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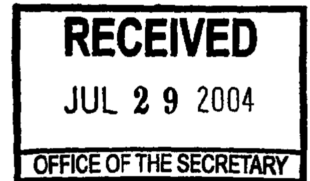
July 23, 2004

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609



Re: File Number S7-26-04
Regulation B

Dear Mr. Katz:

The Commission seeks comment with respect to Regulation B and, in particular new proposed exemptions for banks from the definition of "broker" under Section 3(a)(4) of the Exchange Act, as amended by the Gramm-Leach Bliley Act.

I am submitting this letter both in my individual capacity as a lawyer and on behalf of numerous trust beneficiary clients who will be affected negatively by the proposed rule change.

By way of background, I have been a lawyer for 37 years and, for most of these years, have specialized in securities, banking and consumer litigation, typically representing plaintiffs. I represent and have represented numerous beneficiaries of personal trusts, guardianships and other forms of fiduciary accounts in both litigated and non-litigated matters.

I have also had the privilege of lecturing before the Federal Financial Institutions Examination Council, the organization which provides training for bank examiners employed by the FDIC, the Comptroller of the Currency and the Federal Reserve System, most recently at its Asset Management Forum this year.

Although I am not unmindful of the fact that the Commission has endeavored to deal with the numerous objections put forth in 2001 by members of Congress and banking regulators, the present proposal also misses the mark in fundamental ways. While the Commission has certainly addressed the concerns raised in a joint FDIC, OCC and Federal Reserve letter issued in the wake of the 2001 proposal, it has proceeded to permit a so-called "trust and fiduciary activities exception." Based upon my knowledge and experience, such an exception cannot be justified. My comments are limited to this proposed exception.

TRUST AND FIDUCIARY ACTIVITIES

The banking industry and its sycophants have apparently successfully lobbied the Commission into accepting a false premise; namely, that bank examiners examine the trust operations of banks "for compliance with fiduciary principles or standards." Nothing could be further from the truth! Bank examiners do not have the training or inclination to make such determinations, let alone the time and resources to carry out proper fiduciary examinations. At best, the examiners' mandate is to satisfy themselves as to the financial soundness of the institutions being examined – not to determine whether they are breaching their fiduciary duties owed to those who have been entrusted to their care or are making honest disclosures to such persons with respect to the investments made on their behalf.

Now that banks providing trusteeship services can sell securities (including mutual funds), the temptations to reach into the proverbial piggy banks of fiduciary accounts is a powerful inducement for them to cross the line. It matters little whether the banks or their corporate affiliates receive "relationship compensation," commission-type compensation or one of the various forms of concealed "back door" compensation, such as advisory fees paid by proprietary mutual funds. The affected financial institutions are totally conflicted and, although banking regulators are aware of this fact, they are not likely to address it absent a publicly-documented scandal.

THE CONFLICTS OF INTEREST OF CORPORATE FIDUCIARIES

In the last two years, in the wake of the financial scandals which emerged publicly in the wake of the incestuous relationships existing between securities analysts and the corporate finance departments of the nation's leading brokerage firms, fundamental corrective steps have been taken by the Commission and others to deal with this problem.

Although there was always the proverbial "Chinese Wall" which supposedly existed between such functions, the reality was, all too often, that the wall existed only in fiction. Now, with "Wall Street" having come to grips with the irreconcilable conflicts of interest which caused the need for a "Chinese Wall," it is time to re-direct attention to a similarly serious set of irreconcilable conflicts which exist within the nation's banks. In particular, these conflicts of interest must be addressed in connection with the banks' fulfillment of their roles as fiduciaries. If anything, the proposed rule only serves to give banks a "green light" to further their securities businesses without the protection afforded investors who deal with traditional brokerage outlets.

Because the conflicts are so fundamental to the historical operating practices of most banks, as in "Wall Street," the "cure" will have to be fundamental as well. In this regard, the "cure" in its most therapeutic (although least likely successful) manifestation leads to the total separation of the fiduciary functions of a financial institution from all of its other commercial activities. In effect, this remedy would require a spin-off of the fiduciary functions into separate (and now largely anachronistic) trust companies which provide only fiduciary services, notably investment, custodial and administrative services and, to the extent that they buy and sell securities on behalf of fiduciary accounts, as they all do, require registration as brokers and dealers with the Commission.

Clearly, such a step would be faced with massive opposition by the banking industry and its lobbyists. Nevertheless, nothing less than total separation is warranted by the abuse by banks' of the fiduciary responsibilities they have accepted and for which they have been paid. Many of these abuses, with their attendant questionable disclosure practices, would violate the anti-fraud provisions of the Exchange Act. A number of these abuses are set out in the proposed Amended Complaint in Hughes v. LaSalle Bank, N.A. et al, Civil Action No. 02-CV6384 (S.D.N.Y), and in the Amended Complaint in Kutten v. Bank of America, N.A., et al, Civil Action No. 4:04-CV-244 (E.D.M.O.) *(Exhibits 1 and 2 hereto).*[1] In each of these cases involving the conversions of fiduciary assets previously invested in common trust funds or individually managed accounts into shares of proprietary mutual funds (i.e. the sale of shares by banks to fiduciary accounts), the banks breached their duty of loyalty to the beneficiaries of the accounts in favor of increased profitability for themselves and their corporate affiliates as well as concealing or misrepresenting material facts in connection with the conversions. These abuses were and are rampant within the nation's banks. In addition, as noted in the Kutten Complaint, Nations Funds, the proprietary mutual funds of Bank of America, were used to benefit its banking customers and those of its corporate parent through late trading and other improper means. Furthermore, there is mounting evidence of hidden profits accruing to the benefit of such institutions flowing from the securitization of the cash flow (i.e., advisory fees and other revenue) derived from these proprietary funds.

None of this is to suggest that conversions or investments in proprietary mutual fund shares are, prima facie, improper. Indeed, both state law and banking regulations dictate otherwise. See, in this regard, the Declaration of Prof. John Langbein of the Yale Law School submitted in the LaSalle class action *(Exhibit 3 hereto).* However, because of the conflicts of interest that exist, banks must be especially careful to put beneficiaries' interests before their own. At paragraphs 5-9, 12, 13, 18 of the Langbein Declaration of December 23, 2003, he says:

> "5. The conversion. The issue in this case is not LaSalle's decision to invest in mutual funds, it is rather its decision about when and how to invest in mutual funds. The common trust fund interests that are the subject of this litigation were converted in January, 1993. Until 1996, converting common trust fund interests into mutual funds was a recognition event, treated for federal (and for most state) tax purposes as though it entailed the sale of the interest in the common trust fund and the purchase of the mutual fund shares, with consequent taxation. Section 1805 of the Small Business Job Protection Act of 1996 amended the Internal Revenue Code, adding IRS § 584(h), which permits such conversions on a tax-free basis. Until 1996, therefore, converting common trust fund interests into mutual fund shares was a transaction of dubious prudence, because such a conversion would provoke precisely the sort of tax consequences whose avoidance was the main attraction for investing in mutual funds in the first place. For that reason, responsible corporate fiduciaries decided not to convert their common trust funds until the mutual fund industry could succeed in persuading Congress to render such conversions tax neutral, the step that occurred in 1996.

[1] I am counsel for plaintiffs in both such actions.

6. Entering the mutual fund business. LaSalle's decision to convert from common trust funds to mutual funds as the means for investing fiduciary accounts in pooled vehicles did not require LaSalle to enter the mutual fund business. Rather, LaSalle could have chosen to use proven mutual funds already available in the highly competitive mutual fund marketplace. LaSalle's haste to convert its common trust funds into mutual funds appears to have been was driven by LaSalle's wish to enter the mutual fund business, launching a new set of mutual funds called the Rembrandt Funds. In using its fiduciary accounts as seed money for its new mutual funds, LaSalle placed itself in tension with its duty of loyalty, that is, its "duty to administer [each] trust solely in the interest of the beneficiary." Restatement of Trusts (Second) § 170(1) (1959).

7. Self-dealing. In the absence of special statute, LaSalle's conduct would have been a per se breach of the rule against self-dealing. "The trustee violates his duty [of loyalty] to the beneficiary ... where he uses the trust property for his own purposes. Thus, he cannot properly use the trust money in his business ...." Restatement of Trusts (Second) § 170(1), comment 1 (1959). Likewise, a fiduciary who accepts commission income from fiduciary accounts breaches the duty of loyalty. The Restatement uses the example of a trustee who receives a commission for placing trust insurance business: because the trustee "would be tempted to place the insurance with the company that employs him, even though that might not be for the best interest of the beneficiary, "the transaction violates the duty of loyalty. Id., comment o.

8. State enabling legislation: what the acts relieve against and what they leave in place. In many states, legislation overcomes the per se rule against self-dealing, permitting trustees to invest in proprietary or "affiliated" funds. These statutes do not, however, eliminate the duty of loyalty, nor do they in any way soften the duty of prudence. For example, the Illinois statute says that "[a] trustee shall not be prohibited from investing ... [in an affiliated fund] solely on the basis that the trustee ... receives reasonable remuneration" for its services to the fund. 760 Ill. Comp. Stats. § 760 5/5.2. Thus, the trustee may now use an affiliated mutual fund, even though compensated, but the trustee remains responsible for determining that the investment is reasonably priced and otherwise prudent, and that selecting this fund is in the best interest of the trust beneficiaries.

9. Comparison shopping. Such a determination requires a fiduciary to undertake a careful analysis of the strengths and weaknesses of the affiliated funds, compared to other funds suitable for the objectives of the particular trust fund. Among the comparisons that a prudent fiduciary would consider are the net costs, including investment expenses and management and sales fees; the quality and experience of the fund managements; and the degree of diversification that would be achieved using the affiliated versus the competing funds. After making such investments, a fiduciary is obliged to monitor them closely and continuously, comparing the performance of the affiliated funds against the performance of

benchmark funds of comparable character. See, e.g., Uniform Prudent Investor Act §§ 2, 3, 7, 9 (duties of prudent investing, diversification, cost sensitivity, and monitoring). The deposition evidence indicates that LaSalle gave no consideration to the use of seasoned outsiders before preferring its own insiders. For example, LaSalle's then-president James Wynsma testified that no other investment advisors were ever considered for the Rembrandt funds. Deposition of James Wynsma, at 232-4)... Asked whether there was "any particular advantage to the LaSalle National Bank Trust beneficiaries to having their funds placed in Rembrandt funds beginning in 1993," the current president and CEO of LaSalle's parent, ABN AMRO N.A., who served on LaSalle's board when it approved the conversion, replied: "I have no idea one way or the other." Deposition of Norman Bobins, at 46, Exhibit 19."

"12. Failures of deliberation and documentation. In the present case, the evidence indicates that LaSalle did not engage in the careful, beneficiary-oriented deliberation about whether to convert these fiduciary accounts to proprietary mutual fund accounts, nor did it engage in such deliberation about whether incurring heavy trust-level tax costs was prudent and consistent with its duty of loyalty. LaSalle's Personal Financial Services Director John Crean admitted that LaSalle's trust officers did not analyze "individual trust accounts to determine whether those accounts should be part of the investment conversion ...."Crean Deposition at 97-99, Exhibit 9. If there was deliberation about the fundamental fiduciary issues involved in this conversion, those deliberations appear not to have been the subject of contemporaneous recordation. Indeed, high-ranking officers have bragged about their failure to adhere to the process values of the trust fiduciary tradition. Asked about the failure to document the purposes of the conversion, Harrison Tempest, the then president of LaSalle's parent company ABN-AMRO, N.A., admitted that "I didn't feel minutes were very important." Harrison Tempest Deposition at 38, Exhibit 8. The chair of LaSalle's Trust Investment Committee boasted on deposition that "I have a long and distinguished history of not keeping any minutes of anything anytime anywhere." Jan Persson Deposition at 133-34, Exhibit 14. In a matter so consequential, and in which LaSalle operated from a position of such embedded conflict of interest, this disdain for the ordinary deliberative and record-keeping practices of professional fiduciaries constituted a serious breach of LaSalle's duties of loyalty and prudence.

13. Failures of disclosure. Fiduciaries owe fiduciary account beneficiaries a duty of full disclosure about important matters arising in connection with the administration of their accounts, especially when the fiduciary has an embedded conflict of interest regarding the matter in question. "A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." Uniform Trust Code (UTC) § 813(a) (2000). As I observed in my prior affidavit, disclosure also serves important process values: Disclosure promotes deliberation

and deters imprudent or otherwise wrongful conduct. "Furthermore, disclosure must be honest disclosure if it is to comply with the duty of loyalty. As Judge Posner said in a well-known aphorism that the Supreme Court has endorsed, 'Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.' Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983), quoted in Varity Corp. v. Howe, 516 U.S. 489, 506 (1996)." Langbein April 2003 Affidavit, at § 13. In the present case it appears that LaSalle did not disclose to the beneficiaries that the conversion to affiliated mutual funds would trigger otherwise avoidable tax liabilities and result in increased expenses, nor that LaSalle had not considered the use of less expensive non-affiliated mutual funds, nor that LaSalle had no experience in the mutual fund business. ABN-AMRO N.A.'s former President Harrison Tempest testified that "it was not important to the beneficiaries of fiduciary accounts to know the bank's reasons for the investment conversion." Harrison Tempest Deposition at 163, Exhibit 8. That view is not in accord with fiduciary standards. When the reason for converting these accounts is haste to enter the mutual fund business, and thus to serve the interests of the fiduciary at great and avoidable expense to the beneficiaries, these are "material facts necessary for [the beneficiaries to know] to protect their interests." Uniform Trust Code § 813(a), supra."

"18. The fiduciary's afforced burden when alleging beneficiary consent in a breach of loyalty case. Trust law is appropriately skeptical of claims by a trustee that a beneficiary consented to the trustee's enriching itself at the expense of the beneficiary. In formulating the duty of loyalty, that is, the trustee's duty to act "solely in the interest of the beneficiary," the Restatement provides: "The trustee is dealing with a beneficiary on the trustee's own account is under a duty to deal fairly with the beneficiary and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the transaction." Restatement (Second) of Trusts § 170(2)(1959) (emphasis supplied). Thus, the trustee who pleads beneficiary consent in a loyalty case bears the onerous burden of showing that the beneficiary was fully informed about the circumstances and the consequences; and that the transaction was substantively fair (hence appropriately beneficial) to the beneficiary. I have explained why the pre-1996 conversion of common trust fund interests in this case was in fact harmful to the interests of beneficiaries. Accordingly, LaSalle cannot sustain consent-based defenses to its breaches of trust."

Professor Langbein's views were reinforced by the OCC. The February 2004 issue of Trust Regulatory News quotes Lisa Lintecum, OCC Director of Asset Management, as saying: "I do not want to discourage conversions . . . [but bankers] need to be careful regarding their motives . . . and get past the tired argument of easy defenses [and] really figure out what the benefit is to the beneficiary."

On September 21, 1989, against the backdrop of ever-increasing banking industry interest in conversions and the establishment of families of proprietary mutual funds by banks having

fiduciary assets to invest, the OCC previously said in Trust Interpretation No. 234 *(Exhibit 4 hereto)*:

> "The conflicts of interest presented by the proposals [regarding conversions] are not eliminated by the corporate fiduciary waiving the advisory fee chargeable to discretionary accounts. Establishing the mutual fund may be dependent upon the availability of the fiduciary assets. The presence of the fiduciary assets improve the marketability of the mutual fund. In both situations the use of fiduciary assets result in the direct financial benefit to the corporate fiduciary. Because of the conflicts of interest presented, the proposals fall within the terms of 12 CFR §9.12. Funds held by the Bank as fiduciary should not be invested in a mutual fund advised by the Bank (or an affiliate of the Bank) unless lawfully authorized by the terms of the instrument creating the relationship, court order, or local law. Also, the doctrine of consent may be invoked. This would require all parties in interest to the account to be ascertained and sui juris or represented by a guardian ad litem. Full and accurate disclosure of the nature of the conflict is necessary in order for the consent to be validly obtained. Qualified employee benefit accounts would be subject to ERISA."

More significantly, in the wake of the changes in the Internal Revenue Code in 1996 (permitting such conversions to be carried out on a tax-free basis), the Federal Reserve Board said in Supervisory Letter SR 97-3 (SPE) on February 26, 1997 *(Exhibit 5 hereto)*:

"Conflicts of Interest and Suitability

> In determining whether to convert common trust funds to mutual funds, a banking organization must address the possibility that the conversion could result in conflicts between the best interests of the organization and the best interests of its fiduciary customers. The banking organization must also determine that the mutual fund shares are suitable for accounts which previously held common trust fund units. Banking organizations that convert or transfer common trust funds to mutual funds may face questions from current and future beneficiaries with respect to these two issues.
>
> Potential conflicts can arise if a banking organization were to charge a direct fee to the trust customer for serving as trustee while also charging an advisor's fee to the mutual fund. Investment advisor fees are not ordinarily permitted to be charged to common trust funds, and so it may appear that the organization's primary motive for the conversion was a self-interest in generating greater fee income. State law may preclude charging of both fees. Moreover, in cases where they are not prohibited, the organization should review its discretionary fiduciary responsibilities for each account in order to determine the extent to which it may mitigate the appearance of a conflict through proper disclosure and subsequent authorization by beneficiaries who have appropriate powers under the instrument.

Another possible conflict of interest could arise from the use of *proprietary* mutual funds when there are unaffiliated mutual funds or alternate investment opportunities available that may be equally appropriate for the participant's portfolio. Again, the appearance that the organization put its own interests above those of its fiduciary customers may cause concern particularly if investments are made in a newly-established proprietary fund with no history or track record. It is important that the organization thoroughly document its decision to transfer common trust funds into proprietary mutual funds.

The investment objectives and attributes of the organization's common trust funds that made them suitable and authorized investments do not necessarily carry over to the mutual funds that replace them. Accordingly, management must demonstrate that it has determined that the governing trust instrument for each affected customer authorized investment in mutual funds and that the mutual funds were suitable investments for the particular accounts. For certain types of trust accounts, such as a conservatorship or guardianship, court approval may be required to invest in mutual funds. For other accounts, amendments to agreements or letters of direction authorizing investments in mutual funds may be necessary. Prior investment decisions that approved the purchase of common trust fund units for an account's portfolio must be reconsidered to verify suitability for all accounts about to receive mutual fund shares. Management should maintain, and examiners should review, documentation supporting the decision to invest in or hold specific mutual funds."

Incredibly, there was no disclosure by LaSalle that, in fact, its 1993 conversion was carried out precisely for the purpose of providing the "seed capital" for its "family" of Rembrandt mutual funds. In the LaSalle Bank and Bank of America conversions referred to above, as with numerous others carried out within the past 15 years, the banks that carried them out were motivated in the first instance by reducing the expenses of providing fiduciary services (thereby generating greater profitability) and the formation or "bulking up" of families of proprietary mutual funds, thought to be a substantial source of increased profits for the Banks' parents and siblings. As Prof. Langbein said in an April 10, 2003 Affidavit in the LaSalle Bank case *(see Exhibit 6 hereto)*:

"Trustees must prefer the interests of the beneficiaries to interests of their own. In the conversion of common trust funds, the trustee must be acting to benefit the beneficiaries, and not as a subterfuge for boosting fees."

By "bulking up" these proprietary funds with fiduciary assets, the banks and their parents benefited, as well, by making the funds more saleable to the investing public generally and little or no regard was shown for what should have been paramount, the best interests of the beneficiaries of the affected fiduciary accounts. Where pre-existing proprietary mutual funds were in place pre-conversion, the banks generated benefits to themselves by reason of the operating and financial efficiencies that flowed from placing investment management of fiduciary accounts in the hands of the managers of the proprietary mutual funds. Indeed, in

canned presentations to beneficiaries and co-fiduciaries, the banks misrepresented the actual reasons for the conversions and the purported benefits therefrom while concealing the financial impact on the beneficiaries' investment returns, which would, post-conversion, have to be reduced by a higher expense structure than those expenses pre-conversion.

Uniformly, there was no actual oversight by banking regulators of what were multi-billion dollar purchases of securities in the conversions, nor is there any oversight on an ongoing basis with respect to the continuing purchases of securities, particularly in the shares of the banks' proprietary funds.

Also, prior to 1996, when conversions came to be permitted as tax-free exchanges, as in the LaSalle Bank case, the fiduciary accounts were saddled with premature capital gains taxes which, without the conversions, could be deferred, sometimes endlessly. Incredibly, as LaSalle Bank invested the assets of fiduciary accounts in shares of its own mutual funds, it made no disclosure to beneficiaries of the negative tax implications of its conversion. The lack of disclosure of all facts material to the conversion left LaSalle (and the other banks which had acted similarly) feeling free to pursue its own business objectives before those of the beneficiaries whose funds were mis-invested. While the banking industry would undoubtedly argue that registration would not serve to correct any abuses in the performance of banks' fiduciary responsibilities, common sense dictates that greater regulatory supervision and transparency will reduce the self-dealing that is currently so widespread.

Although regulation by the Commission is no panacea, it can be expected that registration (and ultimate compliance with applicable securities laws, rules and regulations) will better insure compliance by the banks with their pre-existing but typically ignored fiduciary duties.

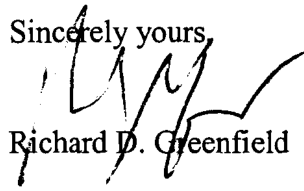
Because bank examiners are not equipped to make competent determinations as to whether the examined institutions are fulfilling their fiduciary obligations to beneficiaries and customers, due to the banks' abuse of their positions when they cross-sell their own financial products and services, the new rules should contain no fiduciary exception. Thus, no matter the form in which banks and their corporate affiliates are compensated, they (and their affected employees) should be required to register as brokers and dealers in securities. Their fiduciary activities, pursuant to which they annually invest hundreds of billions of dollars, mostly on a discretionary basis and from a position of substantial conflict – are largely free from regulatory oversight. Although the bank examiners' manuals and interpretive letters do, indeed, address the banks' fiduciary issues and provide fiduciary "guidelines" for the examiners, reality dictates that absent a well-publicized scandal, the banks' fiduciary activities will continue to go unchecked.

CONCLUSION

At a minimum, before the Commission blindly accepts the notion (undoubtedly promoted by banking industry lobbyists) that there is fiduciary oversight, it should determine the true state of affairs for itself. Absent evidence that the banking regulators provide effective oversight over the fiduciary investment activities of the nation's banks – which I can assure the Commission is likely to be non-existent – registration as brokers and dealers should be mandated.

While the Commission has attempted in the latest proposal to provide for "targeted exceptions" to registration, the Commission should not lose sight of the fact that there are far more funds invested by financial institutions in their fiduciary capacity than are invested in all of the nation's mutual funds. Until a better solution is developed, I strongly urge the Commission to eliminate any exemption from registration based upon the trust and fiduciary activities of affected financial institutions. Similarly, there should be no exemption which would permit bank fiduciaries to receive asset-based sales charges and service fees, purportedly to offset administration fees, or to receive unjustified12 b-1 fees.

Sincerely yours,



Richard D. Greenfield

RDG/slp
Enclosures
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S7-26-04

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
HOLLY HUGHES, HAL HUGHES, and DION HUGHES, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

LA SALLE BANK, N.A., and ABN-AMRO ASSET MANAGEMENT (USA), INC.

Defendants.
--X

CASE NO.
02 CV 6384
(MBM) (HP)

AMENDED COMPLAINT

CLASS ACTION

Plaintiffs, Hal Hughes ("Hal"), Holly Hughes ("Holly") and Dion Hughes ("Dion") for themselves and for all other members of the Class hereinafter described, allege the following on information and belief:

INTRODUCTION

1. This Class Action is brought by plaintiffs on their own behalf and on behalf of all other members of the Class defined below, arising out of, inter alia, breaches of fiduciary duties owed by defendant LaSalle Bank, N.A. ("LaSalle") to beneficiaries of certain fiduciary accounts (the "Fiduciary Accounts") under its care, and tortious interference with such fiduciary relationships by LaSalle's affiliate, ABN-AMRO Asset Management (USA), Inc. ("AAAM").

2. On or about January 4, 1993, LaSalle (then known as LaSalle National Trust) moved assets in its Fiduciary Accounts from individually managed accounts and/or common trust funds (the "Common Trust Funds") to a new family of proprietary mutual funds called the Rembrandt Funds (subsequently renamed the ABN-AMRO Funds). LaSalle's January 4, 1993 divestiture and reinvestment of Fiduciary Account assets is hereinafter referred to as the "Investment Conversion".

3. At all times relevant hereto, the Rembrandt Funds were managed and controlled by defendants LaSalle, LSCM and by LaSalle Street Capital Management ("LSCM"), a LaSalle

Exhibit 1

affiliate which was merged into AAAM some years after the Investment Conversion.

4. At all times relevant hereto, the Rembrandt Funds paid investment advisory fees and other fees to these defendants and to their corporate affiliates. In addition, as a result of the Investment Conversion and the operation of the Rembrandt Funds, additional expenses were incurred, both on a one-time and a continuing basis. These fees and expenses were charged to the Rembrandt Funds, which in turn passed them on to Fiduciary Accounts. The fees and expenses therefore substantially reduced the investment returns of the Fiduciary Accounts.

5. As set forth in detail herein, defendants' decision to invest the assets of the Fiduciary Accounts in their proprietary Rembrandt Funds was motivated by LaSalle's interest in generating more income from its Fiduciary Accounts and its determination to jump start its entry into the proprietary mutual fund business.

6. Also, as set forth in detail herein, defendants cavalierly disregarded the interests of Fiduciary Account beneficiaries when they implemented the Investment Conversion.

7. LaSalle's self-serving Investment Conversion subjected the Fiduciary Accounts to (i) higher fees and expenses than those previously applicable; (ii) premature and unnecessary capital gains taxes; and (iii) incompetent investment management. Plaintiffs and the Class members each suffered substantial damages by virtue of defendants' abuse of their Fiduciary Accounts, and they will continue to be damaged unless the defendants' wrongful activities are enjoined by the Court.

8. Before commencing this lawsuit, plaintiffs brought an individual law suit in Supreme Court, New York County (Hughes et al. v. LaSalle Bank N.A. et al., Index No. 105423/01 (the "Hughes Action"). The Hughes Action has been stayed by agreement of the parties pending determination of this class action.

JURISDICTION AND VENUE

9. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332, since there is complete diversity of jurisdiction between each of the plaintiffs and each of the defendants, and the amount in controversy exceeds $75,000.00 exclusive of interest and

costs.

10. Plaintiff Holly Hughes ("Holly") is a citizen of the State of New York, within the Southern District of New York.

11. Plaintiff Hal Hughes ("Hal") is an American citizen with his residence in Milan, Italy.

12. Plaintiff Dion Hughes ("Dion") is a citizen of the State of Texas.

13. LaSalle is a federally chartered bank, and is a wholly owned subsidiary of a Dutch Bank, ABN-AMRO N.A. LaSalle has its principal place of business in Chicago, Illinois. It has approximately 120 branch offices and $57 billion in assets.

14. Defendant AAAM and its precursor LSCM were both Illinois corporations with their principal place of business in the City of Chicago and the State of Illinois. AAAM and its precursor LSCM were both subsidiaries of LaSalle.

15. This case involves an amount in controversy in excess of $75,000.00.

16. Plaintiffs are the beneficiaries of trusts established in 1988 by their late grandfather John E. Hughes.

17. Defendant LaSalle Bank, N.A. (formerly known as LaSalle National Trust, and referred to herein as "LaSalle" or the "Bank") was the trustee for plaintiffs' trusts.

18. The written trust agreement (the "Trust Agreement") governing plaintiffs' trusts provides at page 11-12: "The Trustee, by joining in the execution of this Agreement, hereby signifies its acceptance of this trust, which shall be construed and regulated in all respects in accordance with the laws of the State of New York."

19. LaSalle accepted the terms and conditions of the Trust Agreement, including the provision that the individual plaintiffs' Trusts would be governed by New York law.

20. Many of the investments referred to herein were made by defendants in the City, State and County of New York.

21. At all relevant times, Hal, Holly and Dion have been beneficiaries of Fiduciary Accounts, to wit, personal trust accounts, which were managed and controlled by LaSalle.

22. At all times relevant hereto, LaSalle was the fiduciary of the Plaintiffs' trust accounts and all the Fiduciary Accounts of which members of the Class are or were beneficiaries.

BACKGROUND FACTS

Defendants' Self-Serving Investment Decisions

23. Prior to 1993, LaSalle invested the assets in its Fiduciary Accounts, including the assets of plaintiffs' trust accounts, in individually managed portfolios and/or its Common Trust Funds.

24. The Common Trust Funds were in-house pools of investments similar to mutual funds, which were managed and directed by LaSalle and its affiliate LSCM.

25. LaSalle and its affiliates received no investment advisory fees from the Fiduciary Accounts before the Investment Conversion. Prior to 1993, the only fees LaSalle and its affiliates received from the Fiduciary Accounts were the fees it received for serving as a trustee, guardian, conservator or other fiduciary (the "Fiduciary Fees").

26. LaSalle's "General Policies Concerning Common Trust Funds" stated in pertinent part:

> The policy of the LaSalle Bank . . . is to operate common trust funds to provide diversification of investments and to facilitate account administration which will enable the Bank to accept accounts which might otherwise be refused."
> The Bank shall not charge any fees, directly or indirectly, to accounts participating in collective investment funds in excess of the amount it would charge if the account were not participating in a collective investment fund . . ..

27. Until 1992, LaSalle actively discouraged customers from investing in mutual funds, in part because of what was perceived to be a duplication of fees.

28. By 1992, LaSalle was so concerned about losing non-fiduciary banking customers to mutual fund companies that it decided to start its own mutual fund family.

29. At the time, the executive management of LaSalle's parent company ABN-

AMRO N.A. believed that in order to grow LaSalle's the business, it would need to establish a family of mutual funds, and that common trust funds stood in the way of the company's growth.

30. By the summer of 1992, LaSalle had decided that its affiliate LSCM would serve as the investment advisor for the Rembrandt Funds and that SEI Corp. ("SEI") would be the distributor and administrator for the Rembrandt Funds.

31. SEI helped LaSalle create the Rembrandt funds, prepared canned "disclosure" documents sent to the Fiduciary Account beneficiaries, and thereafter performed administrative functions for the Rembrandt Funds.

32. Without investors, LaSalle's Rembrandt funds could not generate any profits for LaSalle and its affiliates.

33. However, the Rembrandt Funds had no investment track record and its investment advisor LSCM had never previously managed a mutual fund.

34. Moreover, the investment advisory fees charged by LSCM for the unproven Rembrandt Funds were higher than those paid by most mutual funds.

35. As a result of the Rembrandt Funds' high investment advisory fees and lack of an investment performance history, investors had little incentive to invest in the Rembrandt Funds as compared with the thousands of other mutual funds available in 1992 and 1993.

36. Instead of competing for independent investors, LaSalle forced its Rembrandt Funds on a captive investor pool by converting fiduciary assets under its control from the Common Trust Funds and individually managed investments into shares of the various Rembrandt Funds.

37. Defendants stood to benefit from the Investment Conversion because it increased the fees which they charged to LaSalle's Fiduciary Accounts, and because the administrative expenses previously incurred by LaSalle could be passed along to the Fiduciary Accounts as expenses of the Rembrandt Funds.

38. Prior to January 4, 1993, members of the Class paid Fiduciary Fees to LaSalle but did not pay any investment advisory fees.

39. After the Investment Conversion, LaSalle reduced its Fiduciary Fees by approximately thirty basis points (i.e. 0.3%), but began charging the Rembrandt Funds investment advisory fees for LSCM, administrative fees for SEI and substantial additional operating expenses. These additional fees and expenses averaged more than one hundred basis points (1.0%), and in some cases exceeded two hundred basis points (2.0%).

40. LaSalle refused to even consider maintaining the status quo (i.e., continuing the investment of fiduciary assets in the Common Trust Funds) and it also refused to consider alternate investment vehicles. LaSalle could not charge investment advisory fees if the Fiduciary Accounts were invested in independent mutual funds or remained in the Common Trust Funds.

41. Defendants also stood to benefit from the Investment Conversion because it jump started their launch of the proprietary Rembrandt mutual funds. LaSalle decided to implement the Investment Conversion because it helped fund the establishment of the proprietary Rembrandt mutual funds.

42. Indeed, without the Investment Conversion, LaSalle could not have gotten into the mutual fund business at all. LaSalle always understood that without the Investment conversion they really could not establish the Rembrandt funds at all.

43. LaSalle needed at least 1,000 participants in each Rembrandt Fund in order to get a NASDAQ listing for such funds, and in order to have the Rembrandt Funds' market prices published in newspapers.

44. The Investment Conversion assured defendants that their fledgling, unproven mutual funds would be listed with NASDAQ, that price quotations would appear in newspapers and that it would have a large asset base from inception. These advantages enabled defendants to market the Rembrandt Funds to independent investors.

45. LaSalle stood to benefit from the Investment Conversion because it enabled LaSalle to pass off to SEI both the administrative expenses of operating the Rembrandt Funds and the expenses of implementing the Investment Conversion.

46. Hence, SEI's fees and expenses – like LSCM's investment advisory fees and all

other operating expenses of the Rembrandt Funds – were ultimately paid by the Fiduciary Account beneficiaries in the form of reduced investment returns.

The Adverse Consequences of the Investment Conversion on the Fiduciary Accounts

47. Although the Investment Conversion was beneficial for LaSalle, it was costly for the beneficiaries of LaSalle's Fiduciary Accounts.

48. The Investment Conversion subjected the Fiduciary Accounts to adverse tax consequences as a result of the en masse divestiture of the securities held in the Common Trust Funds. Thus in addition to the transactions expenses the Fiduciary Accounts were forced to pay, these Accounts also prematurely incurred capital gains taxes. LaSalle's President James Wynsma testified that he was warned about a potential conflict of interest due to the tax liabilities which would accrue as a result of the Investment Conversion. However, he pushed the Investment Conversion forward with no consideration for the consequences to Fiduciary Accounts of prematurely selling the securities held by the Common Trust Funds.

49. Although the Fiduciary Account beneficiaries paid dearly for LaSalle's Investment Conversion, the Investment Conversion did not materially change the underlying stocks and bonds held by LaSalle's Fiduciary Accounts or the management of those accounts – it only changed the investment vehicle in which those securities were held.

50. LSCM managed the Common Trust Funds prior to January 4, 1993 and it managed the Rembrandt Funds after January 4, 1993. Its investment philosophy did not change after the Investment Conversion.

LaSalle's Failure to Consider the Interests of the Fiduciary Account Beneficiaries

51. LaSalle never did any cost benefit analysis to determine whether the Fiduciary Account beneficiaries would be better off with the Common Trust Funds or mutual funds. Instead, defendants single-mindedly pursued LaSalle's decision to enter the mutual fund business and seed their mutual funds with captive assets from LaSalle's Fiduciary Accounts without ever considering how changing the status quo would impact the Fiduciary Account beneficiaries.

52. Despite LSCM's lack of experience managing mutual funds and its high

investment advisory fees, LaSalle also never considered alternative investment vehicles for its Fiduciary Accounts, such as low cost mutual fund families.

53. LaSalle's affiliate LSCM was chosen as the investment advisor for the Rembrandt Funds before the Rembrandt Funds Board of Trustees was in place, and no other investment advisors were ever considered.

54. LaSalle chose to invest the Fiduciary Accounts' assets in the Rembrandt Funds not in the proper exercise of its role as a fiduciary, but rather to pursue an overriding business objective; i.e., in order to launch the Rembrandt Funds and to generate investment advisory fees for itself and its affiliates. Defendants proceeded without regard for whether such investments were in the best interests of plaintiffs and the other Fiduciary Account beneficiaries, in order to build the assets invested in the Rembrandt Funds for unrelated business purposes of ABN-AMRO and its affiliates. This conclusion is based on the following facts:

(i) LaSalle invested the assets of the Fiduciary Accounts in the Rembrandt Funds even though LSCM and its staff had no experience managing mutual funds;

(ii) LaSalle invested the assets of the Fiduciary Accounts in the Rembrandt Funds even though LSCM charged inordinately high investment advisory fees;

(iii) LaSalle invested the Fiduciary Accounts in the Rembrandt Funds even though it subjected the Fiduciary Account beneficiaries to adverse capital gains tax consequences by doing so;

(iv) LaSalle kept the assets of the Fiduciary Accounts invested in the Rembrandt Funds even though these Funds chronically underperformed their benchmarks and comparable mutual funds;

(v) Prior to the Investment Conversion, LaSalle never considered maintaining the status quo or investing the assets of the Fiduciary Accounts in independent mutual funds or otherwise seeking alternative investments for the Fiduciary Accounts' assets.

The Class-Wide Decision to Carry Out the Investment Conversion

55. The decision to carry out the Investment Conversion was made by LaSalle's

senior "Management Team" on a class-wide basis, for all Fiduciary Accounts which previously held assets invested in Common Trust Funds. In doing so, LaSalle abandoned its obligation to evaluate on an individual account-by-account basis the most appropriate investments for each of its Fiduciary Accounts.

56. LaSalle's portfolio managers and Trust Investment Committee never analyzed individual trust accounts to determine whether those trust accounts should be part of the investment conversion.

57. While defendants failed to explain to Fiduciary Account beneficiaries why the Investment Conversion was taking place, they utterly failed to document their decision-making process – thereby breaching their fiduciary responsibility to document and explain the reasons for the Investment Conversion to the Fiduciary Account beneficiaries.

58. Indeed, exemption from the Investment Conversion was simply not an option – LaSalle terminated its Common Trust Funds when it completed the Investment Conversion.

Defendants' Failure to Document the Decision Making Process

59. Defendants took great pains to *avoid* documenting their real reasons for the Investment Conversion. LaSalle's "Management Committee" approved the Investment Conversion. However, LaSalle has no minutes of any "Management Committee" meetings at which the Investment Conversion was analyzed, deliberated and/or approved, nor any documents on which such approval was based.

60. Similarly, LaSalle's "Steering Committee" implemented the Investment Conversion. There are no minutes of Steering Committee meetings, and no supporting documents.

61. LaSalle's Trust Investment Committee also held regular, formal meetings in 1992 and 1993 and that it too had input into the Investment Conversion, including approval of the transactions covering the Investment Conversion and the Rembrandt Funds, as being suitable investments. Incredibly, LaSalle now maintains that it kept no minutes of its Trust Investment Committee during 1992 and 1993.

62. Notwithstanding the foregoing, the LaSalle Trust Investment Committee generated minutes for all meetings held prior to 1992 and all meetings held subsequent to 1993.

63. The most senior management of LaSalle and its affiliates – the individuals who were ultimately responsible for the Investment Conversion – did not feel minutes were very important. They operated most of the company – including LaSalle's fiduciary operations – without any minutes whatsoever. Indeed, senior managers responsible for the Investment Conversion never even bothered to read any documents about the Investment Conversion before approving it, because it was not their way of doing business.

64. This lackadaisical attitude towards documentation permeated LaSalle and its affiliates. Senior management had a long and distinguished history of not keeping any minutes of anything anytime anywhere, as a matter of personal philosophy.

65. LaSalle evidently had no practice or policy with respect to keeping minutes of any kind of committee meetings; senior managers frequently did not require subordinates to keep documentary records of what they were doing, and did not have an organized filing system.

Defendants' Conflicts of Interest

66. By the time defendants embarked upon their plan to form the Rembrandt Funds and to fund these mutual funds with the assets of Fiduciary Accounts, they already faced numerous conflicts of interest in acting for the benefit of the beneficiaries of those accounts.

67. LaSalle evidently knew of the conflict of interest posed by the Investment Conversion, and yet ignored the interests of its Fiduciary Account Beneficiaries.

68. LaSalle officers knew that fiduciary conflict of interest issues arose in the context of the Investment Conversion. They also knew that LaSalle had an interest in increasing its fee income, starting a proprietary family of mutual funds and finding a source of investment for its proprietary family of mutual funds.

69. LaSalle officers also knew that the Fiduciary Account beneficiaries had an interest in minimizing any fees they had to pay and avoiding acceleration of capital gains taxes. However, LaSalle evidently had no formula (i.e., process) to balance its own interests against the

interests of Fiduciary Account beneficiaries in minimizing fees and avoiding acceleration of capital gains taxes. Indeed, LaSalle and its senior management did not even pay lip service to the interests of the Fiduciary Account beneficiaries when they were carrying out the Investment Conversion.

70. The Investment Conversion was ultimately approved by the Board of Directors of ABN AMRO N.A. At least some members of this Board were not at all concerned with the interests of LaSalle's Fiduciary Account beneficiaries and had a very limited interest in the actions of LaSalle National Trust. At least some ABN AMRO N.A. Board members did not regard themselves as having any responsibility to the Fiduciary Account beneficiaries of LaSalle National Trusts. They did not know and did not care whether there Investment Conversion was advantageous for the Fiduciary Account Beneficiaries, did not know or care what the tax impact of the Investment Conversion was for Fiduciary Account beneficiaries, never inquired as to whether LaSalle was increasing its fees as a result of the Investment Conversion and did not know whether LSCM and LaSalle were sufficiently financially sophisticated to manage the Fiduciary Accounts.

71. Simply put, the LaSalle officers who decided to effectuate the Investment Conversion – and the LaSalle Board of Directors responsible for overseeing this decision – showed no concern whatsoever for the interests of the Fiduciary Account beneficiaries. They put LaSalle's interest first, and then concealed this fact from the Fiduciary Account beneficiaries, co-trustees and courts overseeing decedent estates and guardianships.

72. Defendants falsely told the Fiduciary Account beneficiaries that LaSalle was carrying out the Investment Conversion because mutual funds offered daily pricing, daily liquidity and increased access to fund information. Defendants told the Fiduciary Account beneficiaries that the Common Trust Funds could not offer these "advantages".

73. Defendants knew that these representations were false when they made them. LaSalle had received information from companies which provided daily pricing for common trust funds. Defendants chose not to avail themselves of such services.

74. Defendants never disclosed to the Fiduciary Account beneficiaries that those beneficiaries did not need and could not use daily pricing, daily liquidity and increased access to fund information, even though LaSalle haled these things as benefits which would flow from the Investment Conversion.

75. The Fiduciary Account beneficiaries had no power to make investment decisions based on daily pricing information, even if they wanted to do so. LaSalle had sole control over all assets held by the Fiduciary Accounts.

Defendants' Misrepresentation of the Reasons for the Investment Conversion

76. In December, 1992, LaSalle sent plaintiffs and the other members of the Class (i) a form letter from a trust officer; (ii) an accompanying "Question and Answer Sheet"; (iii) a prospectus that purported to describe, *inter alia*, the Rembrandt Funds; and (iv) an "Authorization and Instruction Form" by which members of the Class could authorize the conversion of their Fiduciary Accounts' assets to the Rembrandt Funds.

77. The foregoing documents did not disclose the real reason for LaSalle's planned conversion of the Fiduciary Accounts' assets to the Rembrandt Funds: i.e. to generate additional fees for defendants, and to fulfill ABN-AMRO's guiding principle, as stated in its SEC filings, of ". . . asset gathering with [the goal of] creating maximum economic value for our shareholders . . . ."

78. Defendants specifically misrepresented the reasons for the conversion in the "Question and Answer Sheet" supplied to members of the Class:

> Why did LaSalle National Trust decide to switch to mutual funds?
>
> The decision to switch to mutual funds was prompted by many customers requesting a mutual fund approach. This change will offer maximum flexibility to our customers. While retaining the benefits of professional management and diversification of the common funds, the new mutual funds offer much more for each client.

79. This representation was false when made. The LaSalle officers who decided to

carry out the Investment Conversion could not identify a single Fiduciary Account beneficiary who **ever** requested that LaSalle divest the Common Trust Funds in favor of mutual funds.

80. In fact, this representation was drafted by SEI, not by LaSalle. SEI used a boiler-plate form Question and Answer Sheet for many different Investment Conversions by many different banks, and LaSalle simply adopted SEI's Question and Answer Sheet without first determining that it was accurate, or even appropriate to LaSalle's Fiduciary Accounts.

81. LaSalle's failure to advise the Fiduciary Account beneficiaries that their fees would increase was not an oversight.

82. LaSalle sent a different Question and Answer Sheet to the seasoned investment professionals responsible for investing employee benefit trust plans within LaSalle. This Question and Answer Sheet disclosed that Employee Benefit Plans would pay higher fees as a result of the Investment Conversion. Not surprisingly, this disclosure was deliberately and deceptively withheld from plaintiffs and the other members of the Class.

83. This disclosure to administrators of Employee Benefit trusts was in keeping with SEI's 1992 "Proprietary Funds Regulatory Overview", which warned LaSalle that ERISA only permits investment of employee benefit plans in the mutual funds of a plan fiduciary where a "second independent fiduciary [is] notified of any change in the rates or fees . . . [and provides] written approval to continue investment notwithstanding such change in fees."

84. The disclosure regarding increased fees was conveniently omitted in the letter and the Question and Answer Sheet sent to the members of the Class.

85. The Fiduciary Account beneficiaries were never told that their fees and expenses would increase and they could not have readily determined such facts from the materials sent by LaSalle to them.

86. Contrary to its representations to the Fiduciary Account beneficiaries, LaSalle's decision to use its own proprietary mutual funds was not based upon the alleged availability of daily pricing and daily liquidity. In 1992 and 1993 there were thousands of mutual funds which offered both daily pricing and daily liquidity. LaSalle never considered these alternative

investment vehicles.

87. LaSalle had no reason to believe the Rembrandt Funds would offer superior investment performance to the Common Trust Funds. In fact, LaSalle had good reason to doubt that the Rembrandt Funds would offer superior investment performance. LSCM's investment advisory fees and the other expenses charged to the Rembrandt Funds would greatly reduce any investment returns generated by the Rembrandt Funds.

88. LaSalle never told the Fiduciary Account beneficiaries that it was using the Investment Conversion to jump-start its entry into the mutual fund business.

89. LaSalle never told the Fiduciary Account beneficiaries that the Investment Conversion would increase LaSalle's total income from the investment of Fiduciary Assets.

90. LaSalle never told the Fiduciary Account beneficiaries that the Investment Conversion would reduce their investment performance.

91. LaSalle and its parent ABN-AMRO N.A. simply believed that it was not important to the beneficiaries of Fiduciary Accounts to know the Bank's reasons for the Investment Conversion.

The Rembrandt Funds' Performance

92. The Rembrandt Funds consistently underperformed comparable funds and applicable benchmarks, resulting in negligible income and growth for the Fiduciary Accounts.

93. Notwithstanding the poor investment results for members of the Class, the Rembrandt Funds generated millions of dollars in additional income for defendants and their affiliates.

94. LaSalle invested the assets of the Fiduciary Accounts in the Rembrandt Asian Tigers Com Fund (the "Asian Tigers Fund").

95. During the five years prior to commencement of the Hughes Action, this fund consistently performed worse than 94% of comparably invested funds. In the six years prior to commencement of the Hughes Action, the Asian Tigers Fund actually lost twenty percent (20%) of its equity value.

96. Although the Fiduciary Accounts lost money in the Asian Tigers Fund, every year the Fiduciary Accounts paid LaSalle and its affiliates investment advisory fees and other fees and expenses equal to at least 1.62% of the Fiduciary Accounts' investments in the Asian Tigers Fund, in addition to the fees charged by LaSalle to all accounts for serving as fiduciary.

97. LaSalle also invested the assets of the Fiduciary Accounts in the Rembrandt Latin American Equity Com Fund (the "Latin American Fund").

98. During the three years prior to commencement of the Hughes Action (five year data not available), the Latin American Fund performed worse than 87% of comparably invested mutual funds.

99. Despite this poor performance, every year the Fiduciary Accounts paid LaSalle and its affiliates investment advisory fees and other fees and charges equal to at least 1.88% of the Fiduciary Accounts' investment in the Latin American Fund, in addition to LaSalle's fees for serving as fiduciary.

100. LaSalle invested the assets of the Fiduciary Accounts in the Rembrandt Value Com Fund (the "Value Fund").

101. During the five years prior to commencement of the Hughes Action, the Value Fund performed worse than 73% of comparably invested mutual funds.

102. Despite this poor performance, every year the Fiduciary Accounts paid LaSalle and its affiliates investment advisory fees and other fees and expenses equal to at leasts 1.02% of the Fiduciary Accounts' investment in the Value Fund, in addition to LaSalle's Fiduciary Fees.

103. LaSalle invested the assets of the Fiduciary Accounts in the Rembrandt Small Cap Com Fund (the "Small Cap Fund").

104. During the five years prior to commencement of the Individual Action the Small Cap Fund performed worse than 67% of comparably invested funds.

105. Despite this poor performance, every year the Fiduciary Accounts paid LaSalle and its affiliates investment advisory fees and other fees and expenses equal to at least 1.19% of the Fiduciary Accounts' investment in the Small Cap Fund, in addition to LaSalle's fees for

serving as fiduciary.

106. LaSalle also invested the assets of the Fiduciary Accounts in the Rembrandt Growth Tr Fund (the "Growth Fund").

107. During the five years prior to commencement of the Hughes Action, the Growth Fund performed worse than 57% of comparably invested funds.

108. Despite this poor performance, every year the Fiduciary Accounts paid LaSalle and its affiliates investment advisory fees and other fees and expenses equal to at least 1.03% of the Fiduciary Accounts' investment in the Growth Fund, in addition to LaSalle's fees for serving as fiduciary.

109. Notwithstanding the consistently poor performance of the proprietary Rembrandt Funds, LaSalle neither moved the assets of the Fiduciary Accounts into more productive investments, nor explained its failure to do so to members of the Class.

110. LaSalle's decision to keep the assets of the Fiduciary Accounts invested in the chronically underperforming proprietary Rembrandt Funds cannot be justified by the best interests of the Fiduciary Account beneficiaries. This decision admits of only one rational explanation: defendants kept Fiduciary Account assets in the Rembrandt Funds to maximize their own income from the Fiduciary Accounts.

111. All members of the Class suffered damages from the investment practices of the defendants in an amount which cannot presently be determined.

CLASS ACTION ALLEGATIONS

Definition of the Class

112. This is a Class Action brought on behalf of all persons (i) who were beneficiaries of personal trusts or other similarly situated Fiduciary Accounts under LaSalle's management (as e.g., trustee, custodian or executor); and (ii) whose Fiduciary Accounts were invested in whole or part in LaSalle's proprietary Rembrandt Funds in connection with the January 1993 Investment Conversion. This definition is subject to amendment upon the completion of discovery with respect thereto.

The Relief Sought for the Class

113. This action is brought by plaintiffs on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23, Fed. R. Civ. P., for (i) money damages; (ii) injunctive relief permitting members of the Class to remove LaSalle as fiduciary for their Fiduciary Accounts, if they choose to do so; and (iii) relief incident and subordinate thereto, including the expenses and fees of this action and an award of attorneys' fees.

Numerosity of the Class

114. Defendant LaSalle served as fiduciary for at least one thousand Fiduciary Accounts affected by the investment Conversion. The exact number of members of the Class is not known by plaintiffs, but is within the sole knowledge of defendant LaSalle.

115. The members of the Class are located in most or all fifty states, and elsewhere.

116. The Class of Fiduciary Account beneficiaries is so numerous that joinder of the individual members thereof is impracticable.

Common Issues of Law and Fact Predominate

117. In 1992, defendants decided to form a "family" of proprietary mutual funds, which came to be known as the Rembrandt Funds.

118. In furtherance of their business decision to form and operate the Rembrandt Funds, defendants used the plaintiffs' trust fund assets, and the assets of other Fiduciary Accounts, to provide an asset base for the Rembrandt Funds.

119. All members of the Class were adversely affected by LaSalle's self-serving decision to implement the Investment Conversion of their fiduciary assets into the Rembrandt Funds.

120. There are common questions of law and fact in the action that relate to and affect the rights of each member of the Class, including, inter alia:

(i) whether LaSalle's decision to invest Fiduciary Account assets in the Rembrandt Funds was motivated by the best interests of the plaintiffs and other Class members (i.e., the Fiduciary Account

beneficiaries) or by defendants' business plan to generate additional income for themselves and their affiliates.

(ii) whether LaSalle's failure to divest the Rembrandt Funds was motivated by the best interests of the Class members or by defendants' desire to generate additional income for themselves.

(iii) whether LaSalle breached its fiduciary duty to members of the Class by making investment decisions for the Fiduciary Accounts based upon its own interests and those of its affiliates, rather than the interests of Fiduciary Account beneficiaries; and

(iv) whether LaSalle misrepresented the facts regarding the Investment Conversion to members of the Class.

(v) whether LaSalle's failure to document its decision making process leading to the Investment Conversion is a breach of its fiduciary responsibilities to all members of the Class;

(vi) whether defendants unjustly enriched themselves at the expense of plaintiffs and the Class.

(vii) what remedy is appropriate to compensate members of the Class for damages caused by the Investment Conversion, and to prevent further injury as a result of LaSalle's continuing fiduciary obligations to members of the Class.

121. The relief sought hereby is common to the entire Class, including, inter alia:

(i) a declaratory judgment that LaSalle violated its fiduciary duty to the beneficiaries of the Fiduciary Accounts;

(ii) payment by defendants of damages caused by such breaches of fiduciary duty;

(iii) payment by defendants of plaintiffs' costs and expenses, including attorneys' fees;

(iv) an injunction preventing LaSalle from opposing a petition by the beneficiaries of the Fiduciary Accounts to replace it as fiduciary of any such Fiduciary Accounts; and

(v) an injunction requiring LaSalle to fulfill its fiduciary duties to the Class members in connection with the investment of the Fiduciary Accounts' assets.

Typicality of Plaintiffs' Claims

122. LaSalle serves or has served as a fiduciary for the plaintiffs and for all members of the Class.

123. Defendants invested the assets of plaintiffs' Fiduciary Accounts and the Fiduciary Accounts of all other Class members in the Rembrandt Funds, as a result of the Investment Conversion.

124. Defendants used the assets of plaintiffs' Fiduciary Accounts – and the Fiduciary Accounts of all other Class members – to generate investment advisory and other fees for themselves and their affiliates, without regard for the best interests of Fiduciary Account beneficiaries.

125. The claims of the plaintiffs, who are representatives of the Class, are typical of the claims of all members of the Class. The claims of plaintiffs are based on the same factual allegations and legal theories as the claims of all other Class members.

Plaintiffs Will Fairly and Adequately Represent the Class

126. The plaintiffs can and will fairly and adequately protect the interests of the Class.

127. The attorneys for plaintiffs are experienced and capable in litigation involving breaches of fiduciary obligations and Class Actions. The attorneys for plaintiffs and the Class, Richard D. Greenfield and Daniel Cobrinik, will actively conduct and be responsible for the prosecution of this litigation.

COUNT I: BREACH OF FIDUCIARY DUTY

128. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 127 as though stated more fully herein. LaSalle is the only defendant to this Count.

129. LaSalle owed each member of the Class a fiduciary duty to manage the Fiduciary Accounts in the best interests of the Fiduciary Account beneficiaries, without regard for its own interests or those of its affiliates.

130. LaSalle's decision to invest the assets of the Fiduciary Accounts in the Rembrandt

Funds and its subsequent failure to divest the Rembrandt Funds were motivated by defendants' desire to generate investment advisory and other fees for themselves, and not by the interests of plaintiffs and the other members of the Class.

131. LaSalle failed to consider, *inter alia,* the Rembrandt Funds' high fees and expenses, LSCM's relative lack of experience, and the tax consequences to Fiduciary Account beneficiaries when it invested the Fiduciary Accounts' assets in the Rembrandt Funds and when it failed to divest the Fiduciary Account interests in the Rembrandt Funds.

132. LaSalle's investment of Fiduciary Account assets in the Rembrandt Funds and its failure to divest the Rembrandt Funds were in breach of its fiduciary duty to the members of the Class.

133. By virtue of the foregoing breach of fiduciary duty, the members of the Class have been damaged by LaSalle in an amount to be determined.

COUNT II: TORTIOUS INTERFERENCE

134. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 133 as though stated more fully herein. Defendant AAAM is the only defendant to this Count.

135. Defendant AAAM and its predecessor, LSCM, tortiously interfered with LaSalle's fiduciary relationships with plaintiffs and the members of the Class, in order to enrich themselves and to obtain investment advisory fees and other income from members of the Class.

136. As a direct consequence of such tortious interference, plaintiffs and members of the Class have been damaged in an amount to be determined by the Court.

COUNT III: UNJUST ENRICHMENT

137. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 136 as though stated more fully herein.

138. By investing the Fiduciary Accounts' assets in the proprietary Rembrandt Funds and charging investment advisory fees to members of the Class, defendants unjustly enriched themselves at the expense of plaintiffs and the members of the Class.

139. Defendants have invested the proceeds of the foregoing unjust enrichment and realized additional profits thereupon, all of which should be returned to the Fiduciary Accounts and/or their beneficiaries, or otherwise distributed as required by the Court.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request on their own behalf and on behalf of all members of the Class:

1. certification of this action as a Class Action under Rule 23, Fed. R. Civ. P. and appointment of plaintiffs and their counsel to represent the Class;

2. entry of judgment on the claims for breach of fiduciary duty in favor of plaintiffs and the other members of the Class and against defendant LaSalle, and an award of compensatory damages in favor of plaintiffs and the other members of the Class;

3. entry of judgment on the claim that AAAM tortiously interfered with LaSalle's fiduciary duty to all members of the Class;

4. entry of judgment enjoining defendant LaSalle from opposing any petition filed by any plaintiff or member of the Class seeking the removal of defendant LaSalle as fiduciary and requiring defendant LaSalle to pay for all legal fees and expenses incident thereto;

5. entry of judgment compelling all defendants to account for their unjust enrichment and disgorging the amount thereof (and the profits earned thereupon) to the Fiduciary Accounts impacted by the wrongful activities described herein, or as otherwise ordered by the Court;

6. pre-judgment and post-judgment interest at the legal rate;

7. entry of judgment awarding plaintiffs and the members of the Class punitive damages to be paid by defendants;

8. plaintiffs' attorneys' fees and reimbursement of the reasonable costs and expenses of litigating this case; and

9. such other or additional relief as this Court deems appropriate.

Dated: December 24, 2003

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

57-21-04

ELLEN JANE KUTTEN AND MARY ANN ARNOLD on behalf of themselves and all others similarly situated, Plaintiffs, v. BANK OF AMERICA, N.A And BANK OF AMERICA CORPORATION, Defendants.	)	Case No. 4:04CV00244 TIA JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

COME NOW Plaintiffs Ellen Jane Kutten and Mary Ann Arnold, for themselves and for all other members of the Classes hereinafter described, and Ellen Jane Kutten, individually on behalf of herself and her daughters, Alessandra Kutten Cottrell and Louise Kutten Cottrell, by and through counsel, and state and allege as follows:

INTRODUCTION

1. (a) This Class Action is brought by plaintiffs on their own behalf and on behalf of all other members of the Classes defined below and by plaintiff Ellen Jane Kutten individually on behalf of herself and her daughters against the defendants arising out of, inter alia, breaches of fiduciary and contractual duties owed by the defendants Bank of America, N.A. (the "Bank") and the Bank's parent, Bank of America Corporation, to beneficiaries of certain trusts and other fiduciary accounts within the Bank's care. In addition, certain claims are asserted by plaintiffs against the Bank on behalf of a California Sub-Class and a Missouri Sub-Class as defined below. Unless the context indicates otherwise, the term "Class" includes the members of the "California Sub-Class" and "Missouri Sub-Class."

(b) The Bank prominently and falsely advertises its promise as to how it holds itself

Exhibit 2

out to persons such as plaintiffs and the members of the Class who do business with its "Private Bank":

Bank Of America [Logo] Higher Standards

THE PRIVATE BANK

Managing today's complex wealth. Balancing growth, risk, taxes and grandchildren.

As your financial resources increase, perhaps you need more financial resources to manage them.

The Private Bank of Bank of America has greater depth and breadth of wealth management expertise – across the financial spectrum – than any other private bank. Equally important, we bring this expertise together, creating more integrated solutions to your complex needs. And we provide these customized recommendations based on the extraordinary strength and stability of Bank of America.

It's no wonder we've been entrusted to manage, protect and pass on wealth for more than 150 years.

The Private Bank is dedicated to serving affluent families and individuals with complex wealth management needs. Our experienced advisors customize unique and comprehensive solutions for each individual, integrating world-class investment management, trusts, credit and bank services. We welcome the opportunity to work with you. We invite you to call Caroline Grace at 800.863.9500 or visit www.bankofamerica.com/privatebank. [Emphasis in original].

(c) In fact, despite numerous substantially similar promises in the form of advertising, marketing pieces and direct representations to those who established fiduciary accounts with the Bank (and the beneficiaries thereof), as described herein, those promises have been and are being uniformly ignored or deliberately broken.

2. In particular, in order to maximize the Bank's profits earned from trusts, guardianships, estates and other fiduciary accounts (collectively "Trusts") by which it acted as

fiduciary, the Bank conspired with its affiliates and others presently unknown in a business decision to "double dip," by forcing trusts and other fiduciary accounts under the care of the Bank to have their assets re-directed from their historic allocations in individually managed accounts and/or so-called Common Trust Funds and/or other assets, to proprietary mutual funds controlled by subsidiaries of the Bank's parent, defendant Bank of America Corporation and its corporate affiliates and subsidiaries (collectively "BAC"). As used herein, the term "Conversion" refers to such wholesale asset re-direction by the Bank into shares of the Nations Funds. At no time has the Bank distributed to plaintiffs or to any member of the Class defined below or other appropriate recipient a final, annual, or periodic account or any other statement fully disclosing the Bank's wrongdoing as described in this Complaint. Further, the defendants' wrongdoing is continuing in nature. By August 16, 2000, BAC and its affiliates had increased the assets in their Funds to reach $100 billion. On that date the Bank stated:

> Banc of America Capital Management announced today that the Nations Funds family of funds has reached $100 billion in mutual fund assets. This growth was driven by increases in all three types of mutual funds: equity, fixed income and money market.

3. Historically, the Bank, either through its so-called "Private Bank," now based in St. Louis, MO [1], or through the Trust Departments of it and its predecessors, promoted itself by touting its purportedly highly individualized trust administration and asset management services, all of which was intended to and did lure grantors (such as the parents of plaintiff Kutten), testators and others to designate the Bank as a fiduciary for estates, trusts and other fiduciary accounts. In a recent version of such representations, the Bank stated on its website as follows:

[1] To consolidate its own position in the Midwest, the Bank's predecessor, Nations Bank, acquired Boatmen's Bancshares, Inc., the parent of Boatmen's Trust Company ("Boatmen's"). The Bank used Boatmen's trust department as the core of its Private Bank, then proceeded to distribute its administrative functions to Private Bank Offices in various parts of the country.

"Customized Portfolio Management. We do not believe in one-size-fits-all. Rather, we understand that your unique needs require an investment portfolio that is specially tailored to meet them.

A tailored approach:

- **Talk to us** – tell us your investment goals and risk tolerance.
- **A tailored solution** – we will design and recommend a portfolio strategy for you based upon your goals, time horizon, income and liquidity needs.
- **Ongoing communication** – we monitor your portfolio and communicate with you on a regular basis to ensure your goals are being met.

Our equity selection process.

Our equity selection follows a core growth strategy with a focus on large cap stocks. The foundation of our process is proprietary research. We use a blend of qualitative and quantitative fundamental research to target companies that have long-term growth potential, proven earnings track records, competitive advantages and strong management.

A perfect fit.

We work with you to ensure your goals are being met and your total financial picture is being considered. Learn more about our investment management process by contacting a **Private Banker** in your area."

In fact, the plans of the Bank, BAC and their respective predecessors, despite these and substantially similar representations over the years and the implicit incorporation of them in the documents governing the Bank's fiduciary accounts, have been to cut back substantially on such so-called "Customized Portfolio Management" and to direct fiduciary funds, once "captured," into standardized investments such as BAC's proprietary mutual funds, the Nations Funds as part of the Conversion as described herein and otherwise. Further, few if any of the grantors or others who established fiduciary relationships with predecessors of the Bank, such as the parents of plaintiff Kutten and the grandfather of plaintiff Arnold, envisaged the Bank in its present form; namely, a nationwide behemoth with few of the services typically offered by a fiduciary and implicit in the fiduciary relationship. The defendants have also utilized these captive accounts as

targets to market other products and services sold by them, their subsidiaries and affiliates, including loans, credit cards and deposit accounts, all to defendants' enrichment.[2]

4. The Settlors of certain of the Trusts at issue, Joseph Kutten and Carolyn Yalem Kutten (parents of plaintiff Kutten), in entrusting their assets to a local bank, in this case, Boatmen's Trust Company in St. Louis, did so based upon personal relationships with officers of Boatmen's, and its predecessors in interest, St. Louis Union Trust Company and Centerre Bank, built over many years. The fiduciary relationship was established because, inter alia, Boatmen's Trust Company and its predecessor banks, held itself out to the settlors and to other prospective customers of fiduciary serves as institutionally and personally suited not only to the stewardship of settlors' assets over multiple generations but looking after their descendants, the plaintiff in this litigation and her daughters. Similarly, the grandfather of plaintiff Arnold, John T. Crowley, through his Last Will and Testament, entrusted his bequeathed assets to a local bank in California, since acquired by a series of banks, now part of Bank of America ("the Crowley Trust").

5. Over the years, the Bank and its corporate predecessors swallowed-whole Boatmen's Trust Company, and numerous other financial institutions which had fiduciary responsibilities to plaintiffs and members of the Class. In the process of being digested by the Bank, these formerly independent institutions' fiduciary operations were transmogrified into just cogs in the fee-generating machinery of the Bank and its corporate parent.

6. In the course of the metamorphosis of Boatmen's Trust Company and other acquired financial institutions into the Bank, the interests of plaintiffs and members of the Class were not represented by caring, knowledgeable trust officers but by so-called "Call Centers" in

[2] For a vivid history of the Bank's voracity for conversions of assets which it held as a fiduciary, see: http://www.bankofamerica.com/newsroom/press/archives.cfm?LOBID=1.

Dallas and elsewhere manned by lower-level fungible functionaries and other Bank personnel with little or no investment expertise. Except for the highest net worth fiduciary accounts, the "customized recommendations" and "wealth management expertise" promised by the Bank are fictions and have been fictions since the consolidation of the various acquired financial institutions began taking place. The purpose was clear. As stated by the Bank's own press release:

> We will win more business from existing Private Bank clients by proactively delivering cutting-edge solutions for wealth management, by continuing to win high marks for satisfaction and high touch service, and through the company's financial commitment to the Private Bank which will allow for increased marketing and heightened awareness of the value we bring to each relationship.

7. At or prior to the time that Boatmen's Trust Company was acquired by the Bank's predecessor, Nations Bank, it was known by the parties to the acquisition negotiations that the successor entity (i.e. Nations Bank) would materially adversely affect the administration of plaintiff Kutten's and all other Boatmen's fiduciary accounts. Similarly, this was the plan of the defendants with respect to each of the acquired banks and their fiduciary functions.

8. To the best of plaintiff Kutten's knowledge, information and belief, neither Boatmen's nor Nations Bank provided to her or other interested parties in connection with other fiduciary accounts venued in Missouri appropriate written notice as provided in §362.331 R.S.Mo. of Boatmen's transfer of fiduciary capacities to Nations Bank disclosing all material facts which disclosed the material adverse affect of such transfer or advising such interested parties (including plaintiff Kutten and members of the Missouri Sub-Class) that they had a right to object to the transfer and, inter alia, obtain a replacement fiduciary.

9. Plaintiff Kutten believes and therefore alleges that the Bank similarly failed to provide such notice in each of the other instances where the fiduciary responsibilities of an

acquired bank were taken over by the Bank or one of its predecessors. As such, all similarly affected beneficiaries were wrongly denied notice and the right to object to such transferred fiduciary capacities.

THE NATIONS FUNDS

10. The Nations Funds Trust ("NFT") holds a "family" of approximately 70 mutual fund portfolios, which are proprietary funds nominally operated by NFT and its Board of Trustees. They are, in fact, directed and controlled by BAC and its subsidiaries.

11. The Nations Funds' portfolios cover a wide variety of investment disciplines, strategies and types of asset categories including, inter alia, the Nations Municipal Income Funds, the Corporate Bond Portfolio; the Nations Small Company Fund; Nations Large Cap Index Funds and Nations Cash Reserves.

12. Certain of such Nations Funds were funded by BAC in substantial part by transferring fiduciary assets pursuant to the Conversion. Such funding permitted the affected Nations Funds to have substantial asset bases, an important selling point to BAC in marketing shares in the Nations Funds to potential purchasers thereof through the Bank and other subsidiaries of BAC. The Nations Funds selected for investment of fiduciary assets by BAC pursuant to the Conversion were intended generally to "mirror" the categories of assets held by the Trusts pre-Conversion, all or most of which were liquidated immediately prior to the Conversion either as part of so-called "Common Trust Funds" or in individually-managed accounts.

JURISDICTION AND VENUE

13. The claims asserted herein arise under and pursuant to state statutes and common

law.

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 (diversity of citizenship) and 28 U.S.C. § 1367. The amount in dispute exceeds $75,000 exclusive of interest and costs and there is complete diversity of citizenship between plaintiffs, citizens of the states of California and Nevada, and each of the defendants. The conduct of the defendants as described herein occurred within the State of Missouri and Eastern District of Missouri. Accordingly, this Court has personal jurisdiction over all the defendants pursuant to §506.500 R.S.Mo.

15. Venue is proper in this District as many of the acts and practices complained of herein occurred in substantial part in this District, including the establishment of trusts for the benefit of plaintiff Kutten and her daughters by plaintiff Kutten's late parents. Further, Boatmen's Trust Company, a corporate predecessor of the Bank, was based in this District, as is the Bank's Private Bank. Further, many of the most significant witnesses to the wrongdoing referred to herein are found in and/or did business within this District and will only be available for trial purposes in this District. In addition, a substantial amount of documents relevant to this dispute are located in this District.

16. In connection with the acts alleged in this Complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications and the facilities of the national securities markets.

THE PARTIES

17. (a) Plaintiff Ellen Jane Kutten is a California citizen who has varying interests as beneficiary, contingent beneficiary, as well as co-trustee of several trusts which had been, until recently, managed and controlled by the Bank, its corporate parent and affiliates. In particular,

plaintiff is a named beneficiary under trusts created by her parents in this District in 1981 as amended in 1983, 1987 and 1990, namely, the Joseph Kutten Indenture of Trust and the Carolyn J. Kutten Indenture of Trust. In addition, the plaintiff and her daughters were beneficiaries of trusts established in 1989, namely, the Joseph Kutten and Carolyn Y. Kutten 1989 Grandchildren's Trust (collectively referred to hereinafter as the "Kutten Trusts").[3] Plaintiff Kutten's family's relationship with the Bank and its predecessors, including her grandfather, noted St. Louisan and philanthropist, Charles H. Yalem, spans a period in excess of forty years. At relevant times, all of the investment decisions of the Kutten Trusts were made by the Bank or entities controlled by its parent, BAC. The handling of the assets of the Kutten Trusts by the Bank has not been materially different from the other trusts and fiduciary accounts of which the Bank was and/or is serving as corporate fiduciary with respect to the Conversion and otherwise as described in this Complaint. Although documents such as the trust agreements establishing the Kutten Trusts or other documents pursuant to which a fiduciary relationship with the Bank was

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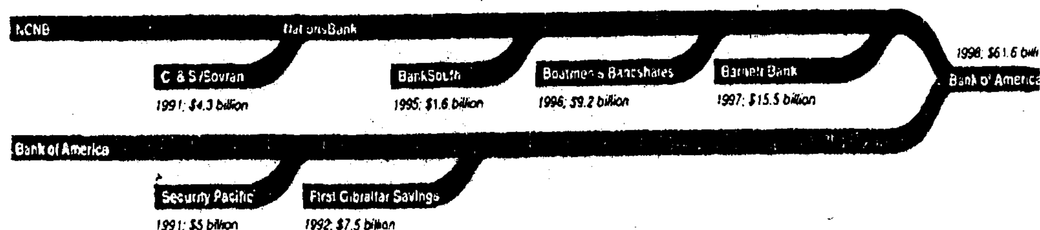
[3] The Original trustee bank under plaintiff's trust and the trust established by her parents for the benefit of plaintiff's daughters was Boatmen's Trust Company which, in turn, was acquired by and merged into Nations Bank, which, in turn, was acquired by and merged with Bank of America, N.A. following such acquisition. On a parallel track, North Carolina National Bank ("NCNB") was similarly making acquisitions until it merged, as Nations Bank with Bank of America, as reflected in the diagram below:



Notwithstanding the foregoing corporate sleight-of-hand, there is little substantive relationship, if any, between the original trustee bank, Boatmen's Trust Company and its successor, Bank of America. Even more significantly, there is virtually no identity of interest between the fiduciary relationship with Boatmen's Trust Company that existed between it and the Kutten Trusts and the one which existed until recently. These circumstances are true with respect to most if not all of the banks presently a part of the Bank.

established typically gave the Bank discretion in the investment of fiduciary assets (even in some cases, permitting investments in proprietary funds), none of such documents permitted the egregious behavior described herein.

(b) Plaintiff Mary Ann Arnold is a Nevada citizen who has varying interests pursuant to the Crowley Trust referred to above including her status as a beneficiary thereof.

18. (a) On information and belief, the Bank is a federally chartered bank domiciled in North Carolina, and is a wholly owned subsidiary of BAC also domiciled in North Carolina. BAC is a financial holding company, and the parent of the Bank. At all relevant times, BAC dictated and controlled the business activities of the Bank, including, inter alia, the wrongful business activities described herein within the Eastern District of Missouri, and wherever in the United States the Bank, BAC and/or their respective predecessors conducted business.

(b) Although the Bank and BAC now have their principal places of business in Charlotte, NC, BAC continues to conduct substantial business within this District in many locations through its "Private Bank" and elsewhere. Notwithstanding the fact that the Kutten Trusts have been under the fiduciary responsibility of the Bank in St. Louis, BAC and the Bank have bounced the beneficiaries of the Kutten Trusts around the country, most significantly to the Banks' Call Center in Dallas in November, 2002, losing their paper files and accounts for a period of months. When plaintiff Kutten sought to obtain a transfer of the Kutten Trusts' accounts to California in October, 2002, where she resides, the Bank refused. Similarly, the Crowley Trust has been bounced around and the beneficiaries thereof are now "serviced" by a Call Center, rather than fiduciary officers with knowledge of the beneficiaries of the Crowley Trust or their individual needs. As such, the following representations of Kenneth D. Lewis, Chairman and Chief Executive Officer of BAC and the Bank on November 3, 2003 in the

context of a new acquisition of yet another bank are baseless:

> The people you know at your branch today will be there tomorrow, and will continue to strive to anticipate and meet your financial needs.

At all relevant times, the Bank was successor Trustee of the Kutten Trusts of which plaintiff Kutten is a beneficiary of one and her daughters another. Similarly, the Bank is successor Trustee of the Crowley Trust, of which plaintiff Arnold is a beneficiary. The Bank is also Trustee or serving in another fiduciary role with respect to the other Trusts or similar groupings of assets of which the remaining members of the Class defined below are beneficiaries.

19. NFT, a non-party herein, is the holding/operating entity BAC formed to do business as the Nations Funds. Its principal place of business is located in Charlotte, NC. Although nominally independent and supervised by its Board of Trustees, NFT has at all relevant times been operated as an alter ego of BAC and its subsidiaries. Upon information and belief, all the members of the Board of Trustees of NFT were selected and/or approved by BAC and its subsidiaries.

20. Defendant BAC (through its subsidiaries) and other business entities not owned by defendant BAC individually and collectively, charge substantial fees and expenses to the Nations Funds for their purported services which, together with NFT's own operating expenses, have had and continue to have a substantial cost to the Kutten Trusts, the Crowley Trust and to each of the other fiduciary accounts, the assets of which have been invested in one or more of the Nations Funds.

Defendants' Self-Serving Investment Decisions

21. (a) Historically, the Bank and its predecessors invested the assets comprising the Kutten Trusts, the Crowley Trust and those of members of the Class primarily through

individually managed portfolios and/or through so-called "Common Trust Funds." The cost of such investment and related administrative services was absorbed by the Bank out of its fees for serving as fiduciary. Beginning some time prior to 1998, in order to, inter alia compensate for massive losses it was incurring from its traditional lending business, the Bank and its predecessors developed various plans and schemes pursuant to which they sought to minimize their operating expenses with respect to fiduciary accounts and maximize their profit from fiduciary business. Defendants' plan included the consolidation and elimination of the previously existing trust departments of the acquired banks with the objective of "servicing" fiduciary accounts and the beneficiaries thereof with fewer and fewer personnel. Pursuant to such business plans, they decided, inter alia, to utilize the funds held by the Bank in fiduciary accounts to fund an initial group of mutual funds and/or to add assets to such funds controlled by the Bank's corporate parent, BAC, the Nations Funds, as well as other mutual funds merged into them. Thereafter, due to numerous acquisitions, mergers and other transactions referred to above, consistent with its longer-term plan and scheme, BAC determined that most or all of the assets in certain fiduciary accounts held by the Bank (and formerly held as fiduciary assets by the acquired banks) such as the accounts of the Kutten Trusts and Crowley Trust, would be converted again into proprietary funds such as the "family" of Nations Funds, the management and investment decisions of which were controlled by subsidiaries of BAC and by the Board of NFT.

(b) Through a complicated and barely comprehensible grouping of advisors, sub-advisors, subsidiaries and other affiliated and unaffiliated service providers, BAC engineered a scheme pursuant to which the Bank was able to abdicate many of its traditional fiduciary responsibilities, functions and services to beneficiaries of fiduciary accounts in favor of alternatives that resulted in higher total direct and indirect expense charges to the fiduciary accounts (such as those of the Kutten and Crowley Trusts) as compared to the trustee or similar

fees historically paid to the Bank for, inter alia, active management of the Trusts' assets. As indicated below, beginning in February 2000 and continuing for some time thereafter, the Bank's "Private Bank" began sending out standardized form letters informing some co-trustees, beneficiaries of the fiduciary accounts and others of the Bank's planned closing of its "Common Trust Funds" and touting the so-called "benefits" of the Conversion, which was then anticipated to take place in May 2000 or at other dates on a carefully orchestrated plan nationwide based, in part, upon the level of integration of the previously acquired banks and other factors. Such letter, signed by David W. Fisher, President, also coerced the recipients of the letter to authorize the Conversion of the Trusts' assets into shares in the Nations Funds. In particular, the Bank's letter said:[4]

> Using Nations Funds, we can provide trust and fiduciary accounts with an attractive mix of investments to pursue the accounts' investment goals. Nations Funds also offer the benefits of:
>
> Daily valuation and liquidity
> Newspaper performance listings
> Broader potential diversification
>
> Flexibility when making trust distributions

In fact, there was little, if any, benefit that would flow to beneficiaries of the Bank's fiduciary accounts and this letter was a sham.

Indeed, all such so-called "benefits," could have been accomplished by means of the Bank's "Common Trust Funds." Curiously, on or about August 16, 1999, the Bank announced that "Common Trust Funds will be valued at month-end instead of twice each month," despite the fact that computer software programs existed that could generate such valuations on a daily

[4] It is not presently known whether the Bank sent such a letter to beneficiaries of all of its fiduciary accounts or, in the case of guardianships and similar accounts, to the appropriate courts overseeing such accounts. Further, not all co-trustees received such a letter nor were their consents sought by the Bank. While the manner in which the conversion was carried out by Defendants may have been different from state-to-state and/or based upon the identity of the acquired bank, such differences were immaterial.

basis. The Bank's letter went on to threaten coercively:

> Any common trust fund units for which we have not received an authorization [by May 1, 2000] may be liquidated and the proceeds placed in a money market vehicle pending discussion about reinvestment. This liquidation could have adverse tax consequences depending upon the cost basis of the common trust fund units.

22. Although plaintiff Kutten did not receive such documents, in response to such coercion and the deceptive and unclear information provided by the Bank, upon information and belief, co-trustees and beneficiaries of the Trusts who received it signed the enclosed form, thereby providing to the Bank their uninformed and fraudulently induced "consent" to the Conversion.

23. Enclosed with the Bank's letter sent to some Trust beneficiaries and/or co-Trustees were various prospectuses and other documents which were drafted so as to conceal, inter alia, the motives of the Bank and BAC for the Conversion into BAC proprietary mutual funds, the benefits of the Conversion to them and their subsidiaries or the increased costs and expenses that would be incurred by the Trusts as a result of the Conversion. There was no explanation in plain English that would put the recipients of these documents on notice of the Bank's wrongdoing as referred to herein. In fact, one of those documents, (Form 3.05D 7/1999) entitled "Disclosure of Investment in Nations Funds," stated deceptively:

> The fee paid directly by the [Trust] Account to the Bank will be reduced (but not below zero) by the Account's pro rata share of the investment advisory fees paid by the Funds to the Service Providers; provided however, that the amount of the reduction will be based on Bank of America Corporation's percentage ownership of the Service Provider. From time to time, the Bank may elect to reduce the Account's fees in recognition of amounts paid by Nations Funds for other services (such as administrative services), but it is not obligated to do so, and the amount of any such fee reduction may vary. The Account will not be charged a sales "load" for buying or redeeming Fund shares described in the accompanying prospectuses.

Such doubletalk-laden form went on to state:

> I acknowledge receipt of the current prospectuses for the Funds and a Nations Funds Fee Disclosure Statement. As co-fiduciary for this account, I understand that the Service Providers will be paid investment advisory and other fees by the Funds. **I approve the method for reducing the investment management fees paid to the Bank by the Account**. I understand and agree that the Bank may choose not to reduce the Account's fee on the account of the compensation paid by the Funds for other services, but the Bank is electing to do so at this time. [Emphasis added].

In fact, the Bank used such language to conceal the fact that although in many cases there was a credit for all of the Nations Fund post-Conversion investment advisory fees, the Bank intended to reduce or eliminate the credit as soon as practicable thereafter once consents were obtained. There was no credit for the substantial operating expenses of the Funds, which substantially reduced the net investment returns to fiduciary accounts.

24. Significantly, at no time did the foregoing "disclosure" documents disclose clearly to a co-Trustee, a beneficiary or other person interested in the affected fiduciary accounts the true additional direct and indirect expenses of the Conversion (although many of such "disclosures" were buried in the Nations Fund prospectuses) nor, in fulfillment of the Bank's fiduciary responsibilities, did the Bank make any personal efforts to insure that plaintiffs or others similarly situated understood the extent to which the Bank and BAC would benefit from the Conversion and how the Kutten and Crowley Trusts and other fiduciary accounts would end up paying substantially more for the investment and related services that the Bank had historically supplied in partial consideration for the Bank's trustee and similar fees. Indeed, Mr. Fisher's letter of August 31, 2000 sent to beneficiaries of fiduciary accounts transmitting the Prospectus for the Nations Funds was "for information" only and recipients, including Plaintiff, were told:

"you do not need to take any action." [Emphasized in original].

25. Notwithstanding its overarching duty of loyalty to plaintiffs and members of the Class, upon information and belief, at no time following the foregoing "disclosure" did the Bank make any complete and candid disclosure to the beneficiaries of the Trusts of the full extent of the damages caused to the Trusts or their beneficiaries by the Conversion, the true motives of BAC and the Bank in carrying out the Conversion or the full extent to which the Bank and BAC were profiting therefrom and, in particular, the additional assets which would flow into the Nations Funds, making them more saleable to the investing public generally. Even after the Bank applied a so-called credit against its fees for some portion of the Nations Funds advisory fees, in practical terms, it was (and is) impossible for co-trustees, executors, beneficiaries and others to understand and have knowledge of the true cost of the Conversion to the Trusts and the income earned upon the assets of the Trusts. Indeed, plaintiffs and other beneficiaries have sought to obtain such information from the Bank and have never received "straight" or any answers to their questions with respect thereto and have received misleading or downright deceptive information as to the impact of the Conversion upon them.

26. Upon information and belief, no analyses or determinations were made by the Bank as to the suitability and/or propriety of the relative costs and benefits of investments in BAC's proprietary funds at the time or before the Conversions were carried out for each fiduciary account as compared to pre-Conversion investments including any comparisons with numerous other available mutual funds or investment vehicles in which the Bank could have invested prudently and at lower cost the funds of the Trusts in which plaintiffs and the members of the Class were beneficiaries. Even assuming that the Bank made a prudent decision to purchase shares in the Nations Funds, which plaintiffs do not, upon information and belief, the Bank did not negotiate the fees and expenses to be charged to the Trusts by the Nations Funds or

comparison shop with other funds or families of funds in an attempt to obtain the same or better investment services elsewhere. Similarly, neither NFT nor its Board of Trustees, sought to obtain the lowest fees from the subsidiaries of BAC actually operating the Nations Funds. Indeed, as stated by New York's Attorney General Eliot Spitzer: "Fund directors do not – and cannot – negotiate hard on the fees." As such, NFT and the entire Board of Trustees of NFT, aided and abetted by defendants, breached the fiduciary duties owed to plaintiffs and the members of the Class.

27. Upon information and belief, BAC and the Bank specifically excluded alternate investment vehicles (such as other families of funds such as the Vanguard and Fidelity mutual funds specifically requested by plaintiff Kutten) from their considerations in order to maximize their earnings and those of their corporate affiliates and did not give serious consideration to leaving the assets of fiduciary accounts invested as they were, pre-Conversion, and/or giving beneficiaries of such accounts a choice as to the various alternatives available. Similarly, at no time did BAC and the Bank give any consideration to making changes in the Bank's "Common Trust Funds" so as to provide any of the purported "benefits" that the Bank claimed would be forthcoming as a result of the Conversion. Plaintiff Kutten's requests for changes in investments were repeatedly rebuffed. [5]

28. On information and belief, as a result of a conspiracy among the defendants and others presently unknown, the Bank and BAC, as part of a corporate business decision, chose to invest the fiduciary assets of plaintiffs and the members of the Class in shares of the Nations Funds as part of the Conversion and otherwise in order, <u>inter alia</u>, to generate investment advisory fees and other fees for its various affiliates and to "bulk-up" the Nations Funds without

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[5] Plaintiff Kutten, although nominally a co-trustee with the Bank, was typically ignored in her role as such and her consent was not sought by the Bank for the Conversion.

regard to whether such investments were prudent and in the best interest of plaintiffs and the other beneficiaries of fiduciary accounts.

29. The foregoing Conversion of the assets of fiduciary accounts to the Nations Funds and the investment of fiduciary assets therein generally was carried out in furtherance of BAC's corporate plan to reduce the Bank's expenses of managing fiduciary assets and increasing BAC's overall direct and indirect profits from fiduciary operations. The assets in the fiduciary accounts managed by the Bank, including the Kutten and Crowley Trusts, were particularly vulnerable to misuse since BAC and the Bank regarded the fiduciary accounts in their care as a "cookie jar" open for the taking. BAC and the Bank proceeded to carry out the Conversion since they would not merely profit from the Bank's trustee and similar fiduciary fees but "double dip" by generating additional revenues through BAC's related asset management business and otherwise. Additional profit was also generated by adding the assets in the Bank's fiduciary accounts to the Nations Funds following the Conversion, thereby making them more saleable at retail to the investing public. Further, the Conversion created an opportunity for the Bank to avoid the relatively low profitability of managing the fiduciary accounts (and the expenses related thereto) which the Bank had contracted to do when it (and/or its predecessors) agreed to serve as fiduciary thereof, and substitute ever-increasing fee income directly and through its corporate affiliates.

30. The Bank and its affiliates reaped many millions of dollars in purported money management, investment advisory and other fees as a result of the Conversion and thereafter from the investment of fiduciary assets in the Nations Funds. The Bank also benefited by receiving Trustee or similar fees for serving as a fiduciary and by reason of the benefits which flowed from, inter alia, substantially reduced operating expenses of the Bank's fiduciary operations. Despite these benefits to the Bank and its affiliates, these investments have been of

little benefit for the Bank's fiduciary accounts and the beneficiaries thereof, including plaintiffs and the members of the Class. On information and belief, all members of the Class suffered damages from the investment practices of the Bank as described above in an amount which cannot presently be determined but which is capable of calculation.

TRADING ACTIVITIES IN NATIONS FUND SHARES

31. Notwithstanding the fact that the Bank now states: "We have zero tolerance for conduct that fails to protect the interests of our clients, associates and shareholders," the defendants for their own financial advantage agreed and conspired with each other and various third parties directly and/or through the operation of the Nations Funds to violate the federal securities laws and breached the fiduciary duties they owed to members of the Class and to the Nations Funds themselves (among others) by, among other things, engaging in fraudulent schemes that benefited the defendants to the extent of tens of millions of dollars at the expense of the affected Nations Funds and its shareholders such as the fiduciary accounts and the beneficiaries of such accounts which held them. Such schemes involved the express agreement and complicity of the Bank, the Nations Funds and others who conspired to and aided and abetted the breach of the fiduciary duties owed by them to holders of Nations Fund shares in return for substantial fees and other benefits for themselves. Although substantial settlements of certain of these claims have now been reached with the SEC and New York Attorney General Spitzer, no benefit from any such settlements has yet accrued to plaintiffs or members of the Class. Further, plaintiff Kutten, will not receive any benefit from any payment by the Bank to the Nations Funds since the Kutten Trusts no longer are shareholders thereof.

32. One scheme pursuant to which the defendants violated the federal securities laws and breached fiduciary duties to the Nations Funds and its shareholders was carried out by their

agreeing that certain favored customers of BAC and the Bank, including Canary Capital Partners, Ltd. ("Canary") would be permitted to "late trade" certain Nations Funds shares. The daily price of mutual fund shares is generally calculated as of 4:00 p.m. EST. Orders to buy, sell or exchange mutual fund shares placed at or before 4:00 p.m. EST on a given day receive that day's price. Conversely, orders placed after 4:00 p.m. EST are required to be priced using the following day's price. Canary agreed and conspired with the other defendants directly or through the Nations Funds that orders Canary placed after 4:00 p.m. on a given day would illegally receive that day's price (as opposed to the next day's price, which the order would have received had it been processed lawfully). This allowed Canary to capitalize on post-4:00 p.m. information to the detriment of the fiduciary accounts which held the particular Nations Funds in which Canary was so trading.

33. Defendants also conspired with others and agreed to violate the federal securities laws and breached fiduciary duties to the members of the Class by allowing Canary and other favored customers of BAC and the Bank to engage in "timing" of transactions in various of the Nations Funds. "Timing" is an investment technique involving short-term, "in and out" trading of mutual fund shares. This technique is designed to exploit inefficiencies in the way mutual fund companies such as NFT price their shares. It is widely acknowledged that timing inures to the detriment of long-term shareholders such as the Bank's fiduciary accounts and through them, the members of the Class. Each of the Nations Funds prospectuses states that timing is monitored and that NFT works to prevent it. However, in return for investments that will increase the revenues of the Bank and its affiliates, certain of the Nations Funds managers – with the express permission of the Bank – entered into undisclosed agreements to allow timing transactions to take place.

34. The Nations Funds' prospectuses distributed to members of the Class at the time

of the Conversion and thereafter created the misleading impression that NFT and its Board of Trustees, were vigilantly protecting Class members' fiduciary accounts against the negative effects of timing. However, the opposite was true in that – with the express permission of the Bank and its affiliates – certain of the Nations Fund managers sold the right to "time" transactions to Canary and other "friends" of the Bank and BAC. The prospectuses were silent about these arrangements.

35. As a result of "late trading" in and "timing" of transactions in shares of the Nations Funds, Canary and the defendants each profited handsomely. The losers were the plaintiffs and the members of the Class, as well as unsuspecting (non-fiduciary account) investors in the Nations Funds because excess profits of the favored customers of BAC and the Bank came dollar-for-dollar out of their pockets, all of which exacerbated the damages experienced by the members of the Class in the wake of the Conversion.

CLASS ACTION ALLEGATIONS

The Relief Sought for Members of the Class

36. This action is brought by plaintiffs Kutten and Arnold, individually and on their own behalf and on behalf of all others similarly situated, under the provisions of Federal Rules of Civil Procedure Rules 23(a) and 23(b)(3) for: (i) an accounting which determines all damages caused by defendants to the members of the Class and the extent of the unjust enrichment of the defendants from their wrongful activities; (ii) money damages to be paid by the defendants; (iii) injunctive relief providing for the possible removal of the Bank as fiduciary for all fiduciary accounts in which members of the Class are beneficiaries; (iv) injunctive relief providing for new procedures and practices at the Bank which put the interests of plaintiff Arnold and the Class ahead of those of BAC and the Bank and which otherwise address the ongoing conflicts of

interest forced by the Bank in the investment of fiduciary assets; and (v) for relief incident and subordinate thereto, including the costs and expenses of this action and an award of attorneys' fees to plaintiffs' counsel. Excluded from the Class are all persons who are members of any Class that may be certified in Williams v. Bank of America, N.A. et al., Case No. 02-15454AB pending in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida and/or in Arnold v. Bank of America, N.A. et al., Cause No. LAC V03-7997 (C.D. Cal.) although the latter case is about to be subject to a motion to transfer to this District or, in the alternative, to dismiss without prejudice.

Numerosity of the Class

37. On information and belief, the Bank serves as a fiduciary (such as a trustee, guardian, executor, etc.) for many thousands of Trusts and other fiduciary accounts affected by the wrongdoing described herein.

38. The Class represented by plaintiffs consists of all persons who are, or were at any time from the time of the Conversion to the present ("Class Period"), beneficiaries of Trusts for which the Bank is or was a fiduciary, the assets of which were "converted" into shares of the Nations Funds. The California Sub-Class consists of those members of the Class whose fiduciary accounts originated in and/or involved beneficiaries residing in California (such as plaintiff Arnold). The Missouri Sub-Class consists of accounts originated in (as in plaintiff Kutten's case) and/or involved beneficiaries residing in Missouri. Such definitions are subject to modification upon completion of discovery with respect thereto.

39. The exact number of members of the Class and California and Missouri Sub-Classes as above described is not known by plaintiffs, but is within the sole knowledge of the Bank. On information and belief, there were and are at least 30,000 fiduciary accounts controlled

by the Bank with, collectively, more than 45,000 beneficiaries thereof, approximately 10% of which are members of the California Sub-Class and 10% of which are members of the Missouri Sub-Class. These approximations are subject to discovery and the exact number of Class members is readily ascertainable from the Bank's records.

40. On information and belief, the members of the Class are located in most or all fifty states, and in numerous foreign countries. Similarly, members of the California and Missouri Sub-Classes are located throughout Missouri, California and in many other states.

41. The beneficiaries of the affected Trusts are so numerous that joinder of individual members is impracticable.

Common Issues of Law and Fact Predominate

42. On information and belief, at least two years prior to the Conversion, the Bank, at the direction of its parent, BAC, and in conspiracy with others, decided to invest the assets of the affected Trusts in shares of the Nations Funds, all of which were directly or indirectly "advised" and managed by subsidiaries of BAC. It is believed that such Conversions were carried out nationwide on a rolling basis subject to a master plan developed by the defendants and others. None of such separate Conversions differed materially despite the timing and different locales of each.

43. All members of the Class and Missouri and California Sub-Classes were adversely affected by the Bank's self-serving business decision to invest the Trusts' assets in the Nations Funds pursuant to the Conversion or thereafter.

44. All Trusts, the assets of which were converted into shares of the Nations Funds, paid directly or indirectly, management and investment advisory fees and other charges to subsidiaries and affiliates of BAC, based on the fiduciary assets invested by the Bank in the Nations Funds.

45. There are common questions of law and fact that relate to and affect the rights of each member of the Class including, inter alia:

(a) whether the Bank's business decision to invest assets of the Trusts and other fiduciary accounts in the Nations Funds was motivated by the best interests of the Class members (which the Bank had a duty to put before its own) or by BAC's desire to generate management and investment advisory fees for its affiliates and subsidiaries, to lower the Bank's expenses of managing fiduciary assets and to generate other benefits for themselves by inter alia, "bulking-up" the assets invested in the Nations Funds;

(b) whether the Bank breached fiduciary duties to plaintiffs and the Class by failing to conduct its fiduciary operations in conformity with the requirements of the National Banking Act and other applicable law;

(c) whether the Bank breached its fiduciary duty to all members of the Class by making investment decisions for the Trusts based upon defendants' own interests and those of their affiliates, rather than the interests of Trust beneficiaries; and,

(d) what remedies are appropriate compensation for the damages caused to plaintiffs and each member of the Class.

46. The relief sought is common to the entire Class including, inter alia:

(a) a declaratory judgment that the Bank violated its fiduciary duty as Trustee (or other similar fiduciary role) with respect to the affected fiduciary accounts and whether it was aided and abetted by defendant BAC and others in doing so;

(b) payment by the defendants of compensatory damages caused by such breaches of fiduciary duty as well as punitive damages;

(c) payment by the defendants of the costs and expenses of this action, including plaintiffs' attorneys' fees;

(d) an injunction preventing the Bank from opposing a petition by beneficiaries of the Trusts affected by the Conversion and other wrongdoing referred to herein to replace it as fiduciary; and

(e) an injunction which establishes appropriate procedures and safeguards within the Bank to ensure that the interests of beneficiaries of Trusts are fully protected from wrongdoing such as described herein.

Typicality of Plaintiffs' Claims

47. Plaintiffs have been beneficiaries of fiduciary accounts affected by the wrongdoing of the Bank as described herein.

48. The assets of the Kutten and Crowley Trusts, like all other Trusts and similar fiduciary accounts, were invested by the Bank in the Nations Funds pursuant to a wholesale business policy decision by BAC made some time prior to 1999 and carried out by the Bank and others thereafter pursuant to the Conversion and subsequently regardless of whether the underlying fiduciary accounts "resided" with the Bank or one of its predecessor banks..

49. On information and belief, the Kutten and Crowley Trusts, like all other Trusts and similarly situated fiduciary accounts, were used by the Bank and its affiliates to generate additional management, investment advisory and/or other fees and benefits for themselves (even after the so-called credits were applied as a result of certain Nations Funds advisory fees) without regard for the best interests of the beneficiaries of such accounts such as plaintiffs and the members of the Class.

50. The claims of the plaintiffs, who are representatives of the Class and the Missouri and California Sub-Classes, are typical of the claims of all members thereof. The claims of plaintiffs are based on the same factual allegations and legal theories as the claims of all other members of the Class and the Missouri and California Sub-Classes.

Plaintiffs Will Fairly and Adequately Represent the Class and the Missouri and California Sub-Classes

51. The plaintiffs are able to and will fairly and adequately protect the interests of the Class and the Missouri and California Sub-Classes.

52. The attorneys for plaintiffs are experienced and capable in complex litigation. The attorneys for plaintiffs and the Class will actively conduct and be responsible for the prosecution of this litigation and the expenses thereof.

COUNT ONE

BREACH OF FIDUCIARY DUTY

53. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

54. On information and belief, the Bank's decision to invest the assets of the Trusts in the Nations Funds was motivated not by the interests of plaintiffs and the Class members but by BAC's desire to generate investment advisory and other fees for its affiliates and, indirectly, for itself, as well as to reduce the Bank's operating expenses.

55. On information and belief, the Bank failed to consider the Nations Funds' high expense or alternative lower cost families of mutual funds (or deliberately did not do so) when it invested the assets of the Trusts into shares of the Nations Funds thus putting its own interests before those of the beneficiaries of fiduciary accounts.

56. On information and belief, the Bank failed to consider the best interests of the Trust beneficiaries when it invested the Trusts' assets in the Nations Funds and breached its duty of loyalty to them by putting the interests of itself and its affiliates before the interests of plaintiffs and the members of the Class.

57. The Bank's wholesale investment of the assets of the Trusts in the Nations Funds in the Conversions carried out around the country was a breach of its fiduciary duty to plaintiffs and the members of the Class, which breach was aided, abetted and/or directed by BAC and its affiliates.

58. As a result of, inter alia, the Bank's improper wholesale transfer of fiduciary assets held by fiduciary accounts the Trusts into shares of the Nations Funds, the beneficiaries of the Trusts or other similarly situated accounts for which the Bank was a fiduciary have been damaged in an amount to be determined by the Court, but believed to be substantial.

COUNT TWO

BREACH OF CONTRACT

59. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

60. By means of the acceptance by the Bank and its predecessors of the trusteeship of the Kutten and Crowley Trusts and each of the other Trusts affected by the Conversion, the Bank and its predecessors committed to provide to all such Trusts complete investment management services of a corporate fiduciary, and render such services on an individualized basis consistent with the goals and objectives of plaintiff Kutten's parents, plaintiff Arnold's grandfather and the other creators of the Trusts and the needs of the beneficiaries thereof. As the Bank states: **"It is our responsibility to invest the trust assets prudently and profitably according to the grantor's wishes as outlined in the trust document." Such promise by the Bank and its predecessors was a material implied term of each trust agreement or other document which established the underlying fiduciary relationship.** No grantor of a Trust anticipated or could reasonably foresee that the Conversion would be carried out by the Bank with Trust assets that the Bank would mishandle fiduciary assets as described herein or that the designated fiduciary

would be the Bank in its present form. Further, as set forth in those Counts not asserted on behalf of the Class, the Bank ignored the express provisions of the Kutten Trusts with respect to the investments made for them by the Bank and otherwise.

61. Plaintiffs and each member of the Class were and/or are beneficiaries of the Bank's contractual obligations to the creators of the Trusts and other fiduciary relationships. By abdicating its responsibilities for individual investment management services and/or through "Common Trust Funds" in favor of the wholesale Conversion of fiduciary assets as described herein that the Bank was obligated to provide to the beneficiaries of its fiduciary accounts, and by conducting itself in its present business form, the Bank breached its contractual obligations thereto.

62. By virtue of the Bank's breach of its contractual obligations to the members of the Class and Missouri and California Sub-Classes, plaintiffs and the members thereof have suffered damages in an amount to be determined by the Court.

COUNT THREE

BREACH OF CONTRACT

63. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

64. This Count if brought by plaintiffs on behalf of those members of the Class who are beneficiaries of Trusts originally established with the designate trustee being one of the banks acquired by and/or merged into the Bank or its predecessors ("Acquired Banks").

65. As with the trusts established by plaintiff Kutten's parents with Boatmen's Trust Company as designated corporate Trustee or by plaintiff Arnold with the Bank of Santa Monica as designate corporate Trustee, the grantors of all affected Trusts selected as Trustee institutions which promised and agreed to deliver personalized fiduciary services to the beneficiaries thereof.

Implicit in the contractual fiduciary relationship between the grantors and the Acquired Banks was the provision of a full range of personalized fiduciary services, including individualized investment management.

66. The Bank, by eliminating the personalized fiduciary services to members of the Class, including, inter alia, individualized investment management, materially breached the explicit and implied terms of the Indentures of Trust or similar documents which initially caused the formation of such Trusts, including, but not limited to the following:

(a) failing to provide appropriate trained personnel to supervise and monitor the performance of the assets in their charge, including a uniform failure to invest in appropriate asset classes;

(b) bouncing plaintiffs and others similarly situated to poorly manned and anonymous "Call Centers" with whom there was no pre-existing relationship, trust and fealty;

(c) changing without plaintiffs' and others similarly situated consent representatives of the Bank to deal with plaintiffs who had no knowledge of plaintiffs' circumstances and others similarly situated or the purposes for which the Trusts were established; and

(d) continuing to charge fiduciary fees when failing to perform the services the services that the Acquired Banks had agreed to perform.

67. Because the transfer of fiduciary responsibilities from the Acquired Banks substantively and materially affected the pre-existing fiduciary relationship with the Bank, it was obliged to give notice to Class members of, inter alia, the terms of the merger or business combination, the forthcoming material changes in the relationship and provide to them the opportunity to seek a replacement fiduciary.

68. By virtue of the foregoing lack of appropriate notice and the material change in fiduciary services delivered by the Bank to members of the Class following the acquisition of the Acquired Banks, such notice should now be provided to affected beneficiaries which, inter alia, provides them with the opportunity to seek a replacement fiduciary.

COUNT FOUR

UNJUST ENRICHMENT

69. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein.

70. By reason of defendant BAC's causing the Bank's fiduciary assets in affected accounts to be invested in the Nations Funds, the Bank and BAC have "double dipped." The defendants have profited by the Conversion and the subsequent acts described herein, thereby unjustly enriching themselves at the expense of plaintiffs and the members of the Class and Missouri and California Sub-Classes. Defendants have similarly enriched themselves, their subsidiaries and affiliates by using information regarding the beneficiaries of fiduciary accounts to market various goods and services including credit cards, loans and deposit accounts (and to permit certain customers of the defendants to engage in late trading and other improper practices involving the Nations Funds) from which products and services they have been unjustly enriched.

71. Such "double dipping" was carried out by the Bank and BAC by imposing on fiduciary accounts the Banks' fees for acting as a corporate fiduciary as well as investment advisory fees, and other related charges which, when taken together with all the Nations Funds' expenses, even after so-called credits for certain Nations Funds advisory fees, exceeded the amounts to which the Bank was entitled to payment for, inter alia, investment of the fiduciary assets and administration of the underlying fiduciary accounts for which services its trustee or similar fees were intended to cover. Such benefits to the Bank and BAC were exacerbated by the

Bank's avoidance of substantial operating expenses by reason of its abdication of its individualized investment and administrative responsibilities owed to the members of the Class and Missouri and California Sub-Classes. The Bank enhanced its profit performance at plaintiffs' expense by favoring the use of its own NationsFunds and investing in same to increase the Nations Funds' own asset base, and aggrandize its own stature under the guise of allegedly providing more services to participants in its so-called "Private Bank." The Bank's objectives were clear from its telling press release of July 14, 1999:

> United by the merger of Bank of America and NationsBank, NationsBanc Investments, Inc., and BA Investment Services, Inc., became one brokerage company on July 12. The birth of Banc of America Investment Services, Inc., the new name for the retail brokerage, gives investors a powerful ally within the Bank of America franchise. (For the full press release, see http://www.bankofamerica.com/newsroom/press/press.cfm?PressID=press.19990714.03.htm&LOBID=1>).

72. Further, upon information and belief, with respect to at least certain of the Trusts for which the Bank has acted as Trustee, the total charges against such Trusts for trustee fees/commissions, advisory fees and other amounts payable by the Trusts exceed the contractual amounts for such charges agreed upon by the creators of such Trusts.

73. The defendants have invested the proceeds of the foregoing unjust enrichment and realized additional profits thereupon, all of which should be returned to the Trusts and other similarly affected accounts and/or their beneficiaries, as the Court shall deem appropriate (e.g. a proportionate share of the defendants' profits during the years of misappropriation) pursuant to California Probate Code, Section 166440(a)(1) and otherwise. Missouri statutes impose strict liability against fiduciaries who "at their sole risk" make investments that are improper such that the Bank is "absolutely liable" to plaintiff Kutten and others in the Missouri Sub-Class for their

damages. (§362.550.5 R.S.Mo.). Plaintiffs and others similarly situated are entitled to recover the Bank's ill-gotten gains and profits therefrom.

COUNT FIVE

VIOLATION OF CALIFORNIA PROBATE CODE

74. Plaintiff Arnold repeats and realleges each and every allegation contained above as if fully set forth herein. The claims set forth in Counts Five through Seven are asserted on behalf of the California Sub-Class.

75. Pursuant to Section 16002 of the California Probate Code, the Bank owes and owed to plaintiff Arnold and the members of the California Sub-Class an absolute duty of loyalty. In exercise of that duty, the Bank has a duty to administer the Trusts solely in the interest of the beneficiaries.

76. Pursuant to the common law of California, the Bank owes and owed to plaintiff Arnold and each member of the California Sub-Class an absolute duty of loyalty. In exercise of that duty, the Bank has a duty to administer the Trusts solely in the best interests of the beneficiaries, i.e. the members of the California Sub-Class.

77. Pursuant to Section 16060 of the California Probate Code, the Bank owes and owed to plaintiff Arnold and the members of the California Sub-Class a duty of candor.

78. Pursuant to the common law of California, the Bank owes and owed to plaintiff Arnold and the members of the California Sub-Class a duty of candor.

79. By acting as alleged herein, the Bank has violated and continues to violate the duties of loyalty and candor it owes and owed to plaintiff Arnold and the members of the California Sub-Class. Such violations of the Bank's duties as fiduciary constitute breach of trust pursuant to 16400 of the California Probate Code.

80. Pursuant to Section 16004 of the California Probate Code, the Bank owes and owed to plaintiff Arnold and the members of the California Sub-Class a duty not to use or deal with Trust property for its own profit, nor to take part in any transaction in which it has an interest adverse to the beneficiary, such as plaintiff Arnold and the members of the California

Sub-Class.

81. Pursuant to the common law of California, the Bank owes and owed to plaintiff Arnold a duty not to take part in a transaction in which it had a conflict of interest, as it did and does as described above.

82. By acting as alleged herein, the Bank has violated and continues to violate the duty not to use or deal with Trust property for its own profit, and the duty to not take part in any transaction in which it had a conflict of interest. Such violations of the Bank's duties as fiduciary constitute breach of trust pursuant to Section 16400 of the California Probate Code.

83. Pursuant to Section 16040 of the California Probate Code, the Bank owes and owed to plaintiff Arnold and the members of the California Sub-Class a duty of care that includes the duty to invest Trust assets prudently and with regard to individualized strategy appropriate and productive pursuant to Probate Code Sections 16007 and 16009. Pursuant to Probate Code Section 16014, the Bank is required to apply fully the special skills of a corporate fiduciary, and this duty heightens the duty of care otherwise applicable to it.

84. By acting as alleged herein, the Bank has violated and continues to violate the duties of care and productivity it owes and owed to plaintiffs and the members of the California Sub-Class. Such violations of the Bank's duties as fiduciary constitutes breach of trust pursuant to Section 16400 of the California Probate Code.

85. Pursuant to Section 16420 of the California Probate Code, plaintiff Arnold and the members of the California Sub-Class may maintain a cause of action against the Bank for its breaches of its duties as fiduciary and its participation in transactions in which it had or has a conflict of interest, as it does here.

86. Pursuant to Section 16440 of the California Probate Code, the Bank is liable to plaintiff Arnold and the members of the California Sub-Class for actual and punitive damages, attorneys' fees, interest, and such other relief as the Court may order.

COUNT SIX

BREACH OF FIDUCIARY DUTY UNDER CALIFORNIA LAW

87. Plaintiff Arnold repeats and realleges each and every allegation contained above as if fully set forth herein.

88. Pursuant to Section 15002 of the Probate Code, the common law of California with respect to fiduciary and trust matters remains the law of the State of California, and Probate Code Section 16420(b) expressly preserves "any other appropriate remedy provided by statute or the common law."

89. By acting as alleged herein, the Bank has violated its fiduciary duties of absolute loyalty and candor owed to plaintiff Arnold and the members of the California Sub-Class.

90. By acting as alleged herein, the Bank has violated its fiduciary duty not to participate in transactions in which it had or has a conflict of interest, as it does here.

91. By acting as alleged herein, the Bank has violated its fiduciary duties of care and productivity it owes or owed to plaintiff Arnold and the members of the California Sub-Class.

92. By acting as alleged herein, the Bank has violated its fiduciary duty that it owes or owed to plaintiff Arnold and the members of the California Sub-Class to take and exercise control over Trust assets.

93. The Bank and its affiliates have already unlawfully extracted huge sums in the form of fees and other charges assessed against fiduciary accounts, and they will continue indefinitely to extract unlawful fees and other charges from plaintiff Arnold and the members of the California Sub-Class, in an amount which cannot be presently determined.

94. Pursuant to Section 16420 of the California Probate Code, plaintiff Arnold and the members of the California Sub-Class may maintain a cause of action against the Bank for its breaches of its duties as fiduciary and its participation in transactions in which it had or has a conflict of interest as described above.

95. The Bank's unlawful conduct, breach of fiduciary duty and breach of contract have, which constitutes breach of trust pursuant to Section 16400 of the California Probate Code.

96. The unlawful acts and practices of the Bank as alleged herein, including violations of violation of Section 16400 of the California Probate Code as well as other state and federal law, constitute unlawful business practices within the meaning of California Business and Professions Code Section 17200, et seq.

97. Unless the Bank is enjoined from continuing to engage in the foregoing unfair and deceptive business practices, plaintiff Arnold and the other members of the general public residing within the State of California and the members of the California Sub-Class will continue to be injured and damaged by the Bank's unfair business practices.

98. So as not to be unjustly enriched by its own wrongful actions and conduct, the Bank should be required to disgorge and restore to plaintiff Arnold and the other members of the general public residing within the State of California and the members of the California Sub-Class all monies wrongfully obtained by it as a result of its wrongful conduct, together with interest and profits earned thereon.

COUNT SEVEN

VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 17200

99. Plaintiffs repeat and reallege each and every allegation contained above as if fully set forth herein. Plaintiffs assert this cause of action in their capacity as private attorneys general on behalf of the members of the general public residing within the State of California and on behalf of the members of the California Sub-Class.

100. The Bank has engaged in and continues to engage in unfair, unlawful and deceptive business practices, including but not limited to sending representatives from St. Louis, Missouri to meet with plaintiff Kutten in Northern California, whereby it has conspired with BAC and its affiliates to force the Trusts to have their assets re-directed from individually managed accounts and/or so-called "Common Trust Funds" and/or other assets to proprietary mutual funds controlled by the Bank and its affiliates. Said Conversions have resulted in higher

total direct and indirect expenses charged to fiduciary accounts than those historically paid to the Bank.

101. By acting as alleged herein, the Bank has violated its duties as a fiduciary, which constitutes breach of trust pursuant to Section 16400 of the California Probate Code.

102. The unlawful acts and practices of the Bank as alleged herein, including violations of Section 16400 of the California Probate Code, constitute unlawful business practices within the meaning of California Business and Professions Code Section 17200, et seq.

103. Unless the Bank is enjoined from continuing to engage in the foregoing unfair and deceptive business practices, plaintiffs and the other members of the general public residing within the State of California and the members of the California Sub-Class will continue to be injured and damaged by the Bank's unfair business practices.

104. So as not to be unjustly enriched by its own wrongful actions and conduct, the Bank should be required to disgorge and restore to plaintiffs and the other members of the general public residing within the State of California and the members of the California Sub-Class all monies wrongfully obtained by it as a result of its wrongful conduct, together with interest and profits earned thereon.

COUNT EIGHT

VIOLATION OF CHAPTER 456 MISSOURI REVISED STATUES

105. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein. The claims set forth in Counts Eight and Nine are asserted on behalf of the members of the Missouri Sub-Class.

106. Pursuant to §456.520.2 R.S.Mo. and §456.900 *et. seq.* R.S.Mo. ("The Prudent Investor Act") R.S.Mo. (2000), the Bank owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class an absolute duty of loyalty. In exercise of that duty, the Bank has a duty

to administer the Trusts and other fiduciary accounts solely in the interests of the beneficiaries thereof.

107. Pursuant to §456.905 R.S.Mo., the Bank owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class an absolute duty of loyalty. In exercise of that duty, the Bank has a duty to administer the Trusts and other fiduciary accounts governed by the Missouri law solely in the best interests of the beneficiaries, i.e. the members of the Missouri Sub-Class.

108. Pursuant to the Missouri Prudent Investor Act, the Bank owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class a duty to exercise reasonable care, skill and caution in investment management decisions, to ascertain facts relevant to the investment and management of trust assets, and a duty to use the special skills and expertise it represented itself to possess when investing and managing trust assets..

109. By acting as alleged herein, the Bank has violated and continues to violate the duties of loyalty and candor it owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class. Such violations of the Bank's duties as fiduciary constitute breach of trust imposed by Missouri statute.

110. Pursuant to the Missouri Prudent Investor Act and §456.570.2 R.S.Mo., the Bank owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class a duty not to use or deal with fiduciary assets for its own profit, not to take part in any transaction in which it has an interest adverse to the beneficiary, such as plaintiff Kutten and the members of the Missouri Sub-Class.

111. By acting as alleged herein, the Bank has violated and continues to violate the duty not to use or deal with fiduciary assets for its own profit, and the duty to not take part in any transaction in which it had a conflict of interest. Such violations of the Bank's duties as fiduciary constitute breach of trust pursuant to Missouri statute.

112. Pursuant to the Prudent Investor Act, the Bank owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class a duty of care that includes the duty to invest fiduciary assets prudently and with regard to individualized strategy appropriate to each fiduciary account and to each beneficiary thereof, and the duty to make fiduciary assets productive. Moreover, the Prudent Investor Act requires the Bank to apply fully the special skills of a corporate fiduciary, heightening the duty of care otherwise applicable to it.

113. By acting as alleged herein, the Bank has violated and continues to violate the duties and productivity it owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class. Clearly the Bank was interested in seizing new opportunities and lining its own pockets at the expense of plaintiff Kutten and those similarly situated. Such violations of the Bank's duties as fiduciary constitutes breach of trust pursuant to Missouri law.

114. The Bank and its affiliates have already unlawfully extracted huge sums in the form of fees and other charges assessed against fiduciary accounts and unless enjoined from doing so, they will continue indefinitely to extract unlawful fees and other charges from the members of the Missouri Sub-Class, in an amount which cannot be presently determined in violation of §456.907 R.S.Mo.

115. Plaintiff Kutten and the members of the Missouri Sub-Class may maintain a cause of action against the Bank for its breaches of its duties as fiduciary and its participation in transactions in which it had or has a conflict of interest, as it does here.

116. The Bank is liable to plaintiff Kutten and the members of the Missouri Sub-Class for actual and punitive damages because the Bank acted with reckless disregard for plaintiff Kutten's and others' rights, attorneys' fees, interest, and such other relief as the Court may order.

COUNT NINE

BREACH OF FIDUCIARY DUTY UNDER MISSOURI COMMON LAW

117. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

118. Pursuant to the common law of Missouri, the Bank owes and owed to plaintiff Kutten and the members of the Missouri Sub-Class an absolute duty of loyalty. In exercise of that duty, the Bank has a duty to administer the Trusts and other fiduciary accounts governed by Missouri law solely in the best interests of the beneficiaries, i.e. the members of the Missouri Sub-Class.

119. By acting as alleged herein, the Bank has violated its fiduciary duties of absolute loyalty and candor owed to plaintiff Kutten and the members of the Missouri Sub-Class.

120. By acting as alleged herein, the Bank has violated its fiduciary duty not to participate in transactions in which it had or has a conflict of interest, as it did and does here.

121. By acting as alleged herein, the Bank has violated its fiduciary duties of care and productivity it owes or owed to plaintiff Kutten and the members of the Missouri Sub-Class.

122. By acting as alleged herein, the Bank has violated its fiduciary duty that it owes or owed to plaintiff Kutten and the members of the Missouri Sub-Class to take and exercise control over fiduciary assets.

123. Plaintiff Kutten and the members of the Missouri Sub-class may maintain a cause of action against the Bank for its breaches of its duties as fiduciary and its participation in transactions in which it had or has a conflict of interest as described above.

124. The Bank's unlawful conduct, breach of fiduciary duty and breach of contract have damaged plaintiff Kutten and the members of the Missouri Sub-Class, inter alia, resulting in waste and mismanagement of fiduciary assets, self-dealing and its consequent unjust enrichment.

125. The Bank is liable to plaintiff Kutten and the members of the Missouri Sub-Class for actual and punitive damages because the Bank acted with reckless disregard for plaintiff Kutten's and others' rights,, attorneys' fees, interest and such other relief as the Court may order.

COUNT TEN

INDIVIDUAL CLAIM OF PLAINTIFF KUTTEN

BREACH OF FIDUCIARY DUTY

126. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

127. As noted above, plaintiff Kutten's family wealth commenced with the toils of her grandfather, Charles H. Yalem, who founded the Aetna Finance Co., later sold to International Telephone and Telegraph Corporation in 1960. Yalem, always a conservative investor, donated hundreds of thousands of dollars to St. Louis civic endeavors, including the St. Louis Zoo (the Charles H. Yalem Children's Zoo), St. Louis University, Jewish Hospital of St. Louis, Washington University, the St. Louis Symphony Orchestra and the St. Louis chapter of the YMCA. Yalem's experience with predecessors to the Bank commenced at least with St. Louis Union Trust which became Centerre Trust Co, which became Boatmen's Trust Co. Yalem's net worth was achieved as a result of a passion for cautious investing and he instilled in his son-in-law and daughter, Joseph and Carolyn Kutten, plaintiff Kutten's parents, the wisdom of careful and conservative investing so that future generations of the family might enjoy his good fortune. In turn, plaintiff Kutten's parents passed these virtues on to her. The Kutten family employed the St. Louis law firm of Bryan, Cave, McPheeters and McRoberts n/k/a/ Bryan Cave to draft the Kutten Trusts and represent them on estate planning matters. The relationship of the Kutten family was not only with their trust company, it was with the individuals who represented the trust company who understood and appreciated the desires and needs of the entire family,

including plaintiff Kutten, a single mother of two children, as well as one of her brothers, a disabled person who is institutionalized and has special needs. The Kuttens had long term personal relationships with several individuals, including Robert Hitpas and Richard Klapp. These individuals and their successors are no longer responsible for the portfolios entrusted to them. Instead, the Bank boasts of a minimum of 450 faceless employees who answer customer inquiries at "Call Centers" established around the country. The systemic change that occurred at the Bank when it acquired the predecessor banks and converted trust assets without the consent of plaintiff Kutten for its own gain and profit represents a classic instance of self-dealing and breach of loyalty, the antithesis of conduct expected of a fiduciary. The Bank has breached its fiduciary duties to plaintiff Kutten and her daughters, including the duty of loyalty, and various duties highlighted by the federal regulations issued by the Office of the Comptroller of the Currency in 1996 directed to all national banks that act in a fiduciary capacity, with which the Bank failed to comply.[6] The Bank:

(a) failed to exercise such specialized care and skill as is required of a fiduciary;

(b) converted trust assets and their subsequent purchase of the Bank's proprietary mutual funds, the Nations Funds;

(c) failed to properly diversify investment portfolios of the Trusts, and acting in derogation of the settlor's expressed directions;

(d) failed to adopt appropriate policies relevant to self-dealing and conflict of interest as required by and in violation of 12 CFR Part 9;

[6] Plaintiff Kutten asserts no private cause of action thereunder. Rather, the Bank's failure to comply with them is a fundamental breach of fiduciary duty.

(e) failed to preview the prospective account to determine if the account could be properly administered subsequent to the acquisition of Boatmen's Trust Co. by the Bank as required by and in violation of 12 CFR, part 9.6;

(f) failed to properly invest funds waiting to be invested to obtain yields consistent with a reasonable rate of return as required by and in violation of 12 CFR Part 9.10;

(g) failed to assign at least two individuals to plaintiff Kutten's accounts as required by 12 CFR, part 9.13;

(h) charged excessive fees for fiduciary compensation in violation of 12 CFR part 9.15;

(i) failed to properly supervise personnel entrusted with the management of plaintiff Kutten's Trusts' assets to ensure implementation of the grantors' expressed directions;

(j) failed to make appropriate trades in the equity and bond markets to enhance the achievement of the objectives of the Trusts, including failing, through neglect, to make trades of any kind for several years;

(k) failed to establish a written plan to engage in the sale and marketing of Nations Funds to Trusts under its fiduciary control and failed to absorb the expenses of establishing a collective investment fund, instead charging the beneficiaries, including plaintiff Kutten a fee of not less than 0.01%;

(l) failed to consider and advise the beneficiaries of the adverse tax consequences arising from a conversion of trust assets and the subsequent purchase of Nations Funds;

(m) failed to consider alternative investments in funds whose returns and ratings are higher than Nations Funds which has scored low on nationally respected ratings;

(n) created a wholly owned subsidiary to serve as the sole vendor of its own product to Trusts under its fiduciary management and control;

(o) failed to resign as Trustee when demanded to do so by plaintiff Kutten, citing its need for business income as overriding its performance as a fiduciary duty and resigning only after plaintiff Kutten's citation of the innumerable occasions when the Bank had breached its duty to plaintiff Kutten and the Kutten Trusts;

(p) failed to observe the parameters of the instructions with regard to conversion issued by the Federal Reserve Bank of the United States in SR 97-3 (SPE), providing [i]n determining whether to convert common trust funds to mutual funds, a banking organization must address the possibility that the conversion could result in conflicts between the best interests of the organization and the fiduciary." Further, the Federal Reserve noted the existence of potential conflicts of interest for a national bank to engage in such transactions and the need for management to demonstrate that it has determined that the governing trust instrument for each affected customer authorizes investment in mutual funds and the mutual funds are suitable investments for the particular accounts;

(q) lost administrative control of plaintiff Kutten's accounts for an undetermined period of time in 2202 and 2003, including electronic access to the accounts and the paper files relating to same; and

(r) failed to communicate with the plaintiff Kutten, return her phone calls and letters and failed to perform as requested by plaintiff Kutten with respect to modifying investment strategies consistent with the investment philosophy that reigned in her family for decades.

COUNT ELEVEN

INDIVIDUAL CLAIM OF PLAINTIFF KUTTEN

BREACH OF FIDUCIARY DUTY

128. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

129. On information and belief, the Bank's decision to invest the assets of the Trusts in the Nations Funds was motivated not by the interests of plaintiff Kutten and her daughters but by BAC's desire to generate investment advisory and other fees for its affiliates and, indirectly, for itself, as well as to reduce the Bank's operating expenses.

130. On information and belief, the Bank failed to consider the Nations Funds' high expense or alternative lower cost families of mutual funds when it invested the assets of the Kutten Trusts into shares of the Nations Funds thus putting its own interests before those of the beneficiaries of fiduciary accounts maintained for the Kutten Trusts.

131. On information and belief, the Bank failed to consider the best interests of plaintiff Kutten and her daughters when it invested the Kutten Trusts' assets in the Nations Funds and breached its duty of loyalty to them by putting the interests of itself and its affiliates before the interests of plaintiff Kutten and her daughters.

132. The Bank's wholesale investment of the assets of the Kutten Trusts in the Nations Funds was a breach of its fiduciary duty to plaintiff Kutten and her daughters, which breach was aided, abetted and/or directed by BAC and its affiliates.

133. As a result of, inter alia, the Bank's improper wholesale transfer of fiduciary assets held by fiduciary accounts the Kutten Trusts into shares of the Nations Funds, the accounts of plaintiff Kutten and her daughters for which the Bank was a fiduciary have been damaged in an amount to be determined by the Court, but believed to be substantial.

COUNT TWELVE

INDIVIDUAL CLAIM OF PLAINTIFF KUTTEN

BREACH OF CONTRACT

134. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

135. By means of the acceptance by the Bank and its predecessors of the trusteeship of the Kutten Trusts, the Bank and its predecessors committed to provide to such Trusts complete investment management services of a corporate fiduciary, and render such services on an individualized basis consistent with the goals and objectives of plaintiff Kutten's parents and the needs of the beneficiaries thereof. As the Bank states: "It is our responsibility to invest the trust assets prudently and profitably according to the grantor's wishes as outlined in the trust document." No grantor of a Trust anticipated or could reasonably foresee that the Conversion would be carried out by the Bank with Trust assets or that the designated fiduciary would be the Bank in its present form. Further, as set forth in those Counts not asserted on behalf of the Class, the Bank ignored the express provisions of the Kutten Trusts with respect to investments and otherwise.

136. Plaintiff Kutten and her daughters were beneficiaries of the Bank's contractual obligations to the creators of the Kutten Trusts and other fiduciary relationships. By abdicating its responsibilities for individual investment management services and/or through "Common Trust Funds" in favor of the wholesale Conversion of fiduciary assets that the Bank was obligated to provide to the beneficiaries of its fiduciary accounts, and by conducting itself in its present business form, the Bank breached its contractual obligations to plaintiff Kutten, her parents and daughters.

137. By virtue of the Bank's breach of its contractual obligations to plaintiff Kutten, her parents and her daughters, plaintiff Kutten and her daughters have suffered damages in an amount to be determined by the Court.

138. The Bank has breached its contractual obligations to plaintiff Kutten and her daughters in their individual capacities as a result of its failure to adhere to the terms of the Kutten family's engagement of the Bank and its predecessors as a fiduciary and plaintiff Kutten as well as her daughters have been damaged.

COUNT THIRTEEN

INDIVIDUAL CLAIM OF PLAINTFF KUTTEN

BREACH OF CONTRACT

139. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

140. This Count if brought by plaintiff Kutten as a beneficiary of Trusts originally established with the Boatman's Trust Company, being one of the Banks acquired by and/or merged into the Bank.

141. Boatmen's Trust Company, as designated corporate Trustee, promised and agreed to the settlers of the Kutten Trusts and its beneficiaries to deliver personalized fiduciary services. Implicit in the contractual fiduciary relationship between the plaintiff Kutten's parents and Boatman's Trust Company was the provision of a full range of personalized fiduciary services, including individualized investment management.

142. The Bank, by eliminating the personalized fiduciary services to plaintiff Kutten, including, inter alia, individualized investment management, materially breached the explicit and implied terms of the Kutten Trusts, including, but not limited to the following:

(a) failing to provide appropriate trained personnel to supervise and monitor the performance of the assets in their charge, including failing to invest in appropriate asset classes;

(b) bouncing plaintiff Kutten to poorly manned and anonymous "Call Centers" with whom these was no pre-existing relationship, trust and fealty;

(c) changing without plaintiff Kutten's consent representatives of the Bank to deal with plaintiff Kutten who had no knowledge of plaintiff Kutten or the purposes for which the Kutten Trusts were established; and

(d) continuing to charge excessive fiduciary fees when failing to perform the services the services that Boatman's Trust Company had agreed to perform.

143. Because the transfer of fiduciary responsibilities from Boatman's Trust Company substantively and materially affected the Kutten Trusts' pre-existing fiduciary relationship with the Bank, it was obliged to give notice to plaintiff Kutten of, inter alia, the terms of the merger between it and Nations Bank, the forthcoming changes in the relationship and provide to them the opportunity to seek a replacement Trustee.

144. Although not provided with said notice, plaintiff Kutten sought the resignation of the Bank in early October, 2003. In response, on October 17, 2003, the Bank incredibly insisted that they be allowed to remain a trustee:

> The (Bank's) Committee decided that they would not resign from these trusts. It was a business decision that was based on the fact that Bank of America does not want to give up your business. Bank of America, like everyone else, has felt the effects of the poor economy and has become very reluctant to voluntarily resign as trustee.

145. The Bank continued to resist resignation until plaintiff Kutten's counsel wrote a seven page letter citing the many examples of the Bank's breach of duties in the administration of the trusts of plaintiff Kutten and her daughters.

COUNT FOURTEEN

INDIVIDUAL CLAIM OF PLAINTIFF KUTTEN

UNJUST ENRICHMENT

146. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

147. By reason of defendant BAC's causing the Bank's fiduciary assets in affected accounts to be invested in the Nations Funds, the Bank and BAC have "double dipped." The defendants have profited by the Conversion and the subsequent acts described herein, thereby unjustly enriching themselves at the expense of plaintiff Kutten and her daughters. Defendants have similarly enriched themselves, their subsidiaries and affiliates by using information regarding the plaintiff Kutten to market various goods and services including credit cards, loans and deposit accounts, from which products and services they have been unjustly enriched.

148. Such "double dipping" was carried out by the Bank and BAC by imposing on plaintiff Kutten's accounts the Banks' fees for acting as a corporate fiduciary as well as investment advisory fees, and other related charges which, when taken together with all the Nations Funds' expenses, even after so-called credits for certain Nations Funds advisory fees, exceeded the amounts to which the Bank was entitled to payment for, inter alia, investment of the fiduciary assets, for which services its Trustee or similar fees were intended to cover. Such benefits to the Bank and BAC were exacerbated by the Bank's avoidance of substantial operating expenses by reason of its abdication of its individualized investment responsibilities owed to plaintiff Kutten and her daughters. The Bank enhanced its profit performance at plaintiff Kutten's expense by favoring the use of its own Funds and investing in same to increase its own asset base, and aggrandize its own stature under the guise of allegedly providing more services

to participants in its "Private Bank" The Bank's objectives were clear from its telling press release in July 14,1999:

> United by the merger of Bank of America and NationsBank, NationsBanc Investments, Inc., and BA Investment Services, Inc., became one brokerage company on July 12. The birth of Banc of America Investment Services, Inc., the new name for the retail brokerage, gives investors a powerful ally within the Bank of America franchise. (For the full press release, see http://www.bankofamerica.com/newsroom/press/press.cfm?PressID=press.19990714.03.htm&LOBID=1>).

149. The defendants have invested the proceeds of the foregoing unjust enrichment and realized additional profits thereupon, all of which should be returned to the Kutten Trusts as the Court shall deem appropriate (e.g. a proportionate share of the defendants' profits during the years of misappropriation). Missouri statutes impose strict liability against fiduciaries who "at their sole risk" make investments that are improper such that the Bank is "absolutely liable" to plaintiff Kutten for their losses. §362.550.5 R.S.Mo. Plaintiff Kutten and her daughters are entitled to recover the Bank's ill-gotten gains and profits.

COUNT FIFTEEN

INDIVIDUAL CLAIM OF PLAINTIFF KUTTEN

VIOLATION OF CHAPTER 456 MISSOURI REVISED STATUES

150. Plaintiff Kutten repeats and realleges each and every allegation contained above as if fully set forth herein.

151. Pursuant to §456.520.2 R.S.Mo. and §456.900 *et. seq.* R.S.Mo. ("The Prudent Investor Act") RSMo. (2000), the Bank owes and owed to plaintiff Kutten and her daughters an absolute duty of loyalty. In exercise of that duty, the Bank has a duty to administer the Trusts and other fiduciary accounts solely in the interests of the beneficiaries thereof.

152. Pursuant to §456.905 R.S.Mo., the Bank owes and owed to plaintiff Kutten and her daughters an absolute duty of loyalty. In exercise of that duty, the Bank has a duty to administer the Kutten Trusts governed by the Missouri law solely in the best interests of the beneficiaries.

153. Pursuant to the Missouri Prudent Investor Act, the Bank owes and owed to plaintiff Kutten and her daughters a duty to exercise reasonable care, skill and caution in investment management decisions, to ascertain facts relevant to the investment and management of trust assets, and a duty to use the special skills and expertise it represented itself to possess when investing and managing trust assets.

154. By acting as alleged herein, the Bank has violated and continues to violate the duties of loyalty and candor it owes and owed to plaintiff Kutten and her daughters. Such violations of the Bank's duties as fiduciary constitute breach of trust imposed by Missouri statute.

155. Pursuant to the Missouri Prudent Investor Act and §456.570.2 R.S.Mo., the Bank owes and owed to plaintiff Kutten and her daughters a duty not to use or deal with fiduciary assets for its own profit, not to take part in any transaction in which it has an interest adverse to the beneficiary, such as plaintiff Kutten and her daughters.

156. By acting as alleged herein, the Bank violated the duty not to use or deal with fiduciary assets for its own profit, and the duty to not take part in any transaction in which it had a conflict of interest. Such violations of the Bank's duties as fiduciary constitute breach of trust pursuant to Missouri statute.

157. Pursuant to the Prudent Investor Act, the Bank owes and owed to plaintiff Kutten and her daughters a duty of care that includes the duty to invest fiduciary assets prudently and with regard to individualized strategy appropriate to each fiduciary account and to each

beneficiary thereof, and the duty to make fiduciary assets productive. Moreover, the Prudent Investor Act requires the Bank to apply fully the special skills of a corporate fiduciary, heightening the duty of care otherwise applicable to it.

158. By acting as alleged herein, the Bank has violated the duties and productivity it owed to plaintiff Kutten and her daughters. Clearly the Bank was interested in seizing new opportunities and lining its own pockets at the expense of plaintiff Kutten and her daughters. Such violations of the Bank's duties as fiduciary constitutes breach of trust pursuant to Missouri law.

159. Plaintiff Kutten may maintain a cause of action against the Bank for its breaches of its duties as fiduciary and its participation in transactions in which it had or has a conflict of interest, as it does here.

160. The Bank is liable to plaintiff Kutten for actual and punitive damages because the Bank acted with reckless disregard for plaintiff Kutten's rights, attorneys' fees, interest, and such other relief as the Court may order.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request on their own behalf and on behalf of all members of the Class and Missouri and California Sub-Classes:

(a) certification of this action as a Class Action and appointment of plaintiff s and their counsel to represent the Class and the Missouri and California Sub-Classes;

(b) entry of judgment on the claims for breach of fiduciary duty in favor of plaintiffs individually and as representatives of the other members of the Class and Missouri and California Sub-Classes and against the defendants and an award of compensatory damages and punitive damages in favor of plaintiffs individually and as representatives of the other members

of the Class and Missouri and California Sub-Classes and against the defendants in the amount of damages caused by the defendants' breaches of fiduciary duties;

(c) entry of judgment on the claims for breach of contract in favor of plaintiffs individually and as representatives of the other members of the Class and Missouri and California Sub-Classes against the Bank and an award of compensatory damages in favor of plaintiffs individually and as representatives of the other members of the Class and Missouri and California Sub-Classes and against the Bank in the amount of damages caused by the Bank's breaches of contract;

(d) entry of judgment enjoining the Bank from opposing any petition filed by any member of the Class or Missouri or California Sub-Classes seeking the removal of the Bank as corporate fiduciary and requiring the Bank to pay for all legal fees and expenses incident thereto including its own;

(e) entry of judgment compelling the defendants to account for their unjust enrichment and disgorging the amount thereof (and the profits earned thereupon) to the fiduciary accounts, including the Kutten and Crowley Trusts, affected by the wrongdoing described herein and/or their beneficiaries, as appropriate;

(f) entry of judgment compelling the Bank to fully insulate its fiduciary operations from all of its other business activities and those of BAC;

(g) entry of judgment compelling the Bank to establish and implement procedures to fully protect the interests of the members of the Class including, inter alia, the appointment of an ombudsman to oversee the Bank's fiduciary operations;

(h) repayment to the affected Nations Funds of the damages caused to them by the defendants' actions as described herein;

(i) pre-judgment and post-judgment interest at the maximum rate allowable by law;

(j) reasonable attorneys' fees and reimbursement of the reasonable costs and expenses of prosecuting this litigation and distributing the recovery to members of the Class and Missouri and California Sub-Classes; and

(k) such other or additional relief as this Court deems appropriate.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

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COUNSEL FOR PLAINTIFFS AND THE CLASS

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2004, a copy of the foregoing was mailed by United States Postal Service to the following non-participants in Electronic Case Filing:

Mary J. Hackett, Esq.
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352275

/s/ Steven M. Hamburg

57-26-04 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---x
HOLLY HUGHES, et al,

Plaintiffs,

02 CIV 6384 (MBM)(HP)

v.

LASALLE BANK, N.A., et al,

Defendants.
---x

DECLARATION OF JOHN LANGBEIN IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND LEAVE TO AMEND COMPLAINT

John H. Langbein declares the following under penalty of perjury:

1. This report. Counsel for plaintiffs in this case have asked me to submit this expert report in affidavit form.

2. Prior affidavit. I have submitted a prior affidavit in this matter, dated April 10, 2003 (hereafter Langbein April 2003 Affidavit), which I reaffirm in this affidavit. I attach a copy of the prior affidavit as Exhibit A. Sections 2-5 of that affidavit summarize my expert qualifications. Attached as exhibits to that affidavit are my c.v. and a schedule of prior trial and deposition testimony.

3. Core principles of fiduciary administration. In my prior affidavit, which I reaffirm and incorporate in this report, I identified "a well-established set of interconnected fiduciary duties" that would pertain to a case such as the present case in which a fiduciary converts common trust funds into mutual funds. Langbein April 2003 Affidavit, § 6. I discussed the following principles: the duty of loyalty, the duty of prudent administration, the higher standard of care applicable to professional fiduciaries, the duty of prudent investing, the duty of appropriate record keeping, the duty to take account of tax consequences when engaging in fiduciary investing, and the duty of disclosure to beneficiaries. Id. §§ 6-13. In the present affidavit, I shall discuss various ways in which LaSalle Bank, N.A., the defendant fiduciary (hereafter "LaSalle")

Exhibit 3

breached these duties.

4. The suitability of mutual funds for trust accounts. The present lawsuit does not challenge the appropriateness of mutual funds as potentially appropriate vehicles for investing of fiduciary accounts. Mutual funds can offer certain advantages over common trust funds, because mutual fund shares can be distributed in kind, whereas interests in common trust funds must be cashed out upon distribution, which triggers recognition of gains or losses and the consequent recognition-based tax consequences.

5. The conversion. The issue in this case is not LaSalle's decision to invest in mutual funds, it is rather its decision about when and how to invest in mutual funds. The common trust fund interests that are the subject of this litigation were converted in January, 1993. Until 1996, converting common trust fund interests into mutual funds was a recognition event, treated for federal (and for most state) tax purposes as though it entailed the sale of the interest in the common trust fund and the purchase of the mutual fund shares, with consequent taxation. Section 1805 of the Small Business Job Protection Act of 1996 amended the Internal Revenue Code, adding IRS § 584(h), which permits such conversions on a tax-free basis. Until 1996, therefore, converting common trust fund interests into mutual fund shares was a transaction of dubious prudence, because such a conversion would provoke precisely the sort of tax consequences whose avoidance was the main attraction for investing in mutual funds in the first place. For that reason, responsible corporate fiduciaries decided not to convert their common trust funds until the mutual fund industry could succeed in persuading Congress to render such conversions tax neutral, the step that occurred in 1996.

6. Entering the mutual fund business. LaSalle's decision to convert from common trust funds to mutual funds as the means for investing fiduciary accounts in pooled vehicles did not require LaSalle to enter the mutual fund business. Rather, LaSalle could have chosen to use proven mutual funds already available in the highly competitive mutual fund marketplace. LaSalle's haste to convert its common trust funds into mutual funds appears to have been was driven by LaSalle's wish to enter the mutual fund business itself, launching a new set of mutual funds

called the Rembrandt Funds. In using its fiduciary accounts as seed money for its new mutual funds, LaSalle placed itself in tension with its duty of loyalty, that is, its "duty to administer [each] trust solely in the interest of the beneficiary." Restatement of Trusts (Second) § 170(1) (1959).

7. Self-dealing. In the absence of special statute, LaSalle's conduct would have been a per se breach of the rule against self-dealing. "The trustee violates his duty [of loyalty] to the beneficiary ... where he uses the trust property for his own purposes. Thus, he cannot properly use the trust money in his business ...." Restatement of Trusts (Second) § 170(1), comment l (1959). Likewise, a fiduciary who accepts commission income from fiduciary accounts breaches the duty of loyalty. The Restatement uses the example of a trustee who receives a commission for placing trust insurance business: because the trustee "would be tempted to place the insurance with the company that employs him, even though that might not be for the best interest of the beneficiary," the transaction violates the duty of loyalty. Id., comment o.

8. State enabling legislation: what the acts relieve against and what they leave in place. In many states, legislation overcomes the per se rule against self-dealing, permitting trustees to invest in proprietary or "affiliated" funds. These statutes do not, however, eliminate the duty of loyalty, nor do they in any way soften the duty of prudence. For example, the Illinois statute says that "[a] trustee shall not be prohibited from investing ... [in an affiliated fund] solely on the basis that the trustee ... receives reasonable remuneration" for its services to the fund. 760 Ill. Comp. Stats. § 760 5/5.2 Thus, the trustee may now use an affiliated mutual fund, even though compensated, but the trustee remains responsible for determining that the investment is reasonably priced and otherwise prudent, and that selecting this fund is in the best interest of the trust beneficiaries.

9. Comparison shopping. Such a determination requires a fiduciary to undertake a careful analysis of the strengths and weaknesses of the affiliated funds, compared to other funds suitable for the objectives of the particular trust fund. Among the comparisons that a prudent fiduciary would consider are the net costs, including investment expenses and management and sales fees; the quality and experience of the fund managements; and the degree of diversification that would

be achieved using the affiliated versus the competing funds. After making such investments, a fiduciary is obliged to monitor them closely and continuously, comparing the performance of the affiliated funds against the performance of benchmark funds of comparable character. See, e.g., Uniform Prudent Investor Act §§ 2, 3, 7, 9 (duties of prudent investing, diversification, cost sensitivity, and monitoring). The deposition evidence indicates that LaSalle gave no consideration to the use of seasoned outsiders before preferring its own insiders. For example, LaSalle's then-president James Wynsma testified that no other investment advisors were ever considered for the Rembrandt funds. Deposition of LaSalle President James Wysnma, [Wynsma Tr. at 232-4). Asked whether there was "any particular advantage to the LaSalle National Bank Trust beneficiaries to having their funds placed in Rembrandt funds beginning in 1993," the current president and CEO of LaSalle's parent, ABN AMRO N.A., who served on LaSalle's board when it approved the conversion, replied: "I have no idea one way or the other." Deposition of Norman Bobins, **(Bobins Tr. p. 46).**

10. Timing. LaSalle's decision to invest fiduciary accounts in its own proprietary funds is linked to its profoundly suspect decision to convert its common trust funds into these captive mutual funds in advance of the 1996 federal legislation that made such conversions tax neutral, contrary to the practice of responsible corporate fiduciaries. As I pointed out in my prior affidavit, a fiduciary's duty to be sensitive to tax consequences is a familiar principle of fiduciary practice. "Among the matters which the trustee should consider in selecting a given investment ... are ... the effect of the investment in increasing or diminishing liability for taxes ...." Restatement of Trusts (Second) § 227, comment o (1959); accord Restatement of Trusts (Third): Prudent Investor Rule § 227, comment h, at 30 (1992); id., Reporter's Note to comment i, at 89; Uniform Prudent Investor Act § 2(c) (placing "the expected tax consequences of investment decisions or strategies" among the circumstances that a trustee "shall consider" in making investment and management decisions"). LaSalle's decision to inflict these avoidable tax costs on its trust accounts in a transaction that was driven at least in part by LaSalle's desire to seed its new mutual fund business violated LaSalle's duties of loyalty and prudence.

11. The duty to document. I said in my prior affidavit that "avoiding needless recognition and

taxation is a fundamental desideratum of good trust administration. There may be circumstances in which the benefits of conversion outweigh the tax cost, but it is the trustee's responsibility to identify and document such benefits." Langbein April 2003 Affidavit, § 12. Under LaSalle's duties of loyalty and prudence, it was obliged not only to conduct the careful inquiry I have described into the merits of the conversion and the use of affiliated funds, but also to document that inquiry fully and contemporaneously. Process values loom large in sound fiduciary practice in all aspects of fiduciary administration. "In cases involving the propriety of investments, the decision-making process may be as important as the decision itself, at least for purposes of determining the trustee's responsibility." A. Walter Nossaman et al., Trust Administration and Taxation § 29.05[2] (1995). Prudent fiduciaries understand that sound procedures for making and recording decisions deter abuse and promote faithful performance. "The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Restatement (Second) of Trusts § 172 (1959). In the case of a professional fiduciary such as LaSalle, the higher standard of care of the professional intensifies this responsibility. Because a corporate fiduciary is an intrinsically bureaucratic entity, its performance of trust functions necessarily involves several persons deliberating and acting over time. Effective recordation is essential for appropriate coordination in such circumstances.

12. <u>Failures of deliberation and documentation</u>. In the present case, the evidence indicates that LaSalle did not engage in the careful, beneficiary-oriented deliberation about whether to convert these fiduciary accounts to proprietary mutual fund accounts, nor did it engage in such deliberation about whether incurring heavy trust-level tax costs was prudent and consistent with its duty of loyalty. LaSalle's Personal Financial Services Director John Crean admitted that LaSalle's trust officers did not analyze "individual trust accounts to determine whether those accounts should be part of the investment conversion ...." **(Crean Tr. 97-99).** LaSalle's former President James Wynsma confirmed this fact. (Wynsma Tr. 67-8, Exhibit 6). If there was deliberation about the fundamental fiduciary issues involved in this conversion, those deliberations appear not to have been the subject of contemporaneous recordation. Indeed, high-ranking officers have bragged about their failure to adhere to the process values of the trust fiduciary tradition. Asked about the failure to document the purposes of the conversion, Harrison

Tempest, the then president of LaSalle's parent company ABN-AMRO, N.A., testified that "I didn't feel minutes were very important." **Tempest Tr. 38, Exhibit ???**. The chair of LaSalle's Trust Investment Committee boasted on deposition that "I have a long and distinguished history of not keeping any minutes of anything anytime anywhere." **Jan Persson Tr. 133-34.** In a matter so consequential, and in which LaSalle operated from a position of such embedded conflict of interest, this disdain for the ordinary deliberative and record-keeping practices of professional fiduciaries constituted a serious breach of LaSalle's duties of loyalty and prudence.

13. Failures of disclosure. Fiduciaries owe fiduciary account beneficiaries a duty of full disclosure about important matters arising in connection with the administration of their accounts, especially when the fiduciary has an embedded conflict of interest regarding the matter in question. "A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." Uniform Trust Code (UTC) § 813(a) (2000). As I observed in my prior affidavit, disclosure also serves important process values: Disclosure promotes deliberation and deters imprudent or otherwise wrongful conduct. "Furthermore, disclosure must be honest disclosure if it is to comply with the duty of loyalty. As Judge Posner said in a well-known aphorism that the Supreme Court has endorsed, 'Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA.' Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983), quoted in Varity Corp. v. Howe, 516 U.S. 489, 506 (1996)." Langbein April 2003 Affidavit, at § 13. In the present case it appears that the LaSalle did not disclose to the beneficiaries that the conversion to affiliated mutual funds would trigger otherwise avoidable tax liabilities and result in increased expenses, nor that LaSalle had not considered the use of less expensive non-affiliated mutual funds, nor that LaSalle had no experience in the mutual fund business. ABN-AMRO N.A.'s former President Harrison Tempest testified on deposition that "it was not important to the beneficiaries of fiduciary accounts to know the bank's reasons for the investment conversion." **Tempest Tr. 163**. That view is not in accord with fiduciary standards. When the reason for converting these accounts is haste to enter the mutual fund business, and thus to serve the interests of the fiduciary at great and avoidable expense to the beneficiaries, these are "material facts necessary for [the beneficiaries to know] to

protect their interests." Uniform Trust Code § 813(a), supra.

14. Comparability of fiduciary standards applicable to trustees, executors, administrators, and conservators (guardians of the property). I have been asked to comment on LaSalle's contention that it would be inappropriate for class certification to extend beyond trust accounts to embrace fiduciary accounts arising from probate estates or conservatorships (guardianships of property), on the ground that the applicable fiduciary standards are incommensurate. In my opinion, as an expert on the fiduciary standards applicable to all three categories of fiduciaries, there are no material differences in the standards appropriate to them. The Uniform Probate Code, for example, says that "[a] personal representative [that is, an administrator or executor] is a fiduciary who shall observe the standards of care applicable to trustees ...." Id. § 3-701 (1969). Likewise, the Uniform Guardianship and Protective Proceedings Act of 1997, also codified as Article 5 of the Uniform Probate Code, provides that "[a] conservator ... is a fiduciary and shall observe the standards of care applicable to a trustee." Uniform Probate Code § 5-418(a). The official comment to the Uniform Prudent Investor Act (1994), notes that "[o]ther fiduciaries--such as executors, conservators, and guardians of the property--sometimes have responsibilities over assets that are governed by the standards of prudent investment." Id, prefatory note. The quoted passage continues, explaining that although the Act does not explicitly apply beyond trustees, "[i]t will often be appropriate for states to adapt the law governing investment by trustees under this Act to these other fiduciary regimes ...." (The comment advises that in extending the legislation to these other fiduciaries, regard should be had to "such changed circumstances as the relatively short duration of most executorships and the intensity of court supervision of conservators and guardians in some jurisdictions." Id.) Thus, the leading authorities that govern fiduciary standards for trustees, personal representatives, and conservators (guardians of the property) make clear the understanding that the standards for all these relationships are common, although in some details differences such as a shorter time horizon for most estates may affect how a particular fiduciary applies those standards in the conduct of fiduciary investing. The underlying commonalty of all these fiduciary relationships abides, especially as applied to the issues of loyalty and prudence arising from this Trustee's conduct in converting these fiduciary accounts.

15. Irrelevancy of Domicile. The legal issue in this lawsuit – i.e., whether defendants have breached fiduciary duties owed to each member of the Class – is materially indistinguishable among Class members. LaSalle's fiduciary duty to its trust accounts is essentially the same without regard to the states of domicile for members of the Class and their particular fiduciary accounts. The alleged breaches of fiduciary duty alleged in the complaint are actionable in every state, regardless of whether a particular state's law permits conversions. Similarly, LaSalle's Investment Conversion is actionable without regard for whether a particular trust instrument, will or other document permits investments in proprietary mutual funds, without regard for whether form releases were signed without consideration or full disclosure when the fiduciary accounts were closed, and without regard for whether Courts of appropriate jurisdiction failed to object to the Investment Conversion.

Dated: December 23, 2003

____

John H. Langbein

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12 CFR 9.12
CONFLICTS OF INTEREST
MONEY MARKET MUTUAL FUNDS

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

Trust Interpretation No. 234
October 1989

September 21, 1989

Dear Mr.

This is in reply to your letter dated August 4, 1988. We regret the length of time that it has taken to respond to your ruling request.

Our attorneys advise us that neither the returning to the discretionary accounts the pro-rata share of the mutual fund advisory fee nor establishing twin portfolios and waiving an advisory fee from the portfolio for discretionary fiduciary accounts resolve the conflicts of interest. Compliance with 12 CFR §9.12 would be required.

The Bank is considering acting as investment advisor to an open-end private label money market mutual fund (MMMF). The MMMF would be available as an investment for both discretionary accounts and non-discretionary clients of the Bank. One alternative under consideration is to return to the discretionary investing accounts a pro-rata share of the advisory fee paid to the Trust Division. The second alternative is to establish a dual portfolio MMMF. One portfolio would be limited to investment by discretionary accounts. The advisory fee would be waived for this portfolio. The second portfolio would be for non-discretionary clients of the Bank. Full fees would be charged to this portfolio.

The conflicts of interest presented by the proposals are not eliminated by the corporate fiduciary waiving the advisory fee chargeable to discretionary accounts. Establishing the mutual fund may be dependent upon the availability of the fiduciary assets. The presence of the fiduciary assets improve the marketability of the mutual fund. In both situations the use of fiduciary assets result in the direct financial benefit to the corporate fiduciary.

EXHIBIT 4

Grant #7
7-9-03

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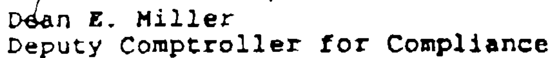
Because of the conflicts of interest presented, the proposals fall within the terms of 12 CFR §9.12. Funds held by the Bank as fiduciary should not be invested in a mutual fund advised by the Bank (or an affiliate of the Bank) unless lawfully authorized by the terms of the instrument creating the relationship, court order, or local law. Also, the doctrine of consent may be invoked. This would require all parties in interest to the account to be ascertained and sui juris or represented by a guardian ad litem. Full and accurate disclosure of the nature of the conflict is necessary in order for the consent to be validly obtained. Qualified employee benefit accounts would be subject to ERISA. See specifically PTE 77-4.

We trust that this fully addresses your request for an opinion. Again, we regret the delay in responding.

Sincerely,



Dean E. Miller
Deputy Comptroller for Compliance

cc: Director for Bank Supervision
Southeastern District

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BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM

WASHINGTON, D. C. 20551

DIVISION OF BANKING
SUPERVISION AND REGULATION

SR 97-3 (SPE)
February 26, 1997

TO THE OFFICER IN CHARGE OF SUPERVISION AT EACH FEDERAL RESERVE BANK

SUBJECT: Conversion of Common Trust Funds to Mutual Funds

A recent new law has facilitated conversions of common trust funds into mutual funds, which has raised several issues and concerns associated with the practice. It will be important for Federal Reserve examiners to review anticipated or completed conversions to assess a banking organization's decision-making and risk management processes, its policies and procedures and its documentation supporting the conversion decision.

Background

On August 20, 1996, legislation was passed permitting the tax-free conversion of common trust funds to mutual funds effective after December 31, 1995.[1] The new law provides that participants in a common trust fund recognize no gain or loss from the transfer of substantially all of the assets of the common trust fund into one or more mutual funds.

A conversion of a common trust fund into a mutual fund may have important benefits to fiduciary customers because, unlike common trust fund units, mutual fund shares are portable and may be transferred to another trustee or to the customer directly, if the situation warrants. Moreover, mutual funds are subject to specific requirements and restrictions pertaining to formation, investments, liquidity and disclosure under the Investment Company Act of 1940, that are intended to safeguard the investor but are not applicable to common trust funds.

The change to the tax laws that now permits a tax-free conversion has enabled banking organizations to eliminate some of the duplicative administrative and operational costs associated with offering

EXHIBIT 5

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common trust funds to fiduciary customers and mutual fund investment products to other customers. Some banking organizations may also recognize that conversion provides an opportunity to generate additional income by charging fees for providing trustee services to customers and additional fees for rendering investment advisory services to the mutual fund in which their fiduciary customers have invested. Income can also be generated from shared fee arrangements with unaffiliated mutual fund providers.

Supervisory Concerns

Conversion of common trust funds to mutual funds can raise supervisory concerns if not conducted properly. These concerns, discussed below, focus on the involvement of the directors and senior management, the potential for conflicts between the best interests of the banking organization and those of its fiduciary customers, and the possible need for outside technical expertise, all of which need to be addressed by examiners.

Role of Directors and Senior Management

The banking organization's directors should be apprised of the issues associated with conversion of common trust funds into mutual funds. Such analysis should consider customer needs and how the conversion will satisfy those needs, as well as any legal or other risks such action poses to the organization. The directors should authorize or ratify management's decision to convert or transfer common trust funds to mutual funds. Examiners should carefully review the organization's decision making process, its stated reasons for converting its common trust funds to mutual funds, its choice of funds, and its procedures for obtaining customer approval and accomplishing the conversion.

Senior management should be responsible for ensuring that such conversions comport with federal and state law, as well as with the organization's policies and the individual trust customer's objectives. Senior management should also be aware of the potential problems and risks involved that will often require the advisory services of outside professionals knowledgeable about the requirements and restrictions contained in the Investment Company Act of 1940, and implementing regulations of federal and state securities industry supervisors. The qualifications and experience of any professionals engaged by the organization to assist in the decision-making or conversion process should be considered by management and reviewed by examiners.

Conflicts of Interest and Suitability

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In determining whether to convert common trust funds to mutual funds, a banking organization must address the possibility that the conversion could result in conflicts between the best interests of the organization and the best interests of its fiduciary customers. The banking organization must also determine that the mutual fund shares are suitable for accounts which previously held common trust fund units. Banking organizations that convert or transfer common trust funds to mutual funds may face questions from current and future beneficiaries with respect to these two issues.

Potential conflicts can arise if a banking organization were to charge a direct fee to the trust customer for serving as trustee while also charging an advisor's fee to the mutual fund. Investment advisor fees are not ordinarily permitted to be charged to common trust funds, and so it may appear that the organization's primary motive for the conversion was a self-interest in generating greater fee income. State law may preclude charging of both fees. Moreover, in cases where they are not prohibited, the organization should review its discretionary fiduciary responsibilities for each account in order to determine the extent to which it may mitigate the appearance of a conflict through proper disclosure and subsequent authorization by beneficiaries who have appropriate powers under the instrument.

Another possible conflict of interest could arise from the use of *proprietary* mutual funds when there are unaffiliated mutual funds or alternate investment opportunities available that may be equally appropriate for the participant's portfolio. Again, the appearance that the organization put its own interests above those of its fiduciary customers may cause concern particularly if investments are made in a newly-established proprietary fund with no history or track record. It is important that the organization thoroughly document its decision to transfer common trust funds into proprietary mutual funds.

The investment objectives and attributes of the organization's common trust funds that made them suitable and authorized investments do not necessarily carry over to the mutual funds that replace them. Accordingly, management must demonstrate that it has determined that the governing trust instrument for each affected customer authorizes investment in mutual funds and that the mutual funds were suitable investments for the particular accounts. For certain types of trust accounts, such as a conservatorship or guardianship, court approval may be required to invest in mutual funds. For other accounts, amendments to agreements or letters of direction authorizing investments in mutual funds may be necessary. Prior investment decisions that approved the purchase of common trust fund units for an account's portfolio must be reconsidered to verify suitability for all accounts about to receive mutual fund shares. Management should maintain, and examiners should review, documentation supporting the decision to invest in or hold specific

mutual funds.

State Tax Laws

Although federal tax law now provides for tax-free conversions of common trust funds in most cases, any tax consequences that may arise under particular state tax laws must be considered. This applies not only to the state tax law that governs the individual common trust fund, but also to the law governing each of the different types of common trust fund investors that may be affected by the conversion. Although many state laws are consistent with federal law, there may be discrepancies requiring resolution through the courts or through the legislative process. Accordingly, examiners should confirm that the organization has been advised by competent, experienced experts on state tax law requirements applicable to such conversions to assure they conform with state law.

Supervisory Follow-up

To the extent that examiners identify significant issues or concerns pertaining to common trust fund conversions, it is requested that the respective Reserve Bank forward such information to the Manager, Trust/IS Supervision Section, stop 407, at the Board. This will facilitate the collection and dissemination of information on industry practices throughout the System.

Please distribute this letter to the appropriate supervision staff including all examiners of fiduciary and securities activities. Staff may find it of interest to refer to two interpretations on related subjects: 12 C.F.R. 225.125 issued by the Board, which pertains to a banking organization's investments in a proprietary mutual fund, and OCC Interpretive Letter 722 - May 12, 1996, which pertains to national banks.

Should there be any questions regarding this letter, please contact Don R. Vinnedge at (202) 452-2717.

Howard A. Amer
Assistant Director

Cross References:

Small Business Jobs Protection Act of 1996
Investment Company Act of 1940
12 C.F.R. 225.125
OCC Interpretive Letter 722 - May 12, 1996

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Footnotes

1. The Small Business Jobs Protection Act of 1996, includes Section 1805(h), *Nonrecognition Treatment For Certain Transfers By Common Trust Funds To Regulated Investment Companies*, which amended the tax treatment of conversions into mutual funds under Section 584 of the Internal Revenue Code of 1986. Return to text

S 7-26-04 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X

HOLLY HUGHES, HAL HUGHES and DION HUGHES on behalf of themselves and all others similarly situated, Plaintiffs, -against- LASALLE BANK, N.A., ABN-AMRO BANK, N.V., ABN-AMRO HOLDING, N.V., ABN-AMRO ASSET MANAGEMENT (USA) INC., and LASALLE STREET CAPITAL MANAGEMENT, LTD., Defendants.	02 Civ. 6384 (MBM) (HP) EXPERT REPLY AFFIDAVIT OF JOHN H. LANGBEIN

--X

State of Connecticut)
) ss.:
County of)

John H. Langbein, being duly sworn, deposes and states:

1. Counsel for plaintiffs in this case have asked me to submit this expert report.

I. Expertise

2. Employment. I am Sterling Professor of Law and Legal History at Yale Law School. Previously, I have held chairs or other academic appointments at the University of Chicago, Cambridge University, Stanford University, Oxford University, and the Max Planck Institutes in Freiberg and Frankfurt, Germany. I have specialized in the connected fields of trusts, fiduciary administration, probate administration, and pension and employee benefits for more than three decades.

3. Publications. I have written extensively about modern investment and fiduciary practice in trusts. My c.v, attached as Exhibit A, lists my publications in these and other areas. I coauthor a student book that is widely used in trusts courses,

Exhibit 6

Langbein & Waggoner, Selected Statutes on Trusts and Estates (Foundation Press, Uniform Statutes on Trusts and Estates: 2002-03 Edition, prior editions since 1987). I am the author of the fiduciary chapters in Langbein & Wolk, Pension and Employee Benefit Law (Foundation Press, 3d ed. 2000 & 2002 Supp.), which is used in most American law schools that teach the pensions curriculum.

4. Law revision activity. Since 1984 I have served continuously under gubernatorial appointments from Illinois and Connecticut as a Uniform Law Commissioner. From 1991 to 1997 I chaired the Commission's probate and trust division (Division D). I was the reporter and principal drafter for the Uniform Prudent Investor Act (1994), which governs fiduciary investing in 37 states and the District of Columbia; it has been emulated in nonuniform legislation in most of the rest. I am a member of the drafting and oversight committees responsible for preparing the Uniform Trust Code, the first comprehensive national codification of the law of trusts. For the American Law Institute, I am one of two reporters drafting the Restatement (Third) of Property: Wills and Other Donative Transfers (Vol. I, 1999; Vol II, forthcoming 2002). I served on the advisory panel for the Restatement (Third) of Trusts: Prudent Investor Rule (1992), and I presently serve on the advisory panel that is overseeing a complete Restatement (Third) of Trusts.

5. Litigation and advisory work. I serve frequently as an expert in trust and pension litigation, and as an advisor and consultant on fiduciary practice and fiduciary investment matters. Since 1994, I have appeared in a series of training videos for bank trust officers on aspects of fiduciary investing produced by Federated Investors. I attach a schedule of prior deposition and trial testimony (Exhibit B).

II. Converting a Common Trust Fund:Applicable Fiduciary Duties

6. Governing fiduciary duties. When dealing with the assets of trust funds, a trustee acts in a fiduciary capacity and has a duty to comply scrupulously with a well-

established set of interconnected fiduciary duties. Converting a common trust fund to a mutual fund is a fiduciary act, to which these fiduciary duties apply.

7. The duty of loyalty. The duty of loyalty places a trustee "under a duty to administer the trust solely in the interest of the beneficiary." Restatement of Trusts (Second) § 170(1) (1959). Trustees must prefer the interests of the beneficiaries to interests of their own. In the conversion of common trust funds, the trustee must be acting to benefit the beneficiaries, and not as a subterfuge for boosting fees.

8. The duty of prudent administration. The core standard of care governing the practice of trust administration is the prudence requirement: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property ...." Restatement of Trusts (Second) § 174 (1959).

9. The professional standard of care. A bank or other corporate fiduciary acting as a professional trustee owes a higher standard of care. In the Restatement formulation, "if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Restatement of Trusts (Second) § 174 (1959). The Uniform Prudent Investor Act, which codifies the rule, explains: "[T]he standard for professional trustees is the standard of prudent professionals, for amateurs, it is the standard of prudent amateurs." UPIA § 2(f), official comment.

10. The duty of prudent investing. Trustees owe trust beneficiaries the duty to invest and manage trust assets prudently. The modern prudent investor standard, which is deeply informed by contemporary financial practice, provides in the Restatement version:

> The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.

> (a) This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust....

Restatement of Trusts (Third): Prudent Investor Rule § 227 (1992). A prudent fiduciary has a duty to invest in accord with objectives appropriate to the particular trust.

11. The duty of appropriate record keeping. A central strand of the duty of prudent investing is the trustee's responsibility to conduct the investment function according to sound procedures designed to facilitate the making of correct decisions. In the case of a professional trustee such as a bank trustee, the higher standard of care intensifies this responsibility. "In cases involving the propriety of investments, the decision-making process may be as important as the decision itself, at least for purposes of determining the trustee's responsibility." A. Walter Nossaman et al., Trust Administration and Taxation § 29.05[2] (1995). In deciding whether, when, and how to convert a common trust fund to a mutual fund, the complexity and importance of the decisions require careful deliberation and meticulous recordation in order to discharge the fiduciary duties of loyalty and of prudent administration and prudent investing. Because a corporate trustee is an intrinsically bureaucratic entity, its decisions on a matter as complex as converting its common trust funds necessarily involve many individuals deliberating and acting across time. Effective recordation is essential for appropriate coordination in such circumstances.

12. The duty to consider tax consequences in fiduciary investing. The trustee's duty to be sensitive to tax consequences is well established in fiduciary practice. "Among the matters which the trustee should consider in selecting a given investment ... are ... the effect of the investment in increasing or diminishing liability for taxes ...." Restatement of Trusts (Second) § 227, comment o (1959); accord Restatement of

Trusts (Third): Prudent Investor Rule § 227, comment h, at 30 (1992); id., Reporter's Note to comment i, at 89. The Uniform Prudent Investor Act codifies this standard, providing that among the circumstances that a trustee "shall consider" in making investment and management decisions is "the expected tax consequences of investment decisions or strategies ...." UTC § 2(c). The decision whether to convert a common trust fund involves difficult decisions about the tax consequences for the beneficiaries on each participating trust. In 1996 Congress amended the Internal Revenue Code, adding IRS § 584(h), which permits such conversions on a tax-free basis. Before that time, such conversions were recognition events triggering capital gains taxation. The point is widely understood in fiduciary investing circles that avoiding needless recognition and taxation is a fundamental desideratum of good trust administration. There may be circumstances in which the benefits of conversion outweigh the tax cost, but it is the trustee's responsibility to identify and document such benefits. Failure to document in circumstances in which documentation is a since qua non of good trust administration is breach of trust.

13. The duty of disclosure. The trustee has a duty to inform trust beneficiaries about important matters arising in connection with the administration of the trust. "A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust." Uniform Trust Code (UTC) § 813(a) (2000). The UTC regards this duty to inform beneficiaries as so fundamental to the enforcement of the trust that not even the trust instrument can abridge it. Id. § 105(b)(8)-(9). The Third Circuit has summarized its case law regarding the duties of ERISA fiduciaries, observing "that we have repeatedly held that a fiduciary may not materially mislead those to whom ... duties of loyalty and prudence are owed." In re Unisys Savings Plan Litigation, 74 F.3d 420, 440 (3d Cir.

1996) (citations omitted). Disclosure also serves important process values: It promotes deliberation and deters imprudent or otherwise wrongful conduct. The duty of disclosure depends for its efficacy upon faithful discharge of the antecedent duty of appropriate record keeping. It is hard for a trustee to disclose effectively that which it does not appropriately record. Furthermore, disclosure must be honest disclosure if it is to comply with the duty of loyalty. As Judge Posner said in a well-known aphorism that the Supreme Court has endorsed, "Lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA." Peoria Union Stock Yards Co. v. Penn Mut. Life Ins. Co., 698 F.2d 320, 326 (7th Cir. 1983), quoted in Varity Corp. v. Howe, 516 U.S. 489, 506 (1996).

III. Hughes v. LaSalle Bank

14. Duties. The present litigation arises from the conversion of LaSalle Bank's common trusts funds. For the reasons presented above, LaSalle Bank (hereafter LaSalle) as trustee for the beneficiaries of the affected trusts had a fiduciary duty of loyalty and prudence to evaluate with professional care, skill, and caution whether conversion of its common trust funds was in the best interests of the beneficiaries of the participating accounts. LaSalle was further required to document its deliberations on all relevant aspects of the conversion in appropriate detail.

15. Assumed facts. Counsel has advised that LaSalle converted its common trusts funds several years in advance of the 1996 legislation discussed above, which made such conversions tax neutral. Accordingly, La Salle's conversion entailed significant tax costs for most of the participating trusts and their beneficiaries. Counsel further advises that in discovery proceedings to date, LaSalle has been unable to provide contemporaneous documentation for the conversion process.

16. Opinion. Assuming the correctness of these facts, and opining in my capacity as an expert on fiduciary practice in trust administration, I consider it a serious breach of trust for a professional fiduciary such as LaSalle to convert a common trust

fund without fulfilling its duty of appropriate contemporaneous record keeping. Because (1) the conversion was certain to inflict severe tax costs on many of the beneficiaries of the affected trusts; (2) there was a prospect that LaSalle stood to gain fee income – at the expense of the trust beneficiaries – from converting the common trust funds to mutual funds; and (3) the details of conversion and implementation into suitable mutual fund vehicles required close monitoring, LaSalle had a fiduciary duty to make, retain, safe keep, and disclose records appropriate to the seriousness of the transactions it was undertaking. In accordance with the principles set forth in Part II of this report, I conclude that LaSalle's failure as a professional trustee to make, retain, safe keep, and/or disclose such records constitutes a palpable and serious breach of trust.

John H. Langbein

Sworn to before me this
10th Day of April 2003

Notary Public

S7-26-04 //

March 2003

John H. Langbein

Mailing address:

Yale Law School
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I. Professional

Sterling Professor of Law and Legal History, Yale University, from 2001; Chancellor Kent Professor of Law and Legal History, Yale University, 1990-2001

Honorary Fellow, Trinity Hall, Cambridge (elected 2000)

Previous positions: University of Chicago, Max Pam Professor of American and Foreign Law, 1980-90; professor, assistant professor 1971-80

Visiting professor: Arthur Goodhart Professor in Legal Science, Cambridge University (1997-98); Yale Law School (1989-90); Stanford Law School (1985-86); University of Michigan Law School (summer 1976)

Visiting fellow:
- Trinity Hall, Cambridge (1997-98)
- All Souls College, Oxford (1977)
- Max Planck Institute for European Legal History, Frankfurt (1977; 1969-70)
- Max Planck Institute for Criminal Law, Freiburg (1973) (Alexander von Humboldt-Stiftung Fellow)Teaching subjects:
  - Pension and employee benefit law (ERISA)
  - Wills and succession

Trusts, estates, and fiduciary administration
English, European, and American legal history
Comparative law (emphasizing German law and legal institutions)

Admitted to the bar:
District of Columbia (1969)
England: Of the Inner Temple, Barrister-at-Law (1970)
Florida (1971)

Member:
Academy of European Private Law (elected 2001)
American Academy of Arts and Sciences (elected 1987)
American Association for the Comparative Study of Law
American Bar Association (sections: Legal Education; Real Property, Probate & Trust)
American College of Trust and Estate Counsel (elected 1985)
American Historical Association
American Law Institute (elected 1983)
American Society for Legal History
Association internationale de droit judiciaire (elected 1984)
Connecticut Bar Association (section: Estates & Probate)
Gesellschaft für Rechtsvergleichung (Germany)
International Academy of Comparative Law (elected 1984)
International Academy of Estate and Trust Law (elected 1985)
International Association of Penal Law
International Commission for the History of Representative and Parliamentary Institutions
Selden Society
Society of Public Teachers of Law (UK)
Wagner Society of America

II. Public Service (current)

Reporter, Uniform Law Commission, Uniform Prudent Investor Act (since 1991)

Associate Reporter, American Law Institute, Restatement of Property (Third): Wills and Other Donative Transfers (since 1990); vols. 1-2 published (1999, 2003), vol. 3 in preparation

Adviser, American Law Institute, Restatement of the Law of Trusts (Third) (since 1993); and Restatement of the Law of Trusts (Third): Prudent Investor Rule (1987-92)

Member, U.S. Secretary of State's Advisory Committee on Private International Law, Study Groups on Trusts and Decedents' Estates (since 1984)

Commissioner, National Conference of Commissioners on Uniform State Laws (since 1984):

Gubernatorial appointments from Illinois, 1984-91; from Connecticut, since 1991. Scope & Program Committee, 1989-91; Director, Division D (Probate and Trust), 1991-97.

Drafting Committee on the Uniform Trust Code, since 1995.

Drafting Committee on Uniform Management of Institutional Funds Act, since 2001

> Completed projects: Co-reporter, Uniform Transfer on Death Security Registration Act; Drafting Committee on Uniform Custodial Trust Act; Drafting Committees to Revise Articles II & VI, Uniform Probate Code; Drafting Committee on Uniform Health-Care Decisions Act (right to die); Drafting Committee on Uniform Principal and Income Act; Drafting Committee on Uniform Management of Public Employee Retirement Systems Act; Study Committee on Uniform Management of Institutional Funds Act

Member, Joint Editorial Board for the Uniform Trust and Estate Acts (formerly Joint Editorial Board for the Uniform Probate Code) (Uniform Law Commission representative), since 1985

Member, Connecticut Law Revision Commission, Probate Advisory Committee, since 1990

III. Personal

Born 17 November 1941; American citizen; married 24 June 1973, Kirsti M. Langbein; children, Christopher H., b. 11 July 1979; Julia L., b. 6 June 1981; Anne K., b. 25 March 1983

Languages: fluent German, good French, working Italian

Church: St. Thomas Episcopal Church, New Haven (vestry, 1991-94); member, Board of Managers, St. Thomas Episcopal Day School (1991-97, chair 1995-97)

Listed in: Who's Who in America
Who's Who in American Law
Who's Who in American Education

IV. Degrees

M.A. 1990 (hon.), Yale University

Ph.D. 1971, Cambridge University, England (Trinity Hall).
Thesis: "The Criminal Process in the Renaissance"

LL.B. 1969, Cambridge University; first class honours;
Trinity Hall Prize in English law; Scholar of Trinity Hall

LL.B. 1968, Harvard Law School; magna cum laude; editor, Harvard Law Review, vol. 80, articles editor, vol. 81; Frank Knox Fellow, 1968-69; Harvard Law School Fellow in Foreign and Comparative Law, 1968-71

A.B. 1964, Columbia University (economics)

V. Principal Publications: Books

The Origins of Adversary Criminal Trial (Oxford Univ. Press 2003)

Uniform Statutes on Trusts and Estates: 2002-03 Edition (with Lawrence Waggoner) (Foundation Press) (previous editions sub nom. Selected Statutes on Trusts and Estates, 2001, 1995, 1994, 1992, 1991, 1989, 1987)

Ppe Pension and Employee Benefit Law (with Bruce Wolk) (3d ed., Foundation Press 2000) (2d ed., 1995; 1st ed. 1990) Teacher's Manual (2000, 1995, 1990); annual supplements (2002, 2001, 1999, 1998, 1997, 1994, 1993, 1992, 1991)

Pension and Employee Benefit Statutes and Regulations: Selected Sections (with Bruce Wolk) (Foundation Press 2003) (previous edition 2002)

The Privilege Against Self-Incrimination: Its Origins and Development (with R.H. Helmholz et al.) (Univ. Chicago Press) (1997)

Comparative Criminal Procedure: Germany (West Publ. Co., American Casebook Series 1977)

Torture and the Law of Proof: Europe and England in the Ancien Régime (Univ. Chicago Press 1977)

Prosecuting Crime in the Renaissance: England, Germany, France (Harvard Univ. Press 1974) (awarded the Yorke Prize by Cambridge University); excerpted in part and published in translation as "Die Carolina" in F.C. Schroeder, ed., Die Carolina: Die Peinliche Gerichtsordnung Kaiser Karls V. von 1532 (Wissenschaftliche Buchgesellschaft, Darmstadt 1986)

VI. Principal Publications: Articles

Pension and Investment Law

What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West (forthcoming Columbia L. Rev. 2003) (Jan. 2003 working draft disseminated on four SSRN databases)

Trust-Investment Law in the United States: Main Themes of the Uniform Prudent Investor Act, Shintaku No. 189 (Feb. 1997) (in Japanese)

The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa Law Review 641 (1996); republished in Modern International Developments in Trust Law (D. Hayton, ed.) (1999)

The New American Trust-Investment Law, 8 Trust Law International 123 (1994)

Reversing the Nondelegation Rule of Trust-Investment Law, 59 Missouri Law Review 104 (1994) (William Fratcher memorial issue)

The Supreme Court Flunks Trusts, [1990] Supreme Court Review 207 (1991)

The Conundrum of Fiduciary Investing under ERISA, in Proxy Voting of Pension Plan Equity Securities (D. McGill, ed.) (Wharton School: Pension Research Council) (1989)

ERISA's Fundamental Contradiction: The Exclusive Benefit Rule (with Daniel R. Fischel), 55 Univ. Chicago Law Review 1105 (1988)

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