In Marsh's hands, MSAs and PSAs took on new dimensions as incentives for both Marsh and participating carriers. For example, the Spitzer Complaint alleged that one PSA paid a bonus of 1% of all renewal premiums if Marsh clients renewed AIG policies at a rate of 85% or higher. If the renewal rate on AIG policies was 90% or higher, Marsh got 2% of the premiums and Marsh got 3% if the renewal rate was 95% or higher. Under this PSA, Marsh's return increased exponentially because Marsh's percentage share increased and the total premium figure increased at the same time. Marsh's MSAs and PSAs combined a variety of factors, depending on the carrier in question, the line of business and Marsh's market power.

105. By the late 1990's, contingent commission fee agreements were an open secret within the corporate insurance community. The Risk and Insurance Management Society, Inc. ("RIMS"), a national professional association of corporate risk managers, complained about the use of contingent commission fee agreements in 1998.

106. In response to RIMS' concerns, the New York State Insurance Department ("NYSID") ordered brokers and carriers to disclose to their clients and insureds compensation agreements between brokers and carriers and to keep a record of fees paid under the agreements. The regulatory order, known as Circular Letter 22 (1998) ("Circular Letter 22"), reiterated the fact that a broker is a legal representative of the insured and that the undisclosed receipt of additional compensation from an insurer creates the perception that brokers have a conflict of interest. Circular Letter 22 set the following guidelines for brokers and insurers:

- (a) All compensation agreements between an insurer and a broker should be reduced to writing and agreed to by both parties;
- (b) All such compensation arrangements should be disclosed to insureds prior to the purchase so as to enable insureds to understand the costs of the coverage and the motivation of their broker in placing the business;
- (c) All fees paid to brokers should be included as factors in the establishment of an insurer's premium rates;
- (d) All fees paid to brokers (and reasons for such fee payments) should be included in a broker file maintained by the insurer; and
- (e) The insurer's internal auditing procedures should include verification that all fees paid to brokers are proper and within the parameters of the NY Insurance Law and Department Regulations.

107. Section 2110 of the New York Insurance Law permits the NYSID to revoke, suspend or refuse to renew an insurance broker's license if, after a hearing, there is a finding that the broker has demonstrated his or her untrustworthiness to act as a broker. The NYSID stated that failure to disclose additional compensation received from an insurer may be considered "untrustworthiness" in violation of the Insurance Law. Marsh was subject to Circular Letter 22, which specifically required disclosure of MSAs and PSAs to its clients.

108. In early 1999, Marsh essentially admitted that it was using contingent commission fee agreements and reached an agreement with RIMS on disclosure of the additional commission fees. Marsh agreed that, if asked by a risk manager, it would disclose the names of insurers that were paying Marsh contingent commissions. Marsh would also provide an annual “ACF” factor that reflected Marsh’s MSA/PSA revenue as compared to Marsh’s total revenue. Marsh agreed to provide additional information from which clients could calculate the contingent commission fees that Marsh received on the client’s premium payments. For example, in July 1999, the factor was 0.0062. By multiplying the factor by the premium on policies placed through Marsh, a client could determine Marsh’s contingent commission. For example, on a \$1,000,000 premium, Marsh would receive \$6,200.00. On substantial commissions, Marsh would provide more information, if asked, but few risk managers asked.

109. Marsh has now admitted that it used the agreement with RIMS to systematically under-report contingent commission fees to clients. When Marsh entered into the January 31, 2005 settlement with the New York Attorney General, Marsh released a summary report of its internal investigation conducted by Marsh, and its outside counsel, Davis, Polk & Wardwell (the “DPW Report”). In the DPW Report, Marsh admitted that the information disclosed did not accurately report the amount of fees generated by the agreements:

[G]iven the manner in which the calculations were performed pursuant to the [RIMS] protocol, the amounts conveyed to clients could be viewed by certain clients as inaccurate or misleading.

110. The DPW Report explained that Marsh overstated its revenue to reduce the ACF factor to under one percent. In reality, it should have been one to two percent. In addition, Marsh admitted that information it provided to enable a client to calculate the contingent commission fees on the client’s own account “could have been materially different than the amount of MSA revenue that was associated with the particular client’s placements.” *Id.* According to the DPW Report, PSA revenues could have been in excess of ten to fifteen percent at the time when Marsh’s disclosure put the figure under two percent. The report concluded that

the disclosures were “technically accurate, but potentially misleading” because of significant variations in the amount of PSA revenues paid among product lines.

111. At the same time that Marsh negotiated the RIMS protocol on disclosure of contingent commission fees, Marsh maintained that because its brokers did not know the specifics of various PSAs, they could not be improperly influenced by the agreements. Marsh concluded, therefore, that the MSAs and PSAs did not create a conflict of interest and the agreements could not lead to improper steering of business to PSA carriers.

**D. Marsh’s Global Broking Unit Consolidated the MSAs and Fostered Improper “Steering” to Maximize Contingent Commission Fee Revenues.**

112. As the use of MSAs developed in the 1990s, each of Marsh’s branch offices around the country entered into separate MSAs with insurance carriers. By 2000, Marsh was consolidating its corporate broking business from its regional offices to a single office in New York called the “Marsh Global Broking” unit. The regional offices continued to operate, but all placements were now required to go through Global Broking. Global Broking included the following divisions:

Excess Casualty	Healthcare
Property	FinPro
Middle Markets	Excess Workers Compensation

Global Broking was established to ensure that since Marsh executives controlled and directed which carriers quoted coverage and which carriers received placements to maximize the PSA return.

113. By negotiating contingent commission fee agreements through Global Broking, Marsh could enter into large, national PSAs. By consolidating and centralizing the PSAs, Marsh could demand far more lucrative terms in the PSAs. In this context, PSAs became revenue driving profit centers. Carriers came to understand that Marsh had a “play to pay” system. Carriers who objected to Marsh’s PSAs soon learned that without a PSA with Marsh, they would

have not be afforded opportunities to quote policies to Marsh clients. Some carriers could not afford to be shut out of the vast share of key markets that Marsh controlled.

114. Eventually, carriers found themselves competing against each other to negotiate the most attractive PSAs from Marsh's perspective. Since Marsh had PSAs with a number of carriers, a hierarchy or tiering developed based on which PSAs would yield the greatest payments to Marsh. Marsh admitted that it steered business to carriers to maximize its return under the PSAs. According to the DPW Report:

The existence of MSA agreements was common knowledge among brokers in various product lines within Global Broking department [sic]. In addition, brokers were often made aware of the terms of these agreements in discussions about the placement process. As such, the prospect of MSA revenues was often a factor in discussions among brokers concerning the desirability of doing business with particular insurance carriers, as well as a significant topic of discussion between placement brokers and the insurance carriers themselves.

115. The DPW Report admitted further that it "does not appear that the type of 'steering' discussions referred to above were shared with clients."

116. With the PSAs in place, steering more profitable business (insureds with low claim ratios) to favored carriers increased PSAs revenues. Similarly, ensuring policy renewal for a favored carrier increased PSA revenue. Finally, the higher the premiums, the greater the PSA revenue.

**E. Marsh's Drive for Still Greater PSA Returns Led to Illegal Bid Rigging.**

117. Traditionally, a broker seeks quotes from a number of carriers by outlining the scope, nature and extent of coverage the client needs. Carriers then determine whether they are willing to underwrite the client's risk. If so, the carrier determines the premium it will charge for the policy.

118. Ideally, the client has several competitive quotes to choose from. The process is intended to allow the client to shop for the carrier providing the broadest coverage, the strongest payment history and the best claims service at the lowest available price. Instead of the open and

fair bidding process Marsh promised its clients, Marsh rigged the bids and made its clients' carrier selections long before the clients ever saw the phony quotes Marsh presented.

119. Marsh controlled the bidding process by pre-selecting the winning carrier and obtaining alternate bids for higher amounts from a select group of carriers who understood that their bids had to exceed the floor set by the pre-selected carrier's bid. The floor itself was inflated well above the price that would have been available if bid competitively. Marsh brokers executed the bid rigging scheme by communicating their requests for quotes in code. In the Excess Casualty Unit of Global Broking, brokers used the term "B quote." Carriers knew that when asked for a "B quote," Marsh had already awarded the "low bid" to another carrier. The B quote was just "window dressing" to create the appearance that a competitive bidding process had taken place and that the lowest bid represented the lowest price available in the market. The carriers in Marsh's select group all had PSAs with Marsh and understood that Marsh would steer plenty of other clients to other PSA carriers. Each PSA carriers' understanding that it would receive its shares of Marsh's placements at inflated premium rates assured the carriers' continued participation in the illegal scheme.

120. American International Group ("AIG") was one of Marsh's most important PSA carriers. Marsh controlled a substantial portion of AIG's business. On February 15, 2005, Carlos Coello, an AIG underwriter, pled guilty to participating in Marsh's bid rigging scheme. Under oath, Mr. Coello stated that:

From September of 2002 through September of 2004 I and others at AIG participated in a scheme with individuals at Marsh, Inc. ...

During this time period, Marsh and AIG periodically instructed me to submit specific quotes that I believed were higher than those of incumbent carriers and were designed to ensure the incumbent carrier would win certain business and resulted in clients being tricked and deceived by a deceptive bidding process.

121. Marsh employee Joshua Belway pled guilty to Class E felony charges in connection with the bid rigging:

I have worked in Manhattan at Marsh, Inc. or its subsidiaries from 1991 through 2004. Beginning in approximately 1998 and continuing through approximately 2003, I along with others at Marsh directed the dictation of losing quotes from various insurance companies or excess liability carriers for Marsh clients. I personally solicited losing quotes on a number of occasions. The losing bids or quotes were often referred to as B quotes. B quotes were, technically, solicited from and provided by the insurance company so the company would retain the business when the client's existing coverage expired and that is, in fact, what occurred on numerous occasions and to more than ten clients.

122. Mr. Belway explained further that the purpose of obtaining and presenting phony quotes was to ensure that the clients selected the carrier Marsh had already chosen for the client:

Unknown to Marsh's clients, I along with others at Marsh and at the various insurance companies who participated in this conduct, shared the common purpose of insuring that the client would select, the carrier, typically, the incumbent that Marsh had pre-determined should win the business.

123. In the DPW Report, Marsh admitted to the bid rigging described in the Marsh employee pleas in Excess Casualty and Excess Workers Compensation groups within Global Broking. The report anticipated that similar examples of bid rigging "may well be identified in these and other product lines as the government investigations continue."

124. In addition to being manifestly illegal, Marsh's bid rigging scheme violated each of the principles stated in Marsh's own Code of Conduct for Insurance Transactions:

- (a) Clients First: Marsh claimed to put its clients' interest first. Certainly, bid rigging placed Marsh's financial interests well above those of its clients;
- (b) Level Playing Field: Marsh stated that qualified insurers would be given opportunities to provide an initial bid, "without regard to Marsh's "revenue consideration." The exact opposite was true, the quotes obtained by Marsh were inflated and the winning bid was pre-selected and assigned an inflated premium level.
- (c) Bidding Integrity: Marsh stated that the terms and conditions of competing bids would not be shared with competing carriers. Marsh has admitted that its bid rigging scheme involved disclosure by the broker to the pre-selected carrier of information concerning other carriers' bids.
- (d) Completeness: Marsh stated that all competitive and valid quotes would be presented to the client. Again, the opposite was true. Marsh did not obtain competitive bids

because the bidding process was rigged. None of the bids Marsh presented to its clients were competitive.

- (e) No Inducements: Marsh stated that brokers were not allowed to accept gifts from carriers except in extremely limited circumstances and gifts of cash were strictly forbidden. Ironically, under Marsh's broking business plan, Marsh accepted substantial payments from carriers as part of the rigged bidding process.

125. By publishing the CCIT on its website, Marsh demonstrated its thorough understanding of exactly how its brokerage practice should have functioned and the fiduciary obligations owed to its clients. Instead of a set of guiding principles, the CCIT now stands as a cynical sham erected to cover up Marsh's systematic illegal conduct. The Spitzer Complaint, Marsh's press release of January 31, 2005, the Settlement Agreement with the New York Attorney General and the DPW Report set forth Marsh's admission that, from 2000 to 2004, Marsh turned each of the CCIT principles on its head. Marsh admits that it did not disclose most of this illegal conduct to its clients. Where there was limited disclosure of contingent commission fees, Marsh intentionally misrepresented the facts it had agreed to disclose in a conscious effort to avoid full and accurate disclosure. The enormous lengths to which Marsh went to keep from disclosing its contingent commission fee, steering and bid rigging from its clients demonstrates how deeply Marsh understood that it was engaged in a risky high wire act.

126. Marsh's clients trusted they had retained the most capable and knowledgeable brokers in the business to find the best coverage with the best carrier for the best price. Instead, as victims of Marsh's illegal scheme, Marsh's clients paid inflated prices for coverage, for policies with less favorable terms and conditions, from carriers providing inferior claims and payment services.

127. Marsh's bid-rigging also had an ERISA dimension, quite apart from its effect on the prudence of holding and acquiring MMC stock in the Plan. In those cases where Marsh acted as a broker for other sponsor's ERISA plans, Marsh became a de facto fiduciary with respect to that plan if it engaged in bid-rigging because, by rigging the bids, Marsh effectively choose or controlled the choice of the carrier. Moreover, Marsh's illegal bid-rigging violated both ERISA

§ 404, 29 U.S.C. § 1104, and ERISA § 406(b)(1) and (3), 29 U.S.C. § 1106(B)(1) and (3), by causing the plans to enter into transactions less favorable than were available through an arms length bidding procedures for the purpose of enhancing Marsh's compensation.

128. By so violating ERISA, Marsh in these cases of bid rigging made itself liable both for the disgorgement of any commissions that it earned as a result of the transaction (the placement of insurance) and for the loss to the plan--*i.e.*, the difference between what the plan paid and what it would have paid through a fair bidding process.

**F. The Spitzer Complaint Revealed Marsh's Illegal Scheme.**

129. Seven months after issuing subpoenas to Marsh and three carriers (AIG, ACE, Ltd. and Hartford) the New York Attorney General filed the Spitzer Complaint against Marsh. Spitzer issued a press release October 14, 2004 announcing sweeping claims of illegal and anti-competitive practices. He commented that “[t]here is simply no responsible argument for a system that rigs bids, stifles competition and cheats customers.” New York Attorney General Press Release, Oct. 14, 2004. The press release stated further that:

The civil complaint filed today in State Supreme Court in Manhattan alleges that for years Marsh received special payments from insurance companies that were above and beyond normal sales commissions. These payments -- known as “contingent commissions” -- were characterized as compensation for “market services” but were, in fact, rewards for the business that Marsh and its independent brokers steered and allocated to the insurance companies. Industry representatives defend this long-standing practice as acceptable and even beneficial to clients, but the Attorney General’s office has uncovered extensive evidence showing that it distorts and corrupts the insurance marketplace and cheats insurance customers.

*In addition to steering business to its insurance company partners, Marsh, at times, solicited fake bids, which deceived its customers into thinking that true competition had taken place. Marsh did this even as it claimed in public statements that its “guiding principle” was to always consider its client’s best interests.*

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The immediate victims of the illegal practices were Marsh’s customers -- mainly large corporations seeking property and casualty coverage, but also small and

mid-size businesses, municipal governments, school districts and some individuals.

*Id.* (emphasis added).

130. On October 14, 2004, after Spitzer's announcements, shares of MMC stock fell \$11.28 per share or 24.45% percent, to close at \$34.85 per share. During the Class Period, MMC stock has fallen from \$52.22 to \$32.50, a drop of 38%. These enormous and avoidable losses erased millions of dollars in retirement savings.

131. Indeed, an October 26, 2004 New York Times article noted that:

[W]hen corporations behave badly, their rank-and-file workers are hit hardest. . . . [and] [n]owhere is this clearer than at Marsh & McLennan. . . . Sadly, rank-and-file workers hold most of the 27 million shares in the stock investment plan. Marsh's filings report that its executive officers and directors held only 24,043 shares, or 0.01 percent of the total.

132. On October 15, 2004, Defendant Michael Cherkasky was named chairman and CEO of Marsh, the MMC subsidiary that handles Marsh's brokerage business. Cherkasky supervised Eliot Spitzer when they both worked together in the Manhattan District Attorney's office. They are also known to be close personal friends. Marsh's purchase of the investigative firm Kroll in July, 2004, brought Cherkasky, Kroll's CEO, to Marsh. Once the Spitzer Complaint was filed, Marsh moved immediately to put Mr. Cherkasky in a position to deal directly with Mr. Spitzer. Such a convenient and clever move by Marsh appears to have been pre-mediated for months.

133. Marsh also announced that it was suspending its practice of using MSAs the day after the Spitzer Complaint was filed.

134. By October 18, 2004, Marsh admitted that its 2003 revenue from contingent commission fee agreements totaled \$845 million, which was 12% of Marsh's \$6.9 million revenue from its risk and insurance services revenue and 7% of Marsh's total revenue of \$11.6 billion. For the first six months of 2004, MSA/PSA revenue totaled \$420 million. Marsh eventually admitted that contingent commission fee revenues were pure profit. This meant that Marsh provided no actual services to the PSA carriers to earn the contingent commission fees.

135. On October 24, 2004, Jeffrey Greenberg, the chairman and CEO of Marsh, was forced to leave the company when Spitzer made it clear that he would not negotiate a settlement of the claims with Marsh's existing current management. Mr. Cherkasky was promoted again, this time to Chairman and CEO of Marsh.

136. In early November, 2004, Marsh fired four executives named in the Spitzer Complaint as well as its lead in-house lawyer, Defendant William Rosoff. At least three groups of senior brokers have left Marsh to join other brokers or to start their own companies. On November 9, 2004 Marsh announced 3,000 immediate layoffs.

137. On January 31, 2005 Marsh announced its \$850,000,000 settlement with the New York Attorney General. The settlement requires Marsh to implement major reforms in its business practices, including:

- (a) Ending the use of contingent commission fee agreements (as of October 14, 2004);
- (b) Providing comprehensive disclosure of all forms of compensation received from carriers;
- (c) Adopting company-wide written standards of conduct for placement of insurance;
- (d) Providing all quotes and policy terms as received from carrier to clients; and
- (e) Establishing a Board-level Compliance Committee and appoint a compliance officer

138. The \$850,000,000 settlement will go into a fund to compensate U.S. policyholder clients with policy inception dates between January 1, 2001 and December 31, 2004 whose placements generated MSA or PSA revenue.

139. Within weeks of the filing of the Spitzer Complaint, Marsh's former clients began to file individual and class action suits against Marsh. More suits are expected as client investigations proceed. These suits are a further indication, as if such were necessary, that Marsh's practices were not merely an internal Marsh bookkeeping or "net pricing" arrangement, but directly damaged Marsh's clients. These suits include the following:

- Sunburst Hospitality Corp. v. Marsh & McLennan Companies, Inc., et al., Civil Action No. 04-5943 (TSH), was filed November 22, 2004 in the United States

- District Court of New Jersey. Sunburst filed individually and as a class action, alleging RICO violations, violations of State and Federal laws, breach of fiduciary duty and unjust enrichment of Marsh's contingent commission fee, steering and bid rigging.
- In The Procaccianti Group v. Marsh & McLennan Companies, Inc., et al., Case No. 05-1368 (FSM) (D.N.J.), filed March 7, 2005, Marsh's client, The Procaccianti Group, seeks class wide damages for anti-trust, RICO and unfair trade practices/consumer protective violations, as well as breach of fiduciary duty and unjust enrichment. Plaintiff filed the action against Marsh, broker AON Corporation and insurer ACE, Ltd. based on the contingent commission fee agreement and bid-rigging scheme.
  - In Shell Vacations LLC v. Marsh & McLennan Companies, Inc., et al. Civil Action No. 05C-0270(E.D. Il.), filed January 14, 2005, Marsh's client, Shell Vacations, filed a class action against Marsh, two other brokerage groups and a host of insurance carriers. The action seeks damages for violations of anti-trust, RICO and state and federal laws prohibiting unfair trade practices arising out of the contingent commission fee agreement and bid rigging scheme.
  - In Redwood Oil Co. v. Marsh & McLennan Companies, Inc., et al. Case No. 05C-0390 (E.D. Il.), filed January 21, 2005, Marsh's client, Redwood Oil, filed a class action seeking damages for the contingent commission fee agreement and bid rigging scheme. The complaint alleges claims for anti-trust and RICO violations, unfair trade practices, breach of fiduciary duty and unjust enrichment. The suit names Marsh, two other brokerage groups and many insurance carriers.
  - In Golden Gate Bridge Highway and Transportation District v. Marsh & McLennan Companies, et al., Case No. 05-1214 (FSH) (D.N.J.), filed February 23, 2005, Marsh's client, Golden Gate, filed a class action for damages arising from the contingent commission fee agreement and bid rigging scheme. Plaintiff alleges

claims of anti-trust, RICO, unfair trade practices and unjust enrichment. Marsh, two other brokerage groups and multiple insurance carriers are named as defendants.

- In MaCuish v. Marsh & McLennan Companies, Inc., et al., Civil Action No. 05c-0440 (E.D. IL.), filed January 25, 2005, Marsh's client, MaCuish, filed a class action against Marsh and a handful of carriers alleging the contingent commission fee agreement and bid rigging scheme. The complaint seeks recovery for violation of anti-trust laws, breach of fiduciary duty and unjust enrichment.
- In Singer v. Marsh & McLennan Companies, Inc., Case No. 04-cv-9130 (DC) (S.D.N.Y.), filed November 18, 2004, Marsh's client, Singer, filed a class action against Marsh arising from the contingent commission fee agreement and bid rigging scheme. The complaint alleges state and federal anti-trust violations, breach of the agent's duty of loyalty, breach of fiduciary duty and unjust enrichment.
- In Accent v. Marsh & McLennan Companies, Inc., Case No. 04-4535 (E.D.N.Y.), filed October 21, 2004, Marsh's client, Accent, filed a class action against Marsh seeking damages for the contingent commission fee agreement and bid rigging scheme. The complaint alleges state and federal anti-trust violations, breach of the agent's duty of loyalty, breach of fiduciary duty and unjust enrichment.
- In QLM Associates, Inc. v. Marsh & McLennan Companies, Inc., Civil Action No. 04-5184 (FSM) (D.N.J.), filed October 22, 2004, plaintiff filed a class action Marsh for damages arising from the contingent commission fee agreement and bid rigging scheme. The complaint alleges violations of state and federal anti-trust statutes, breach of the agent's duty of loyalty, breach of fiduciary duty and unjust enrichment.

140. On May 20, 2005, Marsh notified 135,000 clients across the country that they qualify for reimbursement from the \$850,000,000 settlement with the New York Attorney General's office.

141. MMC and its subsidiaries, including Marsh have and may have been involved in illegal activity beyond that alleged here. Investigations by various governmental agencies and

others are ongoing. Additional inappropriate and/or illegal conduct has contributed to Marsh's highly risky and improper business practices which increased the imprudence of MMC stock for investment by the Plan.

**G. Defendants Knew or Should Have Known that the MMC Stock Was Not a Prudent Plan Investment as a Result of the Company's Highly Risky and Inappropriate Business Activities.**

142. At least by Plan year 2000 (July 1, 2000 to June 30, 2001), Defendants knew or should have known that Marsh's illegal kickback and bid-rigging scheme, and the incomplete and inaccurate disclosures regarding the same, made MMC stock an imprudent Plan investment. By mid-2000 Marsh's illegal MSAs, PSAs, and bid-rigging had been largely consolidated in its Global Broking unit, and, upon information and belief, the illegal conduct was widespread and well known within the Company.

143. MMC, the company engaging in the misconduct, of course, had actual knowledge of it. The Director Defendants either had actual knowledge, or should have had knowledge, of the misconduct. Based on his statements described above, the now former Chairman and CEO Greenberg indisputably had personal knowledge of, if not a direct role in, the scheme and the Company's misleading disclosures by the beginning of the 2000 Plan year. Moreover, given the amount of revenue generated by the scheme, and the extensive planning, coordination, and communication necessary in order to orchestrate and perpetuate the scheme, it is inconceivable that many of the Company's other top officers did not also have actual, personal knowledge of these circumstances. Upon information and belief, Defendant Wijnberg, as CFO, and Defendant Rosoff, MMC's General Counsel, had actual knowledge of the scheme.

144. In the absence of discovery, Plaintiffs cannot now know the extent of actual knowledge of the misconduct by the Administrative Committee Defendants, the Investment Committee Defendants, and the Oversight Committee Defendants. Plaintiffs do allege that not one of these Defendants, or any other Defendants, conducted an appropriate investigation into whether MMC stock was a prudent investment for the Plan in light of the Company's highly

improper practices and the fact that MMC stock was the Plan's largest single asset. Moreover, not one of the Defendants provided Plan participants with information regarding the true nature of Marsh's "contingent commissions," and the risks they presented to the Company, such that Plan participants could make informed decisions regarding the MMC stock in the Plan. Indeed, not one of the Defendants took any meaningful action to protect the Plan against the risk of enormous losses as a result of the Company's highly risky and inappropriate bid-rigging scheme, and consequent artificial inflation of MMC stock. What action was taken was too-little, and too-late to prevent the Plan's massive losses.

145. The failures of the Company's top-level officers who served as Plan fiduciaries, including Defendant Greenberg, are particularly acute. They knew and at the very least tacitly approved of the scheme, as well as the Company's financial disclosures; yet, despite their obligation to prudently and loyally manage the Plan and Plan assets, and properly and materially inform Plan participants and other Plan fiduciaries of the true risks involved with holding MMC stock, they did nothing to protect the Plan.

146. An adequate investigation by any of the Defendants would have revealed to a reasonable fiduciary that investment by the Plan in the MMC stock, under the circumstances described herein, was imprudent. Such a fiduciary would have acted to protect participants against unnecessary losses, and would have taken appropriate steps to protect the Plan from losses due to the Company's improper conduct.

147. Defendants had available to them several different options for satisfying their duty, including: a) making appropriate public disclosures as necessary; b) divesting the Plan of MMC stock; c) discontinuing further matching and participant contributions in MMC stock; d) shifting the stock holdings in the MMC Stock Fund to cash pending an adequate investigation of Marsh's misconduct; e) recommending that the Plan be amended to discontinue MMC stock as a Plan investment option; f) disregarding restrictions requiring participant and employer contributions to be invested in MMC stock; g) consulting independent advisors regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan;

or h) resigning as Plan fiduciaries to the extent that as a result of their employment by Marsh they could not loyally serve Plan participants in connection with the Plan's acquisition and holding of MMC stock. More fundamentally, MMC itself and the Director Defendants could simply not have engaged in the illegal conduct. The Defendants did not take any of these actions and, instead, stood idly by as the tremendous risks their fiduciary failures created turned into tremendous losses.

**H. Defendants Communicated with Plan Participants Concerning Purchases of MMC Stock, the Plan's Single Largest Asset, Yet Failed to Disclose the Imprudence of the Investment in the Stock.**

148. Upon information and belief, Defendants regularly communicated with employees, including Plan participants, about Marsh's performance, future financial and business prospects, and MMC stock, the largest single asset in the Plan. These communications were directed specifically at employees/Plan participants at all-employee meetings, on the Company's website, and in Plan documents and materials which were disseminated to all participants and beneficiaries, and which expressly incorporated by reference the Company's misleading financial statements and disclosures. As such, these communications were acts of Plan administration, and the persons responsible for the communications were ERISA fiduciaries in this regard.

149. As a consequence of these communications, the Company fostered an inaccurately rosy picture of the soundness of MMC stock as a Plan investment. As such, Plan participants could not appreciate the true risks presented by investments in MMC stock and therefore could not make informed decisions regarding investments in the Plan.

150. Despite Defendants' communications with participants regarding MMC stock, Defendants failed to disclose the significance and the risks posed by the Company's highly risky and improper bid-rigging scheme. Defendants knew or should have known that this information was likely to have an extreme impact on the Plan and the value of Plan assets. Therefore, under

ERISA, Defendants had an affirmative duty to disclose this information so that participants and other Plan fiduciaries could make informed decisions regarding Plan assets.

## **VII. THE RELEVANT LAW**

151. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

152. ERISA § 409(a), 29 U.S.C. § 1109(a), “Liability for Breach of Fiduciary Duty,” provides, in pertinent part, that any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

153. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants to seek equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, and other monetary relief.

154. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), provides, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and 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.

155. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence and are the “highest known to the law.” They entail, among other things:

- (a) The duty to conduct an independent and thorough investigation into, and to continually monitor, the merits of all the investment alternatives of a plan, including in

this instance MMC Stock Fund, which invested in MMC stock, to ensure that each investment is a suitable option for the plan;

(b) The duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an “eye single” to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor; and

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

156. ERISA § 405(a), 29 U.S.C. § 1105 (a), “Liability for Breach by Co-Fiduciary,” provides, in pertinent part, that:

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

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

(2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Co-fiduciary liability is an important part of ERISA’s regulation of fiduciary responsibility.

Because ERISA permits the fractionalization of the fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given issue, such as the role of company stock in a plan.

In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could

not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary merely knows of a breach, a breach he had no connection with, he must take steps to remedy it:

[I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . [T]he most appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co- fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

157. Plaintiffs therefore bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by the Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

158. Insofar as any Defendant is sued alternatively as a knowing participant in a breach of fiduciary duty for equitable relief, Plaintiffs proceed pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

#### **VIII. ERISA § 404(c) DEFENSE INAPPLICABLE**

159. ERISA § 404(c) is an affirmative defense that provides a limited exception to fiduciary liability for losses that result from participants' exercise of control over investment decisions. In order for § 404(c) to apply, participants must in fact exercise "independent control" over investment decisions, and the fiduciaries must otherwise satisfy the numerous procedural and substantive requirements of ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations promulgated under it.

160. ERISA § 404(c) does not apply here for several reasons. First, ERISA § 404(c) does not and cannot provide any defense to the Plan fiduciaries' imprudent decision to select and continue offering MMC stock as a Plan investment option, or to continue matching in MMC stock, as these are not decisions that were made or controlled by the participants. See Final Reg.

Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans) (“Final 404(c) Reg.”), 57 Fed. Reg. 46906-01, 1992 WL 277875, at \*46924 n.27 (Oct. 13, 1992) (codified at 29 C.F.R. pt. 2550){ TA \l “Final Reg. Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46906-01, 1992 WL 277875 (Oct. 13, 1992) (codified at 29 C.F.R. pt. 2550)” \s “Final 404(c) Reg.” \c 13 } (noting that “the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA § 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan”).<sup>7</sup>

161. Second, ERISA § 404(c) does not apply because for much of the Class Period the Plan required participant contributions to be made in MMC stock, and did not provide a diversified array of investment options, and, both before and after that date, the Plan restricted the ability of participants to divest their Plan investments in MMC stock, all of which prevents true participant control over their Plan investment in MMC stock.

162. Third, even as to participant directed investment in MMC stock, ERISA § 404(c) does not apply because Defendants failed to ensure effective participant control by providing complete and accurate material information to participants regarding MMC stock. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B){ TA \l "29 C.F.R. § 2550.404c-1(b)(2)(i)(B)" \s "29 C.F.R. § 2550.404c-1(b)(2)(i)(B)" \c 10 } (the participant must be provided with “sufficient information to make informed decisions”). As a consequence, participants in the Plan did not have informed control over the portion of the Plan’s assets that were invested in MMC stock as a result of their

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<sup>7</sup> *See also* Final 404(c) Reg., 1992 WL 277875, at \*46922{ TA \s “Final 404(c) Reg.” \c 13 } (emphasizing that “the act of designating investment alternatives . . . in an ERISA section 404(c) plan is a fiduciary function to which the limitation on liability provided by section 404(c) is not applicable. All of the fiduciary provisions of ERISA remain applicable to both the initial designation of investment alternatives . . . and the ongoing determination that such alternatives and managers remain suitable and prudent investment alternatives for the plan.”).

investment directions, and the Defendants remained entirely responsible for losses that result from such investment.

163. Because ERISA § 404(c) does not apply here, the Defendants' liability to the Plan, the Plaintiffs and the Class (as defined below) for losses caused by the Plan's investment in MMC stock is established upon proof that such investments were or became imprudent and resulted in losses in the value of the assets in the Plan during the Class Period.

## **IX. CAUSES OF ACTION**

### **A. Count I: Failure to Prudently and Loyalily Manage the Plan and Plan Assets**

164. Plaintiffs incorporate by this reference the paragraphs above.

165. This Count alleges fiduciary breach against the following Defendants: MMC, the Director Defendants, and the Investment Committee Defendants (the "Prudence Defendants").

166. As alleged above, during the Class Period the Prudence Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

167. As alleged above, the scope of the fiduciary duties and responsibilities of the Prudence Defendants included managing the Plan's assets for the sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. The Prudence Defendants were directly responsible for, among other things, selecting prudent investment options, eliminating imprudent options, determining how to invest employer contributions to the Plan and directing the trustee regarding the same, evaluating the merits of the Plan's investments on an ongoing basis, and taking all necessary steps to ensure that Plan assets were invested prudently.

168. Yet, contrary to their duties and obligations under the Plan documents and ERISA, the Prudence Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, these Defendants knew or should have known that MMC

no longer was a suitable and appropriate investment for the Plan, but was, instead, a highly speculative, artificially inflated, and risky investment in light of the Company's improper business and accounting practices, and misleading financial statements and disclosures. Nonetheless, during the Class Period, these Defendants continued to offer MMC stock as an investment option for participant contributions and match all employer contributions in MMC stock, require participants themselves to invest in MMC stock, and severely restrict participants' ability to sell shares of MMC stock. They did so despite evidence that the Company was being seriously mismanaged, was engaged in highly improper bid-rigging practices, and was issuing misleading and inaccurate financial statements to the SEC, the investing public, and participants that artificially inflated the value of the stock, and exposed the Plan's investment in the stock to huge risk and certain losses once the truth was revealed.

169. The Prudence Defendants were obliged to prudently and loyally manage all of the Plan's assets. However, their duties of prudence and loyalty were especially significant with respect to company stock because: a) during the Class Period, over half of the Plan's assets were invested in it; b) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and c) participants tend to underestimate the likely risk and overestimate the likely return of investment in company stock investment. In view of this, the Prudence Defendants were obliged to have in place a regular, systematic procedure for evaluating the prudence of company stock.

170. The Prudence Defendants had no such procedure. Moreover, they failed to conduct an appropriate investigation of the merits of continued investment in MMC stock even in light of the Company's highly risky and inappropriate practices, and the particular dangers that these practices posed to the Plan. Such an investigation would have revealed to a reasonably prudent fiduciary the imprudence of continuing to make and maintain investment in MMC stock under these circumstances.

171. Indeed, given the success of the State of New York's investigation, and the speed with which the Company acknowledged that it engaged in bid-rigging practices, promised to

suspend them, and terminated those directly involved and replaced top management, it cannot genuinely be doubted that an investigation by top-level officers who also served as fiduciaries would have revealed that under the circumstances MMC stock no longer was a prudent investment for participants' retirement savings. This conclusion is all the more apparent given that, on information and belief, many of the top-level officer fiduciaries, including Defendants Greenberg, Wijnberg, and Rosoff knew about the bid-rigging scheme and actively sought to downplay the significance of the Company's improper contingent commission agreements.

172. The Prudence Defendants' decisions respecting the Plan's investment in MMC stock described above, under the circumstances alleged herein, abused their discretion as ERISA fiduciaries in that a prudent fiduciary acting under similar circumstances would have made a different investment decision. Specifically, based on the above, a prudent fiduciary could not have reasonably believed that further and continued investment of the Plan' contributions and assets in MMC stock was in keeping with the Plan settlor's expectations of how a prudent fiduciary would operate.

173. The Prudence Defendants were obligated to discharge their duties with respect to the Plan 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. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

174. According to DOL regulations and case law interpreting this statutory provision, a fiduciary's investment or investment course of action is prudent if: a) he has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and b) he has acted accordingly.

175. Again, according to DOL regulations, “appropriate consideration” in this context includes, but is not necessarily limited to:

- A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and
- Consideration of the following factors as they relate to such portion of the portfolio:
  - The composition of the portfolio with regard to diversification;
  - The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
  - The projected return of the portfolio relative to the funding objectives of the plan.

176. Given the conduct of the Company as described above, the Prudence Defendants could not possibly have acted prudently when they continued to invest the Plan’s assets in MMC stock because, among other reasons:

- The Prudence Defendants knew of and/or failed to investigate serious corporate misconduct occurring at the Company that made the Company stock an extremely risky, artificially inflated, and imprudent investment for the Plan;
- The risk associated with the investment in MMC’s stock during this time of serious corporate misconduct was an extraordinary risk, far above and beyond the normal, acceptable risk associated with investment in company stock;
- This abnormal investment risk could not have been known by the Plan participants, and the Prudence Defendants knew that it was unknown to them (as it was to the market generally), because the fiduciaries never disclosed it;

- Knowing of this extraordinary risk, and knowing the participants did not know it, the Prudence Defendants had a duty to avoid permitting the Plan or any participant from investing Plan assets in MM stock; and
- Further, knowing that the Plan was not a diversified portfolio, but was heavily invested in company stock, the Prudence Defendants had a heightened responsibility to divest the Plan of company stock if it became or remained imprudent.

177. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. On information and belief, the compensation and tenure of the Prudence Defendants was tied to the performance of MMC stock and/or the publicly reported financial performance of MMC. Fiduciaries laboring under such conflicts, must, in order to comply with the duty of loyalty, make special efforts to assure that their decision making process is untainted by the conflict and made in a disinterested fashion, typically by seeking independent financial and legal advice obtained only on behalf of the Plan.

178. The Prudence Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, *inter alia*, failing to engage independent advisors who could make independent judgments concerning the Plan's investment in MMC; failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made MMC stock an unsuitable investment for the Plan; failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served; with respect to each of these above failures, doing so in order to avoid adversely impacting their own compensation or drawing attention to MMC's inappropriate practices; and by otherwise placing their own and MMC's improper interests above the interests of the participants with respect to the Plan's investment in MMC stock.

179. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan documents or directives that it knows or reasonably should know would lead to an imprudent

result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor allow others, including those whom they direct or who are directed by the plan, to do so.

180. The Prudence Defendants breached this duty by (1) continuing to offer MMC stock as an investment option for the Plan for participant contributions, and for much of the Class Period requiring participant contributions to be invested in MMC stock; (2) continuing to invest employer matching contributions in MMC stock in the MMC Stock Fund; (3) for both employee and employer contributions to the MMC Stock Fund, continuing to invest the assets of the MMC Stock Fund overwhelmingly in MMC stock rather than in cash or other short-term investment options; and (4) for both employee and employer contributions continuing to impose restrictions on the ability of participants to divest their Plan accounts of holdings of MMC stock, and for each of these actions doing so when the Prudence Defendants knew or should have known that MMC stock no longer was a prudent investment for participants' retirement savings.

181. As a consequence of the Prudence Defendants' breaches of fiduciary duty alleged in this Count, the Plan suffered tremendous losses. If the Prudence Defendants had discharged their fiduciary duties to prudently invest the Plan's assets, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

182. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Prudence Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

**B. Count II: Failure to Provide Complete and Accurate Information to Participants and Beneficiaries**

183. Plaintiffs incorporate by this reference the allegations above.

184. This Count alleges fiduciary breach against the Investment Committee Defendants and the Administrative Committee Defendants (the “Communications Defendants”).

185. As alleged above, during the Class Period the Communications Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

186. As alleged above, the scope the Communications Defendants’ duties included disseminating Plan documents and/or Plan-related information to participants regarding the Plan and/or assets of the Plan, or in the case of the Investment Committee Defendants, the duty to ensure that the Plan’s investments, including its investment in employer stock was made prudently and at an appropriate price reflecting available information about the risk and value of such investment. In the case of the Investment Committee one way to fulfill these duties was to make appropriate disclosures to each other and the Plan’s participants.

187. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to participants, not to mislead them regarding the Plan or the Plan’s assets, and to disclose information that participants need in order to exercise their rights and interests under the Plan. This duty to inform participants includes an obligation to provide participants and beneficiaries of the Plan with complete and accurate information, and to refrain from providing false information or concealing material information regarding the Plan’s investment options such that participants can make informed decisions with regard to investment options available under the Plan. This duty applies to all Plan’s investment options, including investment in MMC stock.

188. This fiduciary duty to honestly communicate with participants is designed not merely to inform participants and beneficiaries of conduct, including illegal conduct, bearing on their retirement savings, but also to forestall such illegal conduct in the first instance. By failing to discharge their disclosure duties, the Communications Defendants facilitated the illegal conduct in the first instance.

189. The Communication Defendants were obliged to provide participants with complete and accurate information concerning all of the Plan's assets. However, their duties of honest disclosure were especially significant with respect to company stock because: a) during the Class Period, over half of the Plan's assets were invested in it; b) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and c) participants tend to underestimate the likely risk and overestimate the likely return of investment in company stock investment.

190. The Communications Defendants breached their ERISA duty to inform participants by failing to provide complete and accurate information regarding the Company and MMC stock, and, generally, by conveying through statements and omission inaccurate information regarding the soundness of MMC stock, and the prudence of investing retirement contributions in the stock.

191. Specifically, the Communications Defendants failed to adequately inform participants of the true nature of the Company's "contingent commissions," the Company's illegal kickback scheme, and the risks these presented for the Company. The Communications Defendants also failed to inform participants that the Company's financial disclosures regarding the kickback scheme and the revenues generated thereby were false and misleading, and caused the value of MMC stock to be artificially inflated.

192. In particular, the Administrative Committee Defendants were responsible for communications made in the official Plan documents and materials which were disseminated directly to all participants, including the Plan's SPDs which during at least part, and perhaps all, of the Class Period incorporated by reference the Company's materially misleading and inaccurate SEC filings and reports. Upon information and belief, such communications also occurred at all-employee meetings, and on website communications directed to Plan participants.

193. These failures were particularly devastating to the Plan and the participants, as a significant percentage of the Plan's assets were invested in MMC stock during the Class Period, with acquisitions of MMC stock occurring at significantly inflated prices. Thus, the stock's

precipitous decline had an enormous impact on the value of participants' retirement assets. Had such disclosures been made to participants, or Plan fiduciaries, if any, who were not aware of the contingent commissions and bid-rigging, participants and fiduciaries could have taken action to protect the Plan, and the disclosure to participants itself, which necessarily have been accompanied by disclosure to the market, would have assured that any further acquisitions of MMC stock by the Plan would have occurred at an appropriate price.

194. As a consequence of the failure of the Communications Defendants to satisfy their duty to provide complete and accurate information under ERISA, participants lacked sufficient information to make informed choices regarding investment of their retirement savings in MMC stock, or to appreciate that under the circumstances known or that should have been known to the Communications Defendants, but not known by participants, that MMC stock was an inherently unsuitable and inappropriate investment option for their Plan accounts.

195. The Communications Defendants' failure to provide complete and accurate information regarding MMC stock was uniform and Plan-wide, and impacted all Plan participants the same way in that none of the participants received crucial, material information regarding the risks of MMC stock as a Plan investment option and all Plan acquisitions of employer stock during the Class Period occurred at inflated prices.

196. As a consequence of the Communications Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Communications Defendants had discharged their fiduciary duties to prudently disclose material information, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

197. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Communications Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

**C. Count III: Failure to Monitor Fiduciaries**

198. Plaintiffs incorporate by this reference the allegations above.

199. This Count alleges fiduciary breach against the following Defendants: Greenberg, the Director Defendants, and the Oversight Committee Defendants (the “Monitoring Defendants”).

200. As alleged above, during the Class Period the Monitoring Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

201. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries, as follows:

<b>Monitoring Fiduciary</b>	<b>Monitored Fiduciary</b>	<b>Relevant Period</b>	<b>Reference</b>
Greenberg	Administrative Committee Investment Committee Oversight Committee	07/00 – 09/03 07/00 – 09/03 09/03 – 10/04	¶¶ 64 - 65
Director Defendants	Administrative Committee Investment Committee Oversight Committee	07/00 – 01/05 07/00 – 01/05 09/03 – 01/05	¶¶ 68 - 69
Oversight Committee Defendants	Administrative Committee Investment Committee	09/03 – 01/05 09/03 – 01/05	¶¶ 84 - 85

202. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

203. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the “hands-on” fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan’s performance, and by ensuring that they have a prudent process for obtaining the

information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

204. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

205. The Monitoring Defendants breached their fiduciary monitoring duties by, among other things: (a) failing, at least with respect to the Plan's investment in company stock, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and inaction with respect to company stock; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of MMC's highly risky and inappropriate business and accounting practices, and the likely impact of such practices on the value of the Plan's investment in MMC stock; (c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan's assets; and (d) failing to remove appointees whose performance was inadequate in that they continued to make and maintain huge investments in MMC stock despite their knowledge of practices that rendered MMC stock an imprudent investment during the Class Period for participants' retirement savings in the Plan, and who breached their fiduciary duties under ERISA.

206. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary

duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

207. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

**D. Count IV: Co-Fiduciary Liability**

208. Plaintiffs incorporate by this reference the allegations above.

209. This Count alleges co-fiduciary liability against the following Defendants: MMC, Greenberg, Wijnberg, Rosoff, the Communications Defendants, and the Monitoring Defendants (the “Co-Fiduciary Defendants”).

210. As alleged above, during the Class Period the Co-Fiduciary Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

211. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. The Co-Fiduciary Defendants breached all three provisions.

212. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if, he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. MMC and Defendants Greenberg, Rosoff, and Wijnberg knew of the breaches by the other fiduciaries and made no efforts, much less

reasonable ones, to remedy those breaches. In particular, they did not communicate their knowledge of the Company's illegal activity to the other fiduciaries.

213. MMC, through its officers and employees, engaged in highly risky and inappropriate business practices, withheld material information from the market, provided the market with misleading disclosures, and profited from such practices, and, thus, knowledge of such practices is imputed to MMC as a matter of law.

214. Defendants Greenberg, Wijnberg, and Rosoff, by virtue of their positions at MMC, participated in and/or knew about the Company's highly risky and inappropriate business and accounting practices, and its consequences, including the artificial inflation of the value of MMC stock.

215. Because MMC and Defendants Greenberg, Rosoff, and Wijnberg knew of the Company's illegal business practices, they also knew: a) that the Prudence Defendants were breaching their duties by continuing to invest in company stock; and b) that the Communication Defendants were breaching their duties by providing incomplete and inaccurate information to participants. Yet, they failed to undertake any effort to remedy these breaches. Instead, they compounded them by downplaying the significance of MMC's improper business practices, and obfuscating the risk that the practices posed to the Company, and, thus, to the Plan.

216. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. MMC knowingly participated in the fiduciary breaches of the Prudence Defendants in that it benefited from the sale or contribution of its stock at artificially inflated prices. MMC also, as a de facto fiduciary as alleged above in paragraphs 60 - 62 participated in all aspects of the fiduciary breaches of the other Defendants. Likewise, Defendants Greenberg, Rosoff, and Wijnberg knowingly participated in the breaches of the Communications and Prudence Defendants because, as alleged above, they had actual knowledge of the Company's illegal conduct and yet,

ignoring their oversight responsibilities, permitted the Prudence and Communications Defendants to breach their duties.

217. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if by failing to comply with ERISA § 404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

218. The Communications Defendants enabled the breaches of the Investment Committee Defendants because their failure to provide complete and accurate information to the participants enabled the Investment Committee Defendants to breach their duties. The Monitoring Defendants failure to monitor the Investment, Administrative, and Oversight Committees enabled those committees to breach their duties.

219. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiffs and the Plan's other participants and beneficiaries, lost millions of dollars of retirement savings.

220. Pursuant to ERISA §§ 409 and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

**E. Count V: Knowing Participation in a Breach of Fiduciary Duty**

221. Plaintiffs incorporate by this reference the allegations above.

222. This Count alleges knowing participation in a fiduciary breach against MMC.

223. To the extent that MMC is found not to have been a fiduciary or to have acted in a fiduciary capacity with respect to the conduct alleged to have violated ERISA, MMC knowingly participated in the breaches of those Defendants who were fiduciaries and acted in a fiduciary capacity and as such is liable for equitable relief as a result of participating in such breaches.

224. MMC benefited from the breaches by discharging its obligations to make contributions to the Plan in amounts specified by the Plan by contributing MMC stock to the Plan or selling stock to the Plan while the value of the stock was inflated as the result of MMC's highly risky and improper bid-rigging practices, and by providing the market with materially misleading statements and omissions. Accordingly, MMC may be required to disgorge this benefit or a constructive trust should be imposed on treasury shares of MMC stock which would have been contributed to the Plan, but for MMC's participation in the foregoing breaches of fiduciary duty.

## **X. CAUSATION**

225. The Plan suffered hundreds of millions of dollars in losses because substantial assets of the Plan were imprudently invested or allowed to be invested by Defendants in MMC stock during the Class Period, in breach of Defendants' fiduciary duties.

226. Defendants are liable for the Plan's losses in this case because: (1) most of the Plan's investment in MMC stock was the result of the Prudence Defendants' decisions to invest matching contributions in MMC stock, to require participants to invest their own contributions in MMC stock, and to severely restrict the ability of participant to sell any of their Plan holdings in the stock; and (2) as to the portion of Plan assets invested in MMC stock as a result of participant contributions, the Prudence Defendants are liable for the losses because they failed to take the necessary and required steps to ensure effective and informed independent participant control over the investment decision-making process, as required by ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations promulgated thereunder. The Communications Defendants withheld material, non-public facts from participants, and provided inaccurate and incomplete information to them regarding the true health and ongoing profitability of MMC, and its soundness as an investment vehicle.

227. As a result, the participants made the decision to contribute to the Plan resulting in the Plan's purchase of stock with both participant contributions and matching contributions (or

the contribution of stock as a matching contribution) with incomplete information about the risks and value of MMC stock, and the stock itself remained overvalued. Had the Communications Defendants made appropriate disclosures, the Plan would not have purchased overvalued shares. The Prudence Defendants also are liable for losses that resulted from their decision to invest nearly all of the assets of the MMC Stock Fund in MMC stock rather than cash or other short-term investment options, as authorized by the Plan, and clearly prudent under the circumstances presented here.

228. Had the Defendants properly discharged their fiduciary and co-fiduciary duties, including the provision of full and accurate disclosure of material facts concerning investment in MMC stock, eliminating MMC stock as an investment alternative when it became imprudent, and divesting the Plan of MMC stock when maintaining such an investment became imprudent, the Plan would have avoided some or all of the losses that it, and indirectly, the participants suffered.

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

229. The Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plan's assets should not have been invested in MMC stock during the Class Period.

230. As a consequence of the Defendants' breaches, the Plan suffered significant losses.

231. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires "any person who is a fiduciary...who breaches any of the...duties imposed upon fiduciaries...to make good to such plan any losses to the plan...." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate...."

232. With respect to calculation of the losses to the Plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have made

or maintained its investments in the challenged investment and, instead, prudent fiduciaries would have invested the Plan's assets in the most profitable alternative investment available to them. Alternatively, losses may be measured not only with reference to the decline in stock price relative to alternative investments, but also by calculating the additional shares of MMC stock that the Plan would have acquired had the Plan fiduciaries taken appropriate steps to protect the Plan. The Court should adopt the measure of loss most advantageous to the Plan. In this way, the remedy restores the Plan's lost value and puts the participants in the position they would have been in if the Plan had been properly administered.

233. Plaintiffs and the Class are therefore entitled to relief from the Defendants in the form of: (1) a monetary payment to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a)(2); (3) injunctive and other appropriate equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3) for knowing participation by a non-fiduciary in a fiduciary breach; (4) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (5) taxable costs and interest on these amounts, as provided by law; and (6) such other legal or equitable relief as may be just and proper.

234. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Plan in this case.

## **XII. CLASS ACTION ALLEGATIONS**

235. **Class Definition.** Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of themselves and the following class of persons similarly situated (the "Class"):

All persons, other than Defendants, who were participants in or beneficiaries of the Plan at any time between July 1, 2000 and January 31, 2005 and whose accounts included investments in MMC.

236. **Class Period.** The fiduciaries of the Plan knew or should have known at least by the beginning of the 2000 Plan year, July 1, 2000, that the Company's illegal conduct was so pervasive that MMC stock could no longer be offered as a prudent investment for a retirement Plan. On the other hand, with the \$850,000,000 settlement with the State of New York on January 31, 2005, the fiduciaries could have reasonably concluded that the illegal conduct had been adequately disclosed and addressed and that MMC stock could once again be offered as Plan investment option.

237. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time, and can only be ascertained through appropriate discovery, Plaintiffs believe there are, based on the Plan's Form 5500 for Plan year 2002 more than 30,000 members of the Class who participated in, or were beneficiaries of, the Plan during the Class Period.

238. **Commonality.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

- (a) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;
- (b) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plan's participants and beneficiaries;
- (c) whether Defendants violated ERISA; and
- (d) whether the members of the Class have sustained damages and, if so, what is the proper measure of damages.

239. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class because Plaintiffs' and the other members of the Class each sustained damages arising out of the Defendants' wrongful conduct in violation of federal law as complained of herein.

240. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

241. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

242. **Other Rule 23(b) Requirements.** Class action status is also warranted under the other subsections of Rule 23(b) because: (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (iii) questions of law or fact common to members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

### **XIII. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for:

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

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

C. An Order compelling the Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if the Defendants had fulfilled their fiduciary obligations;

D. Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

E. An Order enjoining Defendants, and each of them, from any further violations of their ERISA fiduciary obligations;

F. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plan' investment in MMC stock;

G. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

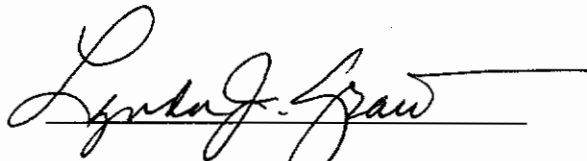
H. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

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

J. An Order for equitable restitution and other appropriate equitable and injunctive relief against the Defendants.

DATED: June 15, 2005.

Respectfully submitted:



**GOODKIND, LABATON  
RUDOFF & SUCHAROW LLP**  
Lynda J. Grant (LJG 4784)  
Stacey Fishbein (SF 4777)

100 Park Avenue  
New York, NY 10017  
Tel: (212) 907-0700  
Fax: (212) 818-0477  
*Liaison Counsel/Member of Executive  
Committee*

**KELLER ROHRBACK L.L.P.**

Lynn Lincoln Sarko  
Margaret E. Wetherald  
Erin M. Riley  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Tel: (206) 623-1900  
Fax: (206) 623-3384

**KELLER ROHRBACK L.L.P.**

Ron Kilgard  
3101 North Central Avenue, Suite 900  
Phoenix, AZ 85012  
Tel: (602) 248-0088  
Fax: (602) 248-2822

*Lead Counsel/Chair of Executive  
Committee*

**SCHATZ & NOBEL, P.C.**

Robert Izard  
Wayne Boulton  
Eric Palmquist  
One Corporate Center  
20 Church Street  
Hartford, CT 06103  
Tel: (800) 797- 5499  
Fax: (860) 493-6290

*Member of Executive Committee*

**COHEN MILSTEIN HAUSFELD &  
TOLL, P.L.L.C.**

Marc Machiz  
1 South Broad Street, Suite 1850  
Philadelphia, PA 19107  
Tel: (215) 825-4010  
Fax: (215) 825-4001

**COHEN MILSTEIN HAUSFELD &**

**TOLL, P.L.L.C.**

Bruce Rinaldi

1100 New York Avenue, N.W.

Suite 500, West Tower

Washington, D.C. 20005

Phone: 202-408-4600

Fax: 202-408-4699

*Member of Executive Committee*