

ADD MASSACHUSETTS STATE COURT CAPTION

LARRY R. PENNINGTON, Derivatively and
on Behalf of Nominal Defendant, FIRST
MARBLEHEAD CORPORATION, INC.,

Plaintiff,

vs.

PETER B. TARR, JACK L. KOPNISKY,
STEPHEN E. ANBINDER, WILLIAM R.
BERKLEY, DORT A. CAMERON, LESLIE
L. ALEXANDER, HENRY CORNELL,
WILLIAM D. HANSEN, PETER S.
DROTCH, GEORGE G. DALY, and JOHN A.
HUPALO,

Defendants,

And

FIRST MARBLEHEAD CORPORATION,
INC.,

Nominal Defendant.

CIVIL ACTION NO.

JURY TRIAL DEMANDED

VERIFIED SHAREHOLDER'S DERIVATIVE COMPLAINT

Plaintiff, Larry R. Pennington ("Pennington"), by and through his attorneys of record, brings this Derivative Complaint on behalf of Nominal Defendant First Marblehead Corporation Inc. ("First Marblehead," "FMD" or the "Company"), and alleges upon personal knowledge as to his own acts and as to all other matters upon information and belief, and based upon the investigation of Plaintiff's counsel, which includes a review of regulatory filings and reports, securities analyst reports and advisories about First Marblehead, press releases and other public statements issued by the Company, as follows:

INTRODUCTION

1. This is a stockholder's derivative action brought by plaintiff, Pennington, who has held FMD common stock at all relevant times.

2. The Individual Defendants (identified below) were or are members of FMD's Board of Directors and/or officers of the Company. They have been and are highly compensated and benefit from compensation plans which provide them with incentives to remain on the Board or in high level management positions and provide further incentives to maintain a high price for FMD stock.

3. The Nominal Defendant, First Marblehead, a Delaware corporation, provides services related to private student loans. The Company provides financial institutions and educational institutions, as well as businesses and other enterprises, with design, implementation, and securitization services for student loan programs. The Company conducts business through the following direct or indirect subsidiaries: First Marblehead Education Resources Inc.; GATE Holdings, Inc.; The National Collegiate Funding LLC; First Marblehead Data Services, Inc.; First Marblehead Securities Corporation I and II; TERI Marketing Services, Inc.; Union Federal Savings Bank; and UFSB Private Loan SPV, LLC.

4. The Education Resources Institute ("TERI"), a private 501(c)(3) non-profit organization, is engaged in, among other things, guaranteeing student loans originated by First Marblehead. TERI promises to buy student loans that are in default, which rescues bondholders from losses. This makes the bonds safer and thus more appealing to investors. The Company has been in a strategic alliance with TERI since 2001. TERI is operated out of First Marblehead's office space.

5. The relevant time period begins on August 10, 2006, when the Company issued a press release announcing its financial results for the fiscal fourth quarter and year end of 2006,

and continues to date (the “Relevant Period”). In that August 10, 2006 press release, defendants represented that the fiscal year 2006 was one of the strongest years in the Company’s history and that the Company was confident in its business model and believed in significant growth in the future.

6. On September 14, 2006, the Company issued a press release announcing “the closing of a securitization enabling the purchase of private student loans by the National Collegiate Loan Trust 2006-3 (the Trust) and the related issuance of Student Loan Asset Backed Notes by the Trust.” Moreover, the Company previously stated that the loans were guaranteed by TERI.

7. On November 26, 2007, investment banking and market research firm Friedman Billings Ramsey downgraded the Company’s stock citing the fact that TERI did not have enough cash to buy the loans from FMD that were going to be in default.

8. On December 7, 2007, the Company announced that it would not be completing a securitization transaction in that fiscal quarter, as had been previously expected.

9. Then, on April 8, 2008, the Company shocked investors when it announced that TERI had filed for bankruptcy. FMD stated that it was analyzing the implications of this filing on its lenders, investors and borrowers, and stated that it was working on securing an alternative guarantor (as well as structural solutions for loan default guarantees) for future originations.

10. Upon this news, shares of the Company’s stock fell \$4.16 per share, or 54%, over the next five trading days, as the investing public continued to digest the news of TERI’s bankruptcy and its effect on the Company.

11. Throughout the Relevant Period, the Individual Defendants failed to disclose material adverse facts about the Company's financial well-being, business relationships, and prospects. Specifically, the Individual Defendants failed to disclose or indicate the following:

(1) that the Company's portfolio was experiencing increasing default rates and was therefore not performing as expected; (2) that it was unlikely that the Company would complete a securitization in the second quarter of fiscal year 2008; (3) that the Company was unable to manage the risk of TERI's portfolio and that TERI was unable to guarantee FMD related loans; (4) the true nature of the Company's role in the management of TERI's affairs; (5) that the Company lacked adequate internal and financial controls; and (6) that, as a result of the foregoing, the Company's statements about its financial well-being and future business prospects were lacking in any reasonable basis when made.

12. As a result of Individual Defendants' wrongful acts and omissions, and the precipitous decline in the market value of FMD's securities, the Company has suffered significant losses and damages.

13. Had the Individual Defendants fulfilled their responsibilities to FMD and its shareholders, they would have recognized the Company's financial and administrative controls were entirely inadequate, and they would have implemented changes required to ensure compliance with effective financial and administrative controls and accurate financial reporting.

14. It is alleged that as a result of the reckless breach of their fiduciary duties to monitor and put into place reasonable control and review procedures, the Individual Defendants have inflicted upon the Nominal Defendant FMD severe and continuing damages.

PARTIES

15. Plaintiff, Pennington, has been the owner of FMD common stock prior to and during the Relevant Period and continues to retain such shares.

16. Nominal Defendant First Marblehead is a Delaware corporation with its principal executive offices located at 800 Boylston Street, 34th Floor, Boston, Massachusetts. FMD

provides various services related to the underwriting, packaging and securitization of student loans.

17. Defendant Peter B. Tarr ("Tarr") is and was, at all relevant times, Chairman of the Company's Board of Directors since October 2005 and the Company's General Counsel since July 2005.

18. Defendant Jack L. Kopnisky ("Kopnisky") is and was, at all relevant times, the Company's President and Chief Operating Officer ("COO") since September 6, 2005, Chief Executive Officer ("CEO") since September 27, 2005, and a member of the Company's Board of Directors since November 9, 2006.

19. Defendant Stephen E. Anbinder ("Anbinder") is and was, at all relevant times, a co-founder of the Company and Vice Chairman of the Board of Directors since May 2002. Defendant Anbinder also served as a consultant to the Company since June 2006, following his retirement as an employee.

20. Defendant William R. Berkley ("Berkley") is and was, at all relevant times, a member of the Company's Board of Directors since December 1995 and a lead director of the Company since January 2004. Also, defendant Berkley is the Chairman of the Board of Directors, and majority shareholder of Associated Community Bancorp ("Associated Bancorp"). Associated Community Brokers, Inc. ("Associated Brokers") is a wholly owned subsidiary of Associated Bancorp. Associated Brokers has served as the FMD's insurance agent in connection with the Company's directors and officers liability insurance. In addition, defendant Berkley has served as Chairman of the Board of Directors, CEO, President, and COO of W.R. Berkley Corporation ("W.R. Berkley"), a publicly held property casualty insurance company, since its formation in 1967. Defendant Berkley owns approximately 13% of W.R. Berkley outstanding stock. InsurBanc is an indirect subsidiary of W.R. Berkley. FMD assists InsurBanc in

connection with development and expansion of its student loan programs.

21. Defendant Dort A. Cameron ("Cameron") is and was, at all relevant times, a member of the Company's Board of Directors since December 1995. Immediate family members of defendant Cameron indirectly own approximately 65% in the aggregate of the membership interests of Milestone Capital Management, LLC (the "Milestone Capital"), an open-end management investment company. Milestone Capital serves as an investment adviser to the Company's portfolio and receives a fee for services it performs.

22. Defendant Leslie L. Alexander ("Alexander") is and was, at all relevant times, a member of the Company's Board of Directors since December 1995. Defendant Alexander has owned the Houston Rockets professional basketball team since 1993. The Houston Rockets advertise FMD's student loan services.

23. Defendant Henry Cornell ("Cornell") is and was, at all relevant times, a member of the Company's Board of Directors since 2008.

24. Defendant William D. Hansen ("Hansen") is and was, at all relevant times, a member of the Company's Board of Directors since July 2003.

25. Defendant Peter S. Drotch ("Drotch") is and was, at all relevant times, a member of the Company's Board of Directors since October 2003.

26. Defendant George G. Daly ("Daly") is and was, at all relevant times, a member of the Company's Board of Directors since September 2002.

27. Defendant John A. Hupalo ("Hupalo") is and was, at all relevant times, the Company's Chief Financial Officer ("CFO") and Senior Executive Vice President since November 2006.

28. Defendants Tarr, Kopnisky, Anbinder, Berkley, Cameron, Alexander, Cornell, Hansen, Drotch, Daly (who comprise the Company's Board of Directors) and Hupalo are

collectively referred to hereinafter as the “Individual Defendants”. The Individual Defendants, because of their positions with the Company, possessed the power and authority to control the contents of FMD’s quarterly reports, documents, and presentations to securities analysts, money and portfolio managers, and institutional investors, i.e., the market. Each defendant was provided with copies of the Company’s reports and documents alleged herein to be misleading prior to or shortly after their issuance and had the ability and opportunity to prevent their issuance or cause them to be corrected. Because of their positions and access to material non-public information available to them, each of these defendants knew that the adverse facts specified herein had not been disclosed to, and were being concealed from, the investing public, and that the positive representations which were being made were then materially false and misleading. The Individual Defendants are liable for the false statements pleaded herein, as those statements were each “group-published” information, the result of the collective actions of the Individual Defendants.

29. At all times herein, the Individual Defendants, in performing each and all of the acts and/or non-actions described herein, functioned as the employees, agents, control persons and/or co-conspirators with each and every other Individual Defendant identified herein.

DUTIES AND OBLIGATIONS OF DIRECTORS AND OFFICER

30. The Individual Defendants owed FMD and its shareholders fiduciary duties including the duties of care and loyalty that require, *inter alia*, that they control and manage the company in a fair, just, honest and equitable manner.

31. To discharge their legal duties, the Individual Defendants were required to exercise reasonable and prudent supervision over, and keep themselves informed of FMD’s senior management, policies, practices, controls and financial affairs which included, *inter alia*, taking steps necessary to ensure that adequate policies and reporting systems existed at FMD and

functioned properly to ensure that relevant government rules and regulations under which FMD were followed, so as to prevent the engaging in of improper financial reporting and promote the efficient and proper use and preservation of its property and assets and engage in fair dealing with the investing public.

32. Moreover, the Individual Defendants, due to their substantial experience and expertise in the specialized area of business management, were aware of the highly fiduciary nature of the business -- that is, they were aware that FMD, as a publicly-owned business, was in a position of heightened trust and confidence with respect to the business' monies and the persons who invested their money in the business, and that this relationship gives rise to fiduciary duties and potential liabilities to the entities and persons to whom those duties are owed. Accordingly, their duties of loyalty, good faith and care to FMD and its shareholders required that they take appropriate action to ensure compliance by the Company with the fiduciary duties owed to third parties, so as to protect the Company and its shareholders from losses arising from liability for breach of those duties.

33. Further, the Individual Defendants, pursuant to Delaware law, to the extent that they exercised control over management of the business and affairs of FMD and its subsidiaries, were required to use their knowledge, experience and ability to control and direct FMD management in furtherance of the best interests of FMD and its shareholders. In addition, as many of the Individual Defendants have, and at all relevant times had, special knowledge, skill, expertise and experience directly gained as a result of, among other things, their executive roles at FMD and other financial services-related entities.

34. The Individual Defendants were required to use their special knowledge, skill, expertise and experience for the benefit of, *inter alia*, FMD, in the exercise of their judgment as directors of FMD.

35. Thus, pursuant to their membership on the Board, as well as on various Committees of the Board, and, in some cases, positions as senior executive and managers at FMD, the Individual Defendants, pursuant to Delaware law, owed the Company and its stockholders fiduciary obligations of candor, fidelity, trust, and loyalty, and are and were required to use their ability to control and direct FMD in a fair, just, and equitable manner, as well as to act in furtherance of the best interests of FMD and its stockholders. In addition, while they occupied their directorships, the Individual Defendants owed FMD the fiduciary duty to exercise due care and diligence in the management and administration of the affairs of the Company, and in the use and preservation of its property and assets.

36. To discharge the aforesaid duties under Delaware law, the Individual Defendants were required to exercise reasonable and prudent supervision over management and the policies, practices, controls, and financial affairs of the Company pursuant to their fiduciary obligations to use the same care and diligence as would an ordinary prudent person in a like position. Specifically, the Individual Defendants were required to, among other things:

- (a) Manage, conduct, supervise and direct the business affairs of FMD in accordance with applicable state and federal law and rules and regulations;
- (b) Neither violate nor permit any officer, director, agent or employee of FMD to violate applicable state laws, federal laws, rules, regulations;
- (c) Establish and maintain systematic and accurate books and records of the business and affairs of FMD and procedures for the reporting of the business and affairs to the Board of Directors, and periodically investigate, or cause independent investigation to be made of, said books and records;

- (d) Maintain and implement an adequate and functioning system of internal financial and accounting controls, such that FMD financial statements and other publicly disseminated information would be accurate;
- (e) Exercise supervision over the public statements made and/or issued to the securities markets relating to FMD;
- (f) Remain informed as to the status of FMD's business, conditions, practices and operations, and upon receipt of notice or information of imprudent or unsound practices or operations, make reasonable inquiry in connection therewith, and take steps to correct such practices or operations and make such disclosures as are necessary to comply with state and federal securities laws; and
- (g) make full and accurate disclosure of all material facts concerning, *inter alia*, each of the subjects and duties set forth above.

37. Notwithstanding the above-referenced duties, the Individual Defendants, in carrying out their functions for the Nominal Defendant Company, breached their fiduciary duties by, among other things:

- (a) permitting wrongful business practices to occur which had the effect of manipulating revenues and earnings;
- (b) inadequately supervising the employees and managers of FMD and failing to instruct and ensure that they acted with honesty and integrity in order to preserve and enhance FMD's reputation in the business community;
- (c) recklessly exposing FMD to millions of dollars of damages, including costs associated with class actions brought by shareholders of the Company for violations of federal securities laws; and

- (d) failing to institute legal action against those officers, directors, contractors and/or and employees of the Company, responsible for permitting FMD to engage in the conduct complained of herein.

SUBSTANTIVE ALLEGATIONS AND BACKGROUND

Background

38. According to its press releases, defendant FMD:

[P]rovides outsourcing services for private, non-governmental education lending in the United States. The Company helps meet the growing demand for private educational loans by providing national and regional financial institutions and educational institutions, as well as businesses and other enterprises, with an integrated suite of design, implementation and securitization services for student loan programs tailored to meet the needs of their respective customers, students, employees and members.

39. FMD packages student loans given by banks like Bank of America Corp. and JPMorgan Chase & Co. and then sells the packaged student loans as bonds. The Company makes money by charging fees for advising on the deals and helping funnel the payments from the students to the bondholders. The prices the bonds command and, in turn, the commissions FMD charges are boosted by a nonprofit organization TERI. TERI promises to buy student loans that are in default, which rescues bondholders from losses. This makes the bonds safer and thus more appealing to the investors. As noted above, the Company has maintained a strategic alliance with TERI since 2001.

40. Unbeknownst to investors, TERI did not have enough cash to buy all the loans that were going to be in default. As a result, banks would look elsewhere to package their loans, which would have a negative impact on FMD's business and operations.

Materially False and Misleading Statements Issued During the Relevant Period

41. The Relevant Period begins on August 10, 2006. On that date, FMD issued a press release announcing its financial results for the fiscal fourth quarter and year end of 2006, the period ended June 30, 2006. For the quarter, the Company reported total service revenues of \$148.8 million, the securitization of \$756 million of private student loans, which generated \$115.4 million of service revenues, and net income of \$70.8 million, or \$1.12 per diluted share. Defendant Kopnisky, commenting on the results, stated, in pertinent part, as follows:

Fiscal year 2006 was one of the strongest years in First Marblehead's history, as revenue, earnings and EPS all exceeded our expectations. We continue to demonstrate that our team can consistently deliver strong operating results. Looking forward, we are confident in our business model and believe a foundation is in place for significant growth into the future. [Emphasis added.]

42. On August 10, 2006, the Company also conducted a conference call with analysts and investors. Therein, the following statements were made:

[Peck]: We do anticipate that there will be some volatility in residual valuations from quarter to quarter, potentially up or down, as the timing of prepayments to false and recoveries varies from how they are modeled for a particular quarter.

The trust continued generally to perform consistent with our expectations, as they have all year. And we have not altered our assumptions regarding future prepayments, defaults and recoveries. As with all of our assumptions, we will continue to monitor trust performance that will make appropriate adjustments as circumstances warrant. [Emphasis added.]

43. On September 12, 2006, First Marblehead filed its Annual Report with the SEC on Form 10-K. The Company's 10-K was signed by Defendants Kopnisky, Peck, Tarr and Anbinder. Therein, the Company, in relevant part, stated:

Strategic Relationship with The Education Resources Institute

TERI is the nation's oldest and largest guarantor of private student loans. As a not-for-profit corporation, TERI's main operating purpose is to provide students with access to educational

opportunities through educational finance and counseling services. To help accomplish this, TERI offers guarantee products for student loan programs pursuant to which TERI agrees to reimburse lenders for all unpaid principal and interest on their defaulted student loans, in exchange for a fee based on the loan type and risk profile of the borrower. Since its inception in 1985, TERI has guaranteed approximately \$13.5 billion of private education loans for students at more than 6,800 schools nationally and internationally.

In 2001, we entered into a strategic relationship with TERI, intended to enhance significantly our risk management and loan processing capabilities. We acquired TERI's historical database and loan processing operations, but not its investment assets or guarantee liabilities. In addition, 161 members of TERI's staff became our employees. TERI remains, however, an independent, private not-for-profit organization with its own management and board of directors. We issued promissory notes totaling \$7.9 million and paid approximately \$1.0 million in cash to TERI in connection with the transaction. Under the terms of a master loan guaranty agreement that we entered into with TERI in 2001, we also agreed to provide a beneficial interest for TERI of 25% of the residual value of TERI-guaranteed program loans owned by the securitization trusts that purchase the loans, and a right of first refusal to guarantee our private label clients' existing and future loan programs.

In connection with the transaction, we also entered into a series of agreements with respect to loan processing services, database updates and the securitization of TERI-guaranteed loans. These include a master servicing agreement and a database purchase and supplementation agreement with TERI. Pursuant to the master servicing agreement, TERI engages us to provide loan origination, pre-claims, claims, and default management services. Under TERI's agreements with lenders, lenders delegate their loan origination functions to TERI, and TERI has the right to subcontract these functions. Pursuant to the database purchase and supplementation agreement, TERI provides updated information to us about the performance of the student loans it has guaranteed, so that we can continue to supplement and enhance our database.

Under the master loan guaranty agreement, we agreed to create a market for our private label clients to sell TERI-guaranteed loans through securitizations that we facilitate. Under our agreement, we must use our best efforts to cause a securitization of a limited category of TERI-guaranteed loans at least twice per

year, subject to the lender having a specified minimum loan volume at the semi-annual purchase date. In October 2004, we renewed our master servicing agreement, master loan guaranty agreement and certain additional agreements with TERI, in each case for an additional term through June 2011.

The master loan guaranty agreement generally provides that the guarantee fees earned by TERI upon the disbursement of student loans are placed in a segregated reserve account which is held as collateral to secure TERI's obligation to purchase defaulted student loans. This account is held by a third-party financial institution for the benefit of the program lender until the student loans are securitized, at which point the account is pledged to the securitization trust that purchases the loans. The master loan guarantee agreement, as implemented through guaranty agreements with individual lenders, entitles TERI to retain a portion of its guaranty fees as an administrative fee rather than place them in the pledged account.

In October 2005, we entered into a supplement to the master loan guaranty agreement. Under the terms of the 2005 supplement, for securitizations of TERI-guaranteed loans during fiscal 2006, TERI's administrative fee of 150 basis points increased, and the amount deposited by TERI into the pledged account decreased, by 90 basis points. In addition, TERI's residual interest in the trusts created at the time of the securitizations was correspondingly reduced to account for the 90 basis point reduction in the pledged account. As a result, the administrative fee for securitizations of TERI-guaranteed loans in fiscal 2006 was 240 basis points multiplied by the principal balance of the loans originated and securitized. For securitizations completed during fiscal 2006, TERI's ownership of the residual value of the TERI-guaranteed loans securitized ranged from 12 to 15 percent.

In August 2006, we entered into a supplement to the master loan guaranty agreement that provides as follows:

· For each securitization closing between August 1, 2006 and June 30, 2007, TERI will be entitled to elect to adjust the amount of its administrative fee, and adjust the amount deposited into the pledged account, within specified parameters. As a result, the amount of the administrative fee applicable to securitizations closing between August 1, 2006 and June 30, 2007 may range from 150 basis points to 240 basis points, at TERI's election. We have agreed to attempt in good faith to structure our securitization transactions to accommodate TERI's election.

- For each securitization for which TERI elects to adjust the administrative fee, we will make a corresponding adjustment to our relative ownership percentages of the residual interests in the applicable securitization trust. To the extent TERI elects to increase the amount of its administrative fee above 150 basis points, such an adjustment would result in an increase in our ownership percentage and a decrease in the ownership interest of TERI, by a percentage that will result in an equivalent dollar reduction in the fair value of TERI's residual ownership interest at the time of the securitization, using a 12 percent discount factor.

TERI has elected to receive an administrative fee of 175 basis points for the securitization transaction we plan to complete in the first quarter of fiscal 2007.

Through June 2006, we paid TERI a monthly fee of approximately \$62,000 pursuant to the database purchase and supplementation agreement. Beginning in July 2006, monthly payments pursuant to the database sale and supplementation agreement were reduced to approximately \$21,000. TERI also maintains a perpetual right to access the data we own solely for use in its guarantee business.

The master loan guaranty agreement was intended in part to create a framework for structuring future relationships among lenders, TERI and us. The master loan guaranty agreement contemplates several ancillary documents that set forth the various obligations among the parties, including:

- program guidelines for each prospective lender establishing acceptable terms for the origination, underwriting and servicing of program loans, including the borrower eligibility criteria, credit requirements, loan limits, deferral options and repayment terms, as well as the lender's forms of application and credit agreement or promissory note;
- a form of guaranty agreement between TERI and a prospective lender providing for a full and unconditional guarantee of principal and accrued interest when a program loan becomes more than 180 days delinquent, the borrower dies or the borrower seeks discharge of the loan in a bankruptcy proceeding;
- a form of loan origination agreement between TERI and a prospective lender pursuant to which the lender delegates its loan origination functions to TERI, and TERI agrees to receive loan applications, perform underwriting according to the standards in the program guidelines and approve and deny applications. TERI has agreed to subcontract these loan origination functions to us

pursuant to the master servicing agreement described above;

- a form of note purchase agreement between us and a prospective lender setting forth the terms and conditions under which a special purpose entity, such as a securitization trust, that we establish purchases program loans from the lender; and
- a form of deposit and security agreement, or a security agreement alone, providing for the payment of a portion of the guarantee fee under the guaranty agreement between TERI and a prospective lender to an account at a national bank and subject to a security interest to pay guarantee claims.

As contemplated by the master loan guaranty agreement, prospective lenders agree to provide initial loan funding and own the loans until they are purchased in a securitization transaction that we facilitate. The lender provides representations and warranties that support the loan for the securitization pursuant to the requirements of the rating agencies.

Processing fees from TERI represented approximately 19% of our total service revenue during fiscal 2006, 19% of our total service revenue during fiscal 2005 and 18% of our total service revenue during fiscal 2004.

* * *

We do not solicit or assist borrowers directly, but rather work with schools and Bank of America in establishing a program operated by them.

* * *

Our business could be adversely affected if TERI's ratings are downgraded.

In its role as guarantor in the private education lending market, TERI agrees to reimburse lenders for unpaid principal and interest on defaulted loans. TERI is the exclusive provider of borrower default guarantees for our clients' private label loans. As of June 30, 2006, TERI had a Baa3 counterparty rating from Moody's Investors Service, which is the lowest investment grade rating, and an insurer financial strength rating of A+ from Fitch Ratings. If these ratings are lowered, our clients may not wish to enter into guarantee arrangements with TERI. In addition, we may receive lower structural advisory fees because the costs of obtaining financial guarantee insurance for the asset-backed

securitizations that we structure could increase. Finally, the inability of TERI as student loan guarantor to meet its guaranty obligations could reduce the amount of principal or interest paid to the holders of asset-backed securities, which could adversely affect our residual interests in securitization trusts or harm our ability to structure securitizations in the future. In each such case, our business would be adversely affected.

* * *

A number of factors, some of which are beyond our control, may adversely affect our securitization activities and thereby adversely affect our results of operations.

Our financial performance and future growth depend in part on our continued success in structuring securitizations. Several factors may affect both our ability to structure securitizations and the revenue we generate for providing our structural advisory and other services, including the following:

- degradation of the credit quality or performance of the loan portfolios of the trusts we structure, which could reduce or eliminate investor demand for future securitizations that we facilitate;
- prolonged volatility in the capital markets generally or in the student loan sector specifically, which could restrict or delay our access to the capital markets;
- unwillingness of financial guarantee providers to offer credit insurance in the securitizations that we structure or in student loan-backed securitizations generally;
- adverse performance of, or other problems with, student loan-backed securitizations that other parties facilitate could impact pricing or demand for our securitizations;
- challenges to the enforceability of student loans based on violations of federal or state consumer protection laws and related regulations, or imposition of penalties or liability on assignees of student loans for violation of such laws and regulations; and
- any material downgrading or withdrawal of ratings given to securities previously issued in securitizations that we structured, or any occurrence of an event of default with respect to such securities, which could reduce demand for additional securitizations that we structure.

* * *

Changes in any of the following factors can materially affect our financial results:

- the demand for private education financing;
- the competition for providing private education financing;
- the education financing preferences of students and their families;
- applicable laws and regulations, which may affect the terms upon which our clients agree to make private student loans and the cost and complexity of our loan facilitation operations;
- the private student loan securitization market, including the costs or availability of financing;
- the general interest rate environment, including its effect on our discount rates;
- our critical accounting policies and estimates;
- borrower default rates and our ability to recover principal and interest from such borrowers;
- prepayment rates on private student loans, including prepayments through loan consolidation; and
- the availability of student loans through federal programs.

* * *

Because there are no quoted market prices for our additional structural advisory fees or residuals receivable, we use discounted cash flow modeling techniques and the following key assumptions to estimate their values:

- the discount rate, which we use to calculate the fair value of our additional structural advisory fees and residuals;
- the annual rate of student loan prepayments;
- the trend of interest rates over the life of the loan pool, including the forward LIBOR, and the spread between LIBOR and auction rates; and

· expected loan defaults, net of recoveries.

* * *

Except for the change to the discount rate applied to additional structural advisory fees to account for the change in the market rate of 10-year U.S. Treasury Notes, ***we did not materially change any loan performance assumptions regarding default rates***, recovery rates or discount rates in valuing projected trust cash flows during fiscal 2006 or fiscal 2005. During the second quarter of fiscal 2006, we increased our estimate of the fair value of structural advisory fees by approximately \$0.5 million and increased our estimate of the fair value of residuals receivables by approximately \$3.1 million as a result of refinements to our prepayment rate assumptions and use of an enhanced cash flow model. During the fourth quarter of fiscal 2006, loans in the securitization trusts experienced higher prepayment rates than we had estimated would occur during this period of time, which reduced the positive net accretion that comes from updating the carrying value of our structural advisory fees and residuals receivables for the passage of time. We do not believe it is necessary at this time to alter our assumptions regarding future prepayments that we use to estimate the fair value of these receivables. We continue to monitor the performance of trust assets against our expectations, and will make such adjustments to our estimates as we believe are necessary to value properly our receivables balance at each balance sheet date. [Emphasis added.]

44. On September 14, 2006, the Company issued a press release announcing “the closing of a securitization enabling the purchase of private student loans by The National Collegiate Student Loan Trust 2006-3 (the Trust) and the related issuance of Student Loan Asset Backed Notes by the Trust.” Moreover, the Company previously stated that the loans were guaranteed by TERI. The press release continued, in pertinent part, as follows:

In connection with that securitization, the Trust filed today with the Securities and Exchange Commission a Term Sheet providing additional preliminary details regarding the anticipated transaction. In that filing, the Trust announced that the amount that it expects to raise from the sale of asset-backed securities has increased to approximately \$1.84 billion, and that the principal and accrued interest balance of private student loans that it expects to acquire has increased to approximately \$1.39 billion. The Trust expects

that 71% of the loans to be purchased at closing will be “Direct to Consumer” loans, and that the remaining 29% of loans to be purchased at closing will be “School Channel” loans.

At the closing of the transaction, First Marblehead expects to receive up-front structural advisory fees of approximately \$175 million, or 12.6% of the private student loan balance securitized.

45. Upon this news, shares of the Company’s stock rose \$9.10 per share, or 17%, to close at \$61.45 per share, on heavy trading volume.

46. On September 26, 2006, the Company issued a press release announcing “its estimated additional structural advisory fees and residual revenue in connection with a previously announced securitization involving The National Collegiate Student Loan Trust 2006-3 (the Trust).” The press release continued, in pertinent part, as follows:

At the closing of the transaction, First Marblehead expects to receive up-front structural advisory fees of approximately \$173.3 million, or 12.5% of the private student loan balance securitized. In addition, over the term of the Trust, First Marblehead expects to receive additional structural advisory fees from the Trust with an estimated discounted present value of approximately \$17 million, or 1.2% of the loan balance securitized, as well as residual revenue with an estimated discounted present value of approximately \$53 million, or 3.8% of the loan balance securitized.

* * *

Jack L. Kopnisky, First Marblehead’s President and Chief Executive Officer, stated, “*We are very pleased with the results of this securitization, which is our largest securitization of private student loans to date. Current market conditions presented our Capital Markets Group the opportunity to structure this securitization with a class of investment grade notes expected to be rated Baa2 by Moody’s Investors Service, Inc., BBB by Standard & Poor’s Ratings Services and BBB by Fitch, Inc., thereby generating higher cash yields for First Marblehead.*” [Emphasis added.]

47. Upon this news, shares of the Company’s stock rose \$2.98 per share, or approximately 5%, to close at \$68.98 per share, on heavy trading volume.

48. On October 26, 2006, First Marblehead issued a press release announcing its financial results for the fiscal first quarter of 2007, the period ended September 30, 2006. For the quarter, the Company reported total service revenues of \$301.8 million and net income of \$141.0 million, or \$2.23 per diluted share. Defendant Kopnisky commented on the results, stating, in pertinent part, as follows:

We are pleased with the strong results from this past quarter. Our team continues to maximize value derived from our securitizations, deliver strong loan volume growth and expand our market leadership position. With our continued addition of new clients and expanded programs, we are poised to seize future growth opportunities and will continue our relentless focus on delivering optimal value to our shareholders. [Emphasis added.]

49. On October 26, 2006, the Company also conducted a conference call with analysts and investors. Therein, the following statements were made:

[Analyst]: On the forbearance data, can you just let us know how that is tracking relative to your expectations, and what is the duration of a loan that is in forbearance before it either becomes a delinquency or it is secured?

[Kopnisky]: Well, again, what we see generally is there are two opportunities during the 20-year period to seek a forbearance, and each forbearance period lasts up to six months. Indeed, what we have seen is that a forbearance is not a precursor for delinquency, and indeed, many students generally take a forbearance right after they get out of college and pass through their grace period if they need some more time to get their feet under them, and indeed, they become very good payers after they come out of forbearance.

[Analyst]: *And how are these numbers tracking relative to your expectations and pricing?*

[Kopnisky]: *Just about on.* [Emphasis added.]

50. On December 5, 2006, the Company issued a press release announcing “its estimated revenues in connection with a previously announced securitization involving The National Collegiate Student Loan Trust 2006-4 (the “Trust”).” Moreover, the Company

previously stated that the loans were guaranteed by TERI. The press release continued, in pertinent part, as follows:

At the closing of the transaction, First Marblehead expects to receive up-front structural advisory fees of approximately \$89.6 million, or 12.4% of the private student loan balance securitized. In addition, over the term of the Trust, First Marblehead expects to receive additional structural advisory fees from the Trust with an estimated discounted present value of approximately \$8.8 million, or 1.2% of the loan balance securitized, as well as residual revenue with an estimated discounted present value of approximately \$48.7 million, or 6.7% of the loan balance securitized. The blended yield for the securitization, representing total securitization revenues as a percentage of the total principal and accrued interest balance of loans securitized, is expected to be approximately 20.3%.

The Trust expects that approximately 93% of the loans to be purchased at closing will be “direct to consumer” loans and that the remaining 7% of the loans to be purchased will be “school channel” loans. Up-front structural advisory fees attributable to direct to consumer loans are expected to represent approximately 12.7% of the direct to consumer loan balance securitized, and additional structural advisory fees and residual revenues attributable to direct to consumer loans are expected to represent approximately 1.2% and 7.1%, respectively, of the direct to consumer loan balance securitized. Up-front structural advisory fees attributable to school channel loans are expected to represent approximately 7.3% of the school channel loan balance securitized, and additional structural advisory fees and residual revenues attributable to school channel loans are expected to represent approximately 1.2% and 2.1%, respectively, of the school channel loan balance securitized.

* * *

Jack L. Kopnisky, First Marblehead’s President and Chief Executive Officer, stated, “*Our securitizations continue to be well-received by investors worldwide. This is our second consecutive transaction with BBB-rated securities, and we are very pleased with the results of this securitization.*” [Emphasis added.]

51. Following this press release, shares of the Company’s stock fell \$23.00 per share, or 30%, to close at \$53.50 per share, on heavy trading volume. However, defendants continued

to conceal the truth about TERI's ability to guarantee the loans that would go into default.

52. On January 25, 2007, First Marblehead issued a press release announcing its financial results for the fiscal second quarter of 2007, the period ended December 31, 2006. For the quarter, the Company reported total revenues of \$197.8 million and net income of \$81.2 million, or \$0.85 per diluted share. Defendant Kopnisky commented on the results, stating, in pertinent part, as follows:

The Company had an excellent quarter and first six months of fiscal 2007. Our facilitated loan volume remained strong, we added meaningful new clients, and we executed against our plan to complete quarterly securitizations. We remain focused on providing an excellent experience for our clients and value to our shareholders. [Emphasis added.]

53. On January 25, 2007, the Company conducted another conference call with analysts and investors. Therein, the following statements were made:

[Analyst]: The default rate on that, or the gross default rates, up to 531, which I assume is -- your overall is 9% for the entire life of the loan. Is that basically in line with your assumptions at this point, even though the pool is basically only two years old?

[Hupalo]: Let me -- I'll make a general statement that applies to that particular trust. *When we've gone back and looked at each one of the five drivers, including the default rates, we've found that they're in line with what our expectation is for this point in their development.*

I think your point, though, about any particular trust is really important. There are some variations trust-to-trust with regard to some performance, either prepayment performance or credit performance, or recovery performance, or whatever it might be. And we do monitor that carefully to run it against where our expectation is. [Emphasis added.]

54. On April 26, 2007, the Company filed a Form 8-K with the SEC signed by Defendant Hupalo, and issued a press release entitled "First Marblehead Announces Third Quarter Fiscal 2007 Results: Net Income up 78% and Earnings per Share up 81% Through the

First Three Quarters of FY 2007." Therein, the Company, in relevant part, stated:

The First Marblehead Corporation (NYSE: FMD-News) today announced its financial and operating results for the third quarter of fiscal 2007 and for the nine months ended March 31, 2007. Total revenues for the nine months ended March 31, 2007 were \$681 million, up 63% from \$419 million for the same period last year. Net income for the nine-month period was \$293 million, or \$3.09 per diluted share, an increase of 78% in net income, and 81% in diluted earnings per share over the same nine-month period last year. For the third quarter of fiscal 2007, total revenues were \$180 million, up 20% from \$151 million for the same period last year. Net income for the third quarter was \$71 million, or \$0.75 per diluted share, an increase of 20% in net income, and 21% in diluted earnings per share, over the same period last year.

The operating results also reflect adjustments to certain of the assumptions used by the company in estimating the value of its service receivables. Based on the current interest rate environment and securitization market, the company adjusted its prepayment and discount rate assumptions. The net effect of these adjustments reduced service receivables as well as the quarter's securitization revenues by a total of \$16 million, or \$.11 per diluted share. [Emphasis added.]

55. Also on April 26, 2007, the Company conducted a conference call with analysts and investors. During the call, the following statements were made:

[Hupaloo]: Since our IPO in 2003 investors have heard First Marblehead consistently speak about the package of *five key assumptions which we outline on the next slide. They are default performance, discount rate, interest rates, prepayment performance and recovery performance.* We have talked about them as a package because we firmly believe that this is the most appropriate way for investors to gain insight into how the Company determines the fair value for our service receivables. It would be a mistake and potentially misleading to isolate one assumption without considering the correlations and the effects across all the other assumptions.

To arrive at a fair value we consistently consider a number of factors including, but not limited to -- trends in the underlying loan portfolio; macroeconomic conditions; the immediate past, current and projected interest rate environment; the effect of the passage of time; and attributes unique to student loans. These attributes when combined with the 20-year repayment terms that

include forbearance and deferment periods, drive any decision to modify our assumption package. *Using this methodology we determined it appropriate to increase the prepayment assumption from 7% to 8% and to modify the discount rate calculation used to value our residuals.* [Emphasis added.]

56. On August 9, 2007, the Company issued a press release entitled "First Marblehead Announces Full Year and Fourth Quarter Fiscal 2007 Results: Net Income Up 57% and Earnings Per Share Up 60% for the Year." Therein, the Company, in relevant part, stated:

Total revenues for the fiscal year ended June 30, 2007 were \$881 million, up 55% from \$569 million for the same period last year. Net income increased 57% for the fiscal year to \$371 million, or \$3.92 per diluted share.

"Fiscal 2007 was the strongest year in First Marblehead's history. Our focus on adding value to our clients has resulted in exceptional revenue, earnings, and EPS growth," said Jack L. Kopnisky, First Marblehead's President and Chief Executive Officer. "We processed a record 1.4 million loan applications resulting in \$4.3 billion in student loans facilitated. Our business continues to grow as we remain focused on developing financial solutions to help students achieve their dreams."

For the fourth quarter of fiscal 2007, total revenues were \$200 million, up 33% from \$150 million for the same period last year. Operating income for the fourth quarter was \$132 million, an increase of 31% over the same period last year. For the fourth quarter, net income was \$78 million or \$0.83 per diluted share.

The volume of loans facilitated during the fourth quarter of fiscal 2007 that are available for securitization increased 39% over the same period last year to \$792 million. The rolling twelve-month volume of loans available for securitization increased 33% to \$3.9 billion for the twelve months ended June 30, 2007. [Emphasis added.]

57. Also on August 9, 2007, the Company conducted a conference call with analysts and investors. During the call, the following statements were made:

[Hupaló]: *The assumptions we use for the other four valuation drivers, defaults, recoveries, interest rates, and the discount rate, also remain appropriate.* In aggregate, the portfolio continues to perform well. In light of the turmoil in the residential mortgage

market, this is a good time to reemphasize that our clients and our business is not focused on down credit, subprime borrowers the way some of the mortgage lenders structured their businesses. They specifically created businesses to serve credit challenged customers. We did not. The trust loans, we remind everyone, are guarantee against default but investment-grade guarantor, the Education Resources Institute. More than 80% of our portfolio is cosigned. The typical cosigner's credit profile is very strong. They are 50 years old, have been on active credit file for 22 years, so they have been through a variety and number of economic cycles. 85% of them own their own homes. ***The credit characteristics of the pool remain strong.***

* * *

[Kopnisky]: ***Our fourth quarter volume growth was exceptional with loans available for securitization increasing 39% over the same period last year.*** During the quarter, loans available for securitization through the direct to consumer channel increased 49% while school channel loan volume decreased by 3% over the same period last year. Over the past 12 months, our loan volumes available for securitization have shown increases of 44% and 10% in direct to consumer and school channel volume, respectively.

In the year ended June 30th, the mix of direct to consumer to school channel available for securitization was 79% to 21%. ***We continued to see increasing consumer demand as borrowers seek a range of options in a direct relationship.*** However, the school channel remains an important and viable growth channel, where we will continue to allocate meaningful resources. As of the end of June, we had \$832 million of loans available for securitization that had not yet been securitized. For the year, we securitized \$3.75 billion of private student loans. The blended yield was over 18% with approximately \$457 million coming in the form of upfront cash at the time of closing. Investor demand in our securitization program has been diverse and strong. Also, during the quarter, our Board increased the quarterly cash dividend to \$0.25 per share from \$0.15, an increase of 67%. This was the fourth consecutive quarterly increase and represents a 94% increase in full-year dividends for fiscal year 2007, \$0.62 per share compared to \$0.32 per share on a split adjusted basis. [Emphasis added.]

58. Upon this news, shares of the Company's stock rose \$2.80 per share, or approximately 9%, to close at \$34.49 per share, on heavy trading volume.

59. On August 28, 2007, First Marblehead filed its Annual Report with the SEC on Form 10-K. The Company's 10-K was signed by the Defendants Hupalo, Kopnisky and Anbinder. Therein, the Company, in relevant part, stated:

Our business could be adversely affected if TERI's ratings are downgraded.

In its role as guarantor in the private education lending market, TERI agrees to reimburse lenders for unpaid principal and interest on defaulted loans. TERI is the exclusive provider of borrower default guarantees for our clients' private label loans. As of June 30, 2007, TERI had a Baa3 counterparty rating from Moody's Investors Service, which is the lowest investment grade rating, and an insurer financial strength rating of A+ from Fitch Ratings, which was reaffirmed on April 2, 2007. TERI also held a rating of A from Dominion Bond Rating Service as of June 30, 2007. If TERI's ratings were downgraded, our clients may not wish to enter into guarantee arrangements with TERI, our upfront structural advisory fee yields could decline, or market conditions could dictate that we obtain additional credit enhancement for the asset-backed securitizations that we structure, the cost of which could result in lower revenues. *In addition, the inability of TERI as student loan guarantor to meet its guaranty obligations could reduce the amount of principal or interest paid to the holders of asset-backed securities, which could adversely affect our residual interests in securitization trusts or harm our ability to structure securitizations in the future. Finally, if TERI's ratings were downgraded below the ratings TERI held in January 2003, or if a rating agency were to place a negative watch on TERI, our agreement with Bank of America relating to the purchase of direct-to-consumer loans could be terminated.* In January 2003, TERI had a Baa3 counterparty rating from Moody's Investors Service and an insurer financial strength rating of A from Fitch Ratings. If TERI experiences a material adverse financial change such as a reduction of its credit rating below investment grade, Bank of America could suspend the processing of new application for school channel loans. In each such case, our business would be adversely affected.

* * *

TERI received an administrative fee of 175 basis points for the securitization transaction the Company completed in the first quarter of fiscal 2007, 221 basis points for the securitization transaction the Company completed in the second quarter of fiscal

2007, 215 basis points for the securitization transaction the Company completed for the third quarter of fiscal 2007 and 212 basis points for the securitization transaction the Company completed in the fourth quarter of fiscal 2007. The Company expects to allow TERI to elect to adjust the amount of its administrative fee, and adjust the amount deposited into the pledged account, within specified parameters for the securitization transaction the Company plans to complete in the first quarter of fiscal 2008. [Emphasis added.]

60. On August 31, 2007, the Company issued a press release announcing that, on August 22, 2007, it received a subpoena from the New York Attorney General's Office for information regarding the Company's role in the student loan industry.

61. From September 10, 2007 to September 18, 2007, shares of the Company's stock rose from \$32.19 per share on September 7, 2007, to \$40.60 per share on September 18, 2007 – an \$8.41 per share increase, or 26%. The result of the increase was due to the Company's press releases and earnings estimates relating to the fees associated with the securitization of two trusts. Specifically, on September 10, 2007, First Marblehead announced that it expected to raise about \$2.8 billion from the securitization and sale of asset-backed securities involving private student loans. Moreover, the Company announced that the loans were guaranteed by TERI.

62. On October 25, 2007, the Company conducted a conference call with analysts and investors. During the call, the following statements were made:

[Hupalo]: *In aggregate, the portfolio continues to perform generally within the range of our expectations, and we continue to carefully monitor prepayments, defaults, and recoveries.* Although still elevated, prepayments have generally been trending favorably.

* * *

As we look forward to our next securitization, I'll repeat my comments from August. As we do at this stage of each transaction, we are currently considering a number of structures for our December transaction. Unless there are dramatic improvements in the markets over the next month, it is most likely that the December structure will look a lot like the very successful

September transaction.

* * *

Just for those who are not as familiar, the loans that we securitize are all guaranteed by TERI. And the mechanism, obviously, has not changed over the years, such that we have a cash pledge fund for each one of the segregated trusts. And then we rely on TERI's guarantee beyond that.

To your point though, we have been monitoring very closely the portfolio performance. As I said earlier, it remains within our expectation. And we're really monitoring some of the lower credit tiers with special attention. We talked in the past about our collection activities and what we're trying to do for default aversion programs. And that is beginning collection activity or supplemental collection activity at the 60 rather than the 90. And we're evaluating opportunities to begin some of the collection activity earlier for certain of the borrower populations. So we are looking at that.

And then your point with regard to credit criteria, we are in the process of looking at adjusting certain credit criteria, just as we do periodically during the course of any credit cycle. [Emphasis added.]

63. Also on October 25, 2007, the Company issued a press release entitled "First Marblehead Announces First Quarter Fiscal 2008 Results: Net Income Up 20% and Loans Available for Securitization Increase 46% for the Quarter." Therein, the Company, in relevant part, stated:

"We are off to a great start to the fiscal year as a result of record volumes in the first quarter. This fiscal quarter's volume of private student loans facilitated and available for securitization exceeded all such volume for fiscal 2005," said Jack L. Kopnisky, First Marblehead's Chief Executive Officer and President. "Even in the midst of one of the most volatile credit cycles, we completed our largest securitization to date, providing market leadership and helping to increase the availability of private student loan financing." [Emphasis added.]

64. On November 26, 2007, Friedman Billings Ramsey downgraded the Company's stock citing the fact that TERI did not have enough cash to buy the loans from First Marblehead

that were going to be in default.

65. Upon this news, shares of the Company's stock fell \$2.90 per share, or approximately 10%, to close at \$27.10 per share, on heavy trading volume.

66. The statements referenced above in ¶¶ 41-44, 46, 48-50, 52-57, 59, 62-63 were materially false and misleading when made because defendants failed to disclose or indicate the following: (1) that the underlying loans of the Company's bonds were experiencing increasing default rates and was therefore not performing as expected; (2) that it was unlikely that the Company would complete a securitization in the second quarter of fiscal year 2008; (3) that the Company was unable to manage the risk of TERI's portfolio and that TERI was unable to guarantee FMD related loans; (4) the true nature of the Company's role in the management of TERI's affairs; (5) that the Company lacked adequate internal and financial controls; and (6) that, as a result of the foregoing, the Company's statements about its financial well-being and future business prospects were lacking in any reasonable basis when made.

THE TRUTH BEGINS TO EMERGE

67. On December 5, 2007, *TheStreet.com* published an article entitled "Wednesday's Financial Winners & Losers." Therein, the article, in relevant part, stated:

Fellow government-backed mortgage investor Freddie Mac FRE was also cut to neutral from buy at Credit Suisse today but, in a wave of broadly positive action, shares rose 3.9% at \$33.58 with nary a stray into the red.

Not so for First Marblehead FMD, however, which ranked among today's worst-performing stocks following a cut to hold from buy at Sandler O'Neill.

In a company note, analyst Michael Taiano pointed to yesterday's announcement at Moody's that it's reviewing 16 tranches of the student lender's deals for possible downgrade, which he believes "severely diminish[es]" the likelihood that it will complete a securitization this month. And that, argued

Taiano, could force the firm to suspend its dividend.

He furthermore said that, "*given heightened credit risk aversion across all asset classes, we believe future securitizations will likely require greater levels of subordination, which could compromise FMD's upfront cash advisory fees.*" He also questioned the ability of its current structure to hold its own through a "prolonged liquidity crunch," even as he maintained a generally positive view of the long-term growth trends of private student loans.

Taiano slashed \$19 from First Marblehead's price target to \$25 while sharply lowering its fiscal 2008 earnings estimate to \$3.56 from \$4.40 a share. First Marblehead shares were plummeting \$5.10, or 20.4%, to \$19.88. [Emphasis added.]

68. On this news, the Company's shares fell \$5.05 per share, or 20.22 percent, to close on December 5, 2007 at \$19.93 per share, on unusually heavy trading volume.

69. Then on December 7, 2007, First Marblehead issued a press release entitled "First Marblehead Announces Quarterly Cash Dividend." Therein, the Company, in relevant part, further revealed:

The company also announced today that it has elected not to execute a securitization transaction this fiscal quarter.

"Due to uneconomic terms in the current capital markets, we have elected not to securitize private student loans this quarter. We are exploring non-securitization and securitization alternatives for future quarters to enhance our business model and provide long-term capacity to the private student loan market in a manner that benefits our shareholders. Our business volumes remain strong and we see many opportunities to facilitate and process private student loans," said Jack Kopnisky, Chief Executive Officer and President of The First Marblehead Corporation. "Our Board of Directors determined it was prudent to continue to return capital to our shareholders this quarter even during these challenging times."

"With regard to the current credit environment, First Marblehead continues to monitor closely the performance of the portfolio," added Kopnisky. "The credit quality of the overall portfolio remains strong with average FICO scores in excess of 700. Steps have been taken to tighten underwriting criteria related to lower credit tiers. The collection and recovery processes are being

modified, including reaching out earlier to borrowers, and to co-borrowers who frequently have higher credit scores than borrowers. These new processes are being implemented and the results are not yet reflected in the performance of the portfolio. We remain focused on providing long term value to our shareholders, our clients, and students." [Emphasis added.]

70. From December 3, 2007 to December 20, 2007, shares of the Company's stock plummeted to \$11.24 per share on December 20, 2007 – a decline of \$18.77 per share, or over 60% - as investors continued to digest the news that TERI was in financial trouble.

71. On December 21, 2007, the Company issued a press release announcing that it "entered into a definitive agreement with GS Capital Partners ("GSCP") pursuant to which GSCP will invest up to \$260.5 million equal to 19.99% of the shares currently outstanding upon closing of the transaction." Defendant Kopnisky, commenting on the capital infusion from Goldman Sachs, stated, in pertinent part, as follows:

The fundamentals of our business are strong, and we remain encouraged and excited about our growth prospects. We see strong demand for loans in our second fiscal quarter and continue to believe that private student loans are an important source of college funding.

We welcome Goldman Sachs' equity investment and warehouse financing, and its validation of First Marblehead's unique business model. Goldman Sachs' investment and financing provides our Company with additional capital resources to fund our long-term strategy. In the current market, we plan to continue to focus on prudent credit underwriting. We believe this will allow us to provide the greatest value to our shareholders, our clients, students and their parents, and to our employees. [Emphasis added.]

72. Upon this news, shares of the Company's stock temporarily rose \$7.46 per share, or 66%, to close at \$18.70 per share, on heavy trading volume. However, shares quickly dropped over the next few trading days – reaching \$12.67 per share on January 8, 2008.

73. On January 31, 2008, First Marblehead issued a press release announcing its financial results for the fiscal second quarter of 2008, the period ended December 31, 2007.

For the quarter, the Company reported that revenues declined “as a result of a \$178.0 million pre-tax write-down of the Company’s service receivables due to changes in certain assumptions used in estimating their fair value.” Moreover, the Company recorded a net loss of \$117.7 million. Defendant Kopnisky commented on the results, stating, in pertinent part, as follows:

Even though our business volumes were strong in the second fiscal quarter, our earnings were affected by the volatility in the capital markets.

The strategic investment by GS Capital Partners significantly adds to our financial strength and expands our financing options for the future. Upon receipt of regulatory clearances and determinations, we expect to receive an additional \$200.7 million in connection with the transaction announced in December 2007. In addition, the \$1 billion secured warehouse credit facility that Goldman Sachs has committed to offer provides us with access to an alternative source of funding.

First Marblehead’s strategy is to deliver long-term value to our shareholders by focusing on our core competencies, such as our customized products and services and expert processing capabilities for private student loans. ***At the same time, we are managing through the disruptions in the capital markets by taking action to increase alternative funding sources, tighten credit criteria, adjust the recovery and collection process, and reduce our cost structure. We believe these actions are prudent in the current environment and are part of a broader strategy to further strengthen the company.*** [Emphasis added.]

74. On March 27, 2008, the Company issued a press release reacting to the recent downgrades by Moody’s. In that regard, the press release stated:

In the beginning of December 2007, Moody’s Investors Service placed on review for possible downgrade the ratings of certain subordinated classes of asset-backed notes issued by the NCSLT. Since December, Moody’s has conducted a thorough review of First Marblehead’s NCSLT securitization portfolio, which consists of over 130 distinct classes of securities. Last evening, Moody’s announced the results of their review. Three classes of securities had their current ratings affirmed ***and eighteen classes of***

subordinated notes had a downward adjustment to their ratings.

“During the review period, First Marblehead provided Moody’s with a comprehensive level of historical data and cash flow projections for each outstanding trust. In addition, we detailed the significant steps taken to improve student loan collection practices, which are designed to reduce delinquencies and eventually defaults,” said Jack Kopnisky, Chief Executive Officer and President of The First Marblehead Corporation. “We also discussed the substantial modifications we have made to our credit underwriting policies. We have worked closely with our clients and TERI in recent months to tighten underwriting criteria.

“First Marblehead’s management team has been focused on adjusting our business model to manage the challenges presented by the current negative consumer credit cycle and the capital markets credit dislocation. The performance of the securitization trusts continues to be strong as evidenced by the fact that the subordinated classes of securities have retained their investment grade ratings. We remain dedicated to taking the actions necessary to maintain the highest quality program to benefit students who require financial assistance to attend college and to support investors in our securitization program,” added Kopnisky.

Separately, Moody’s has been conducting its own review of TERI, a nonprofit guarantor of private education loans. With regard to the rating action, Kopnisky made the following comment:

“The Education Resources Institute has a rich history of providing programs to help students achieve their dreams of attaining a higher education. First Marblehead is currently working with TERI to determine how we may be able to provide assistance in this challenging environment. As we have discussed in the past, First Marblehead has been developing other guaranty options for our clients including a self-guaranteed loan product and products guaranteed by another third party.

“In 2008, there will be more students starting college than ever before and early indications show that they will require substantial financial assistance. First Marblehead looks forward to providing high quality solutions to our clients and students to meet their growing needs.” [Emphasis added.]

75. Upon this news, shares of the Company’s stock fell \$0.92 per share, or over 10%, to close at \$7.46, over the next three trading days

THE TRUTH EMERGES

76. On April 8, 2008, the Company issued a press release entitled "First Marblehead Statement on TERI's Petition for Reorganization Under Chapter 11." Therein, the Company, in relevant part, stated:

"Late yesterday, The Education Resources Institute (TERI), a non-profit guarantor of private student loans, filed a voluntary petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Massachusetts.

"The First Marblehead Corporation has been in a strategic alliance with TERI since 2001, pursuant to which the non-profit has been the exclusive third-party provider of borrower default guarantees for our clients' private student loans. TERI also guarantees the loans held by The National Collegiate Student Loan Trusts (NCSLT), the series of trusts we use in our securitization program. According to the filing, TERI is developing a long-term business plan so that it can continue its College Access Programs as well as its guarantee activities.

"First Marblehead is analyzing the implications of this filing on its lenders, investors, borrowers, as well as the NCSLT. We are committed to continuing to provide an integrated suite of services including product development, processing, and securitization services. The company is working diligently on securing an alternative guarantor as well as structural solutions for loan default guarantees for future originations. In addition, we have adjusted our collection and underwriting strategies to adapt to the challenges presented by the turmoil in the capital markets and the current consumer credit cycle." [Emphasis added.]

77. Upon this news, shares of the Company's stock fell \$4.16 per share, or 54%, over the next five trading days, as the investing public continued to digest the news of TERI's bankruptcy and its effect on the Company.

78. On April 17, 2008, the Company issued a press release announcing that Bank of America notified the Company that "due to the ongoing disruption in the capital markets it has decided to exit the private student loan business and focus on providing federal student loans.

In connection with this decision, Bank of America has elected to exercise its right to terminate its agreements with First Marblehead due to the filing by The Education Resources Institute (TERI) of a voluntary bankruptcy petition on April 7, 2008.”

79. Upon this news, shares of the Company’s stock fell \$0.68 per share, or approximately 17%, to close at \$3.37 per share, on heavy trading volume.

FUTILITY OF DEMAND ON THE BOARD OF DIRECTORS

80. Plaintiff has not made a demand on FMD’s Board of Directors to pursue the claims asserted herein, because such demand is excused and would have been a futile act for the reasons set forth below and throughout this Complaint:

- a. All of the Individual Defendant directors of the Company are accused of a breach of fiduciary duties for failing to put into place adequate internal controls and adequate means of supervision to prevent the wrongful conduct complained of herein and in other complaints filed against the Company, creating a substantial doubt that any of the director defendants could consider a demand in a disinterested and independent manner;
- b. A substantial likelihood exists that Individual Defendant directors did not exercise valid business judgment because the wrongful actions and/or inactions by Individual Defendants alleged herein constituted breaches of their respective fiduciary duties of good faith, disclosure, and loyalty to FMD and its stockholders, and an abdication of the directors' responsibilities giving rise to liability to FMD; and
- c. Certain of the Individual Defendants are presently defendants in certain federal securities class action suits described above, and face a substantial likelihood of liability given the misstatements of FMD’s operating

revenues, gains, and expenses. Accordingly, FMD's directors have disabling conflicts and could not be relied upon to reach a truly independent decision as to whether to commence action against them arising out of the same misconduct.

81. As such, each and all of the Individual Defendants were on direct notice that rigorous and ever-vigilant scrutiny of compliance with legal guidelines for ethical corporate conduct were absolutely essential to protect the Company and its shareholders from substantial liability and the potential financial impact to FMD resulting from both pending civil actions and reputational harm in the market place.

82. Given the importance to FMD to maintain the integrity of the financial reports and auditing practices as well as the need to maintain adequate internal controls and monitoring of business functions, the FMD Board of Directors was or should have been aware of the risk of harm to the Company and its shareholders.

83. Defendant Tarr has served as Chairman of the Company's Board of Directors since October 2005 and the Company's General Counsel since July 2005. His compensation from the Company for 2007 was \$4,319,746.

84. Defendant Kopnisky has served as the Company's President and COO since September 6, 2005, CEO since September 27, 2005, and a member of the Company's Board of Directors since November 9, 2006. His compensation from the Company for 2007 was \$4,069,838.

85. Defendant Hupalo has served as the Company's CFO and Senior Executive Vice President since November 2006. His compensation from the Company for 2007 was \$1,797,387.

86. Defendants Kopinsky and Tarr (as well as non-director defendant Hupalo) were motivated to make the above referenced representations, at least in part, by their desire to obtain

additional compensation. On August 20, 2007, the Company filed a Current Report on form 8-K, detailing the salaries, performance awards, and restricted stock options due to certain key employees, including *inter alia*, defendants Kopinsky, Tarr and Hupalo. The award totaled \$2,500,000, \$2,500,000, and \$1,000,000 respectively and was “keyed to the Corporation’s income from operations for Fiscal 2007.” Therefore, Defendants Kopinsky and Tarr are conflicted.

87. Defendant Anbinder has served as a co-founder of the Company and Vice Chairman of the Board of Directors since May 2002. His compensation from the Company for 2007 was \$922,667. Defendant Anbinder also served a consultant to the Company since June 2006. Pursuant to his agreement with the Company, FMD has agreed to pay defendant Anbinder fees of \$25,000 per month and maintain his office for so long as he provides his services to the Company. In addition, the Company has agreed to continue health insurance for the remainder of defendant Anbinder’s life. Defendant Anbinder is financially beholden to the Company and is therefore conflicted.

88. Defendant Berkley has served as a member of the Company's Board of Directors since December 1995 and a lead director of the Company since January 2004. Defendant Berkley is the Chairman of the Board of Directors, and majority shareholder of Associated Bancorp. Associated Brokers is a wholly owned subsidiary of Associated Bancorp. The Associated Brokers has served as the FMD’s insurance agent in connection with the Company’s directors and officers liability insurance. FMD paid Associated Brokers commissions of approximately \$146,700 during fiscal 2007. In addition, defendant Berkley has served as Chairman of the Board of Directors, CEO, President, and COO of W.R. Berkley and owns approximately 13% of its outstanding stock. The Company paid fees to InsurBanc, an indirect subsidiary of W.R. Berkley Corporation, in connection with loan securitizations and assistance

FMD provided to InsurBanc in connection with its student loan program. The Company has also agreed to spend a certain amount to assist InsurBanc in connection with development and expansion of this loan program.

89. Defendant Cameron has served as a member of the Company's Board of Directors since December 1995. On June 30, 2007, the Company had on deposit with The Milestone Funds, an open-end management investment company, approximately \$84.3 million of cash and cash equivalents in a treasury obligations portfolio. Milestone Capital, which serves as investment adviser to the portfolio, charges the Company its standard service fees based on its assets under management in the portfolio. In addition, approximately \$118.0 million of investments were invested by Milestone Capital on behalf of FMD under an investment management agreement. Milestone Capital receives a fee for services it performs under this agreement. Immediate family members of defendant Cameron indirectly own approximately 65% in the aggregate of the membership interests of Milestone Capital. As a result, these family members would be entitled to receive a portion of any amounts distributed by Milestone Capital to its members, including any net income attributable to the Company's investment in the portfolio or investment management agreement. The aggregate amount of net revenues (before expenses) that Defendant Cameron's family members could be entitled to receive in light of their membership interests during fiscal 2007 and the gross revenue attributable to the Company's average historical assets under management in the portfolio during fiscal 2007 was \$98,309.

90. Defendant Alexander has served as a member of the Company's Board of Directors since December 1995. Defendant Alexander has owned the Houston Rockets professional basketball team since 1993. In 2007, the Company paid fees to the Houston Rockets, which is owned by defendant Alexander, in connection with an advertising program for the Company's student loan services.

91. As stated above, defendants Berkley, Cameron and Alexander have affiliations with Associated Brokers, InsurBanc, Milestone Capital, and Houston Rockets, respectively, and owe their allegiance to those respective entities.

92. Moreover, defendants Drotch, Daly, and Hansen were members of the Company's Audit Committee making their responsibilities even greater. The Committee was entrusted with a great deal of power and influence in connection with financial reporting and financial controls. Defendant Drotch has even been determined to be "financial experts" as required by §307 of the Sarbanes-Oxley Act. Thus, his responsibility to the Company's shareholders to prevent and ferret out fraud and inadequate financial controls is even greater than the other directors. The audit committee met seven times during the fiscal year ended December 31, 2007.

93. According to the 1992 "Internal Control -- Integrated Framework," published by the Committee of Sponsoring Organizations of the Treadway Commission, which is the accepted standard for defining and assessing the effectiveness of the internal control of organizations in the United States, "internal control" is defined as follows:

Internal control is a process, effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories:

- Effectiveness and efficiency of operations.
- Reliability of financial reporting.
- *Compliance with applicable laws and regulations.*

(Emphasis added.)

94. As such, the FMD Audit Committee was at all times specifically responsible for oversight of compliance by FMD with applicable laws and regulations. Relevant to this demand futility analysis, as noted above, several of the Audit Committee members have special skill,

knowledge and experience that they were duty bound to bring to bear, in their roles as directors and members of the Audit Committee, for the benefit of FMD and its shareholders.

95. Additionally, defendants Cameron, Alexander, Berkley, Daly, and Hansen are members of the Compensation Committee. While on the Committee, they approved compensation plans for directors and executives which included millions of dollars which have not been re-sought since the information that the Company's financial results were grossly inflated became known. The compensation committee met a mere three times during the fiscal year ended December 31, 2007.

96. Additionally, defendants Berkley, Alexander, Cameron, and Daly are members of the Nominating and Governance Committee. While on the Committee, they were responsible for identifying, evaluating, and recommending to the Board Individuals to serve as directors. The Committee also oversees the Board's annual review of director independence and effectiveness of the corporate governance guidelines. The Nominating and Governance Committee only met once during the fiscal year ended December 31, 2007.

97. Despite of and in the face of all of this knowledge, and despite the fact that they were on notice of serious issues concerning the performance of the Company and the blatancy of the misrepresentations, the Individual Defendants recklessly failed to make adequate inquiry and/or take appropriate action to ensure that serious violations of various fiduciary duties would be recognized, tracked and, ultimately, reported through appropriate channels with notice to the full FMD Board of Directors.

98. Instead of ensuring that effective compliance reporting and corrective action was built into FMD's system of internal controls, by their reckless disregard of known risks, the Individual Defendants instead allowed a culture to persist at FMD that placed the profits before fiduciary duties and compliance with all applicable laws and regulations.

99. The wrongful acts and omissions at issue constitute violations of law resulting from the Individual Defendants' bad faith, knowing and reckless failure to take effective action to protect the Company and its shareholders by ensuring compliance by FMD with all applicable legal and regulatory requirements. Such conduct is thus not subject to the protection of the business judgment rule, nor are the Individual Defendants protected from personal liability for such bad faith misconduct by virtue of any exculpatory provision in the Company's certificate of incorporation.

100. As a result of the Individual Defendants' bad faith and reckless breach of fiduciary duty, the Company and its shareholders have suffered, and will further suffer, massive financial harm.

101. Moreover, to the extent that the Company presently maintains or previously maintained officers and directors liability insurance coverage, that insurance would be the primary or principal source of any recovery against the defendants, and would be rendered void if the Company commenced proceedings against the Individual Defendants, as these policies uniformly contain provisions which void coverage if the Company brings suit in its own name. For this reason also, demand is excused.

102. Additionally, during the Relevant Period, and with the Company's securities trading at artificially inflated prices, Company insiders sold 3,797,528 shares of the Company's stock for gross proceeds of \$209,251,476, including over \$52 million in gross proceeds received by the Individual Defendants (the "Insider Selling Defendants"). This trading by Company insiders is evidenced by the following chart:

Date of Trade	Inside Trader	Number of Shares	Price per Share	Gross Proceeds

December 28, 2007	Anbinder, Stephen E.	15,000	\$15.07 - \$15.55	\$230,000
December 27, 2007	Anbinder, Stephen E.	15,000	\$16.65 - \$16.7	\$250,000
December 13, 2007	Anbinder, Stephen E.	15,000	\$13.60 - \$13.75	\$205,000
December 12, 2007	Anbinder, Stephen E.	15,000	\$15.05 - \$15.32	\$228,000
November 30, 2007	Anbinder, Stephen E.	15,000	\$30.64 - \$30.85	\$461,000
November 29, 2007	Anbinder, Stephen E.	15,000	\$28.18 - \$28.4	\$424,000
November 16, 2007	Anbinder, Stephen E.	15,000	\$30.35 - \$30.91	\$459,000
November 15, 2007	Anbinder, Stephen E.	15,000	\$30.87 - \$31.5	\$468,000
October 30, 2007	Anbinder, Stephen E.	15,000	\$39.38 - \$39.96	\$595,000
October 29, 2007	Anbinder, Stephen E.	4,800	\$39.44 - \$39.65	\$190,000
October 29, 2007	Anbinder, Stephen E.	10,200	\$39.02 - \$39.43	\$400,000
October 18, 2007	Anbinder, Stephen E.	15,000	\$39.30 - \$39.47	\$591,000

October 17, 2007	Anbinder, Stephen E.	15,000	\$39.82 - \$40.23	\$600,000
October 3, 2007	Anbinder, Stephen E.	15,000	\$40.10 - \$40.1	\$602,000
October 2, 2007	Anbinder, Stephen E.	15,000	\$39.50 - \$39.56	\$593,000
September 20, 2007	Anbinder, Stephen E.	15,000	\$39.45 - \$39.72	\$594,000
September 19, 2007	Anbinder, Stephen E.	15,000	\$41 - \$41.35	\$618,000
September 6, 2007	Anbinder, Stephen E.	15,000	\$31.62 - \$31.83	\$476,000
September 5, 2007	Anbinder, Stephen E.	15,000	\$32.72 - \$32.72	\$491,000
August 23, 2007	Anbinder, Stephen E.	15,000	\$35.25 - \$35.5	\$531,000
August 22, 2007	Anbinder, Stephen E.	15,000	\$35.23 - \$35.41	\$530,000
August 15, 2007	Hupalo, John A.	1,548	\$32.29 - \$32.29	\$50,000
August 8, 2007	Anbinder, Stephen E.	15,000	\$32.97 - \$33.05	\$495,000
August 7, 2007	Anbinder, Stephen E.	15,000	\$32.20 - \$32.39	\$484,000
July 24, 2007	Anbinder, Stephen E.	15,000	\$35.70 - \$35.73	\$536,000

July 23, 2007	Anbinder, Stephen E.	15,000	\$37 - \$37.05	\$555,000
July 13, 2007	Anbinder, Stephen E.	15,000	\$39.40 - \$39.77	\$594,000
July 12, 2007	Anbinder, Stephen E.	15,000	\$39.05 - \$39.39	\$588,000
June 26, 2007	Anbinder, Stephen E.	15,000	\$39.80 - \$40.25	\$600,000
June 25, 2007	Anbinder, Stephen E.	15,000	\$40.20 - \$40.67	\$607,000
June 14, 2007	Anbinder, Stephen E.	15,000	\$38.36 - \$38.36	\$575,000
June 13, 2007	Anbinder, Stephen E.	15,000	\$37.60 - \$38.27	\$569,000
June 1, 2007	Anbinder, Stephen E.	15,000	\$37.58 - \$37.84	\$566,000
May 31, 2007	Anbinder, Stephen E.	15,000	\$36.15 - \$36.52	\$545,000
May 18, 2007	Anbinder, Stephen E.	15,000	\$35.30 - \$35.4	\$530,000
May 17, 2007	Anbinder, Stephen E.	15,000	\$34.82 - \$35.27	\$526,000
May 2, 2007	Anbinder, Stephen E.	4,500	\$36.51 - \$36.66	\$165,000

May 2, 2007	Anbinder, Stephen E.	10,500	\$35.57 - \$36.5	\$378,000
May 1, 2007	Anbinder, Stephen E.	6,100	\$34.87 - \$35.32	\$214,000
May 1, 2007	Anbinder, Stephen E.	7,300	\$35.33 - \$35.9	\$260,000
May 1, 2007	Anbinder, Stephen E.	1,600	\$36.06 - \$36.43	\$58,000
April 17, 2007	Anbinder, Stephen E.	1,400	\$36.60 - \$36.83	\$51,000
April 17, 2007	Anbinder, Stephen E.	3,500	\$35.50 - \$36.59	\$126,000
April 17, 2007	Anbinder, Stephen E.	4,800	\$34.73 - \$35.49	\$169,000
April 17, 2007	Anbinder, Stephen E.	4,500	\$33.35 - \$34.71	\$153,000
April 16, 2007	Anbinder, Stephen E.	900	\$36.66 - \$37.07	\$33,000
April 16, 2007	Anbinder, Stephen E.	3,200	\$31 - \$33.47	\$103,000
April 16, 2007	Anbinder, Stephen E.	3,400	\$33.50 - \$34.79	\$116,000
April 16, 2007	Anbinder, Stephen E.	3,900	\$34.80 - \$35.28	\$137,000

April 16, 2007	Anbinder, Stephen E.	3,600	\$35.29 - \$36.65	\$129,000
April 4, 2007	Anbinder, Stephen E.	9,300	\$44.06 - \$44.46	\$412,000
April 4, 2007	Anbinder, Stephen E.	5,700	\$43.44 - \$44.05	\$249,000
April 3, 2007	Anbinder, Stephen E.	5,800	\$44.35 - \$44.64	\$258,000
April 3, 2007	Anbinder, Stephen E.	9,200	\$43.88 - \$44.34	\$406,000
March 23, 2007	Anbinder, Stephen E.	3,900	\$45.44 - \$45.78	\$178,000
March 23, 2007	Anbinder, Stephen E.	11,100	\$44.98 - \$45.43	\$502,000
March 22, 2007	Anbinder, Stephen E.	3,200	\$45.50 - \$46.03	\$146,000
March 22, 2007	Anbinder, Stephen E.	11,800	\$45.17 - \$45.49	\$535,000
March 6, 2007	Anbinder, Stephen E.	4,200	\$43.41 - \$43.86	\$183,000
March 6, 2007	Anbinder, Stephen E.	5,500	\$42.97 - \$43.4	\$238,000
March 6, 2007	Anbinder, Stephen E.	5,300	\$42.48 - \$42.95	\$226,000

March 5, 2007	Anbinder, Stephen E.	4,400	\$42.84 - \$43.33	\$190,000
March 5, 2007	Anbinder, Stephen E.	5,700	\$42.43 - \$42.81	\$243,000
March 5, 2007	Anbinder, Stephen E.	4,800	\$41.87 - \$42.42	\$202,000
February 23, 2007	Anbinder, Stephen E.	2,000	\$45.97 - \$46.38	\$92,000
February 23, 2007	Anbinder, Stephen E.	6,600	\$45.55 - \$45.95	\$302,000
February 23, 2007	Anbinder, Stephen E.	6,400	\$45.14 - \$45.54	\$290,000
February 22, 2007	Anbinder, Stephen E.	400	\$46.57 - \$46.68	\$19,000
February 22, 2007	Anbinder, Stephen E.	4,800	\$45.84 - \$46.56	\$222,000
February 22, 2007	Anbinder, Stephen E.	9,800	\$45.42 - \$45.82	\$447,000
February 9, 2007	Anbinder, Stephen E.	1,700	\$54.86 - \$55.19	\$94,000
February 9, 2007	Anbinder, Stephen E.	7,200	\$54.16 - \$54.85	\$392,000
February 9, 2007	Anbinder, Stephen E.	6,100	\$53.67 - \$54.14	\$329,000

February 9, 2007	Berkley, William R.	31,600	\$54 - \$54.18	\$1,709,000
February 8, 2007	Anbinder, Stephen E.	2,300	\$54.79 - \$55.3	\$127,000
February 8, 2007	Anbinder, Stephen E.	12,700	\$53.97 - \$54.78	\$691,000
January 31, 2007	Berkley, William R.	20,200	\$54.42 - \$54.73	\$1,102,000
January 31, 2007	Berkley, William R.	39,800	\$54.07 - \$54.41	\$2,159,000
January 30, 2007	Berkley, William R.	100	\$54.76 - \$54.76	\$5,476
January 30, 2007	Berkley, William R.	89,900	\$54.32 - \$54.7	\$4,900,000
January 23, 2007	Anbinder, Stephen E.	8,900	\$52.85 - \$53.04	\$471,000
January 23, 2007	Anbinder, Stephen E.	6,100	\$51.90 - \$52.84	\$319,000
January 22, 2007	Anbinder, Stephen E.	4,400	\$52.91 - \$53.02	\$233,000
January 22, 2007	Anbinder, Stephen E.	10,600	\$52.53 - \$52.9	\$559,000
December 19, 2006	Anbinder, Stephen E.	4,800	\$53.62 - \$53.85	\$258,000

December 19, 2006	Anbinder, Stephen E.	10,200	\$52.92 - \$53.61	\$543,000
December 18, 2006	Anbinder, Stephen E.	2,200	\$53.61 - \$53.79	\$118,000
December 18, 2006	Anbinder, Stephen E.	8,200	\$53.25 - \$53.6	\$438,000
December 18, 2006	Anbinder, Stephen E.	4,600	\$52.61 - \$53.17	\$243,000
December 15, 2006	Berkley, William R.	17,600	\$53.20 - \$53.57	\$940,000
December 15, 2006	Berkley, William R.	82,400	\$53 - \$53.2	\$4,375,000
December 14, 2006	Alexander, Leslie L.	21,800	\$53.01 - \$53.03	\$1,156,000
December 14, 2006	Berkley, William R.	1,800	\$53.20 - \$53.2	\$96,000
December 14, 2006	Berkley, William R.	56,700	\$53.03 - \$53.18	\$3,011,000
December 14, 2006	Berkley, William R.	53,700	\$52.95 - \$53.02	\$2,845,000
December 14, 2006	Berkley, William R.	37,800	\$52.50 - \$52.94	\$1,993,000
December 13, 2006	Berkley, William R.	50,000	\$51.50 - \$52.1	\$2,590,000

December 12, 2006	Berkley, William R.	50,000	\$52 - \$52.21	\$2,605,000
December 11, 2006	Alexander, Leslie L.	21,000	\$53.78 - \$54	\$1,132,000
December 11, 2006	Alexander, Leslie L.	39,300	\$53.45 - \$53.77	\$2,107,000
December 8, 2006	Alexander, Leslie L.	2,100	\$53.44 - \$53.45	\$112,000
December 8, 2006	Alexander, Leslie L.	52,700	\$53.05 - \$53.43	\$2,806,000
December 8, 2006	Berkley, William R.	22,300	\$52.75 - \$52.97	\$1,179,000
December 7, 2006	Alexander, Leslie L.	121,600	\$53.05 - \$53.29	\$6,465,000
December 7, 2006	Berkley, William R.	7,600	\$53 - \$53.05	\$403,000
December 7, 2006	Berkley, William R.	20,100	\$52.75 - \$52.99	\$1,063,000
December 6, 2006	Anbinder, Stephen E.	6,600	\$53.03 - \$53.18	\$350,000
December 6, 2006	Anbinder, Stephen E.	8,400	\$52.40 - \$53.02	\$443,000
December 6, 2006	Alexander, Leslie L.	131,900	\$53.05 - \$53.18	\$7,006,000
December 5, 2006	Alexander, Leslie L.	141,200	\$53.50 - \$53.9	\$7,582,000
December 5, 2006	Anbinder, Stephen E.	2,800	\$53.84 - \$54.9	\$152,000

December 5, 2006	Anbinder, Stephen E.	7,700	\$53.39 - \$53.83	\$413,000
December 5, 2006	Anbinder, Stephen E.	4,500	\$52.88 - \$53.38	\$239,000
December 4, 2006	Alexander, Leslie L.	35,800	\$76.74 - \$76.93	\$2,751,000
December 4, 2006	Alexander, Leslie L.	83,300	\$76.45 - \$76.73	\$6,380,000
December 1, 2006	Alexander, Leslie L.	1,500	\$75.71 - \$75.8	\$114,000
December 1, 2006	Alexander, Leslie L.	60,500	\$75.40 - \$75.7	\$4,571,000
November 30, 2006	Hansen, William Dean	4,000	\$75.05 - \$75.22	\$301,000
November 30, 2006	Alexander, Leslie L.	6,400	\$75.35 - \$75.4	\$482,000
November 29, 2006	Alexander, Leslie L.	21,900	\$75.20 - \$75.34	\$1,648,000
November 24, 2006	Alexander, Leslie L.	19,700	\$77.35 - \$77.69	\$1,527,000
November 22, 2006	Alexander, Leslie L.	60,000	\$77.45 - \$77.67	\$4,654,000
November 22, 2006	Alexander, Leslie L.	25,000	\$77.07 - \$77.44	\$1,931,000
November 22, 2006	Alexander, Leslie L.	55,000	\$76.70 - \$77.06	\$4,228,000
November 21, 2006	Anbinder, Stephen E.	1,800	\$76.17 - \$76.55	\$137,000
November 21, 2006	Anbinder, Stephen E.	4,200	\$73.28 - \$76.16	\$314,000

November 21, 2006	Anbinder, Stephen E.	4,000	\$72.12 - \$73.25	\$291,000
November 21, 2006	Alexander, Leslie L.	3,300	\$76.55 - \$76.56	\$253,000
November 21, 2006	Alexander, Leslie L.	18,900	\$76.24 - \$76.54	\$1,444,000
November 21, 2006	Alexander, Leslie L.	188,900	\$75.95 - \$76.23	\$14,373,000
November 20, 2006	Alexander, Leslie L.	12,600	\$72.40 - \$72.5	\$913,000
November 20, 2006	Anbinder, Stephen E.	3,869	\$72.43 - \$72.94	\$281,000
November 20, 2006	Anbinder, Stephen E.	6,131	\$71.95 - \$72.42	\$443,000
November 20, 2006	Alexander, Leslie L.	1,200	\$76.38 - \$76.38	\$92,000
November 17, 2006	Alexander, Leslie L.	25,100	\$71.90 - \$72.04	\$1,806,000
November 10, 2006	Berkley, William R.	46,200	\$68.65 - \$68.94	\$3,178,000
November 10, 2006	Berkley, William R.	6,800	\$68.95 - \$69.01	\$469,000
November 10, 2006	Berkley, William R.	59,580	\$68.32 - \$68.64	\$4,080,000
November 9, 2006	Anbinder, Stephen E.	10,000	\$66.74 - \$66.87	\$668,000
November 8, 2006	Anbinder, Stephen E.	10,000	\$65.07 - \$65.56	\$653,000

October 26, 2006	Anbinder, Stephen E.	10,000	\$73 - \$73.5	\$733,000
October 25, 2006	Anbinder, Stephen E.	10,000	\$69.43 - \$70	\$697,000
October 11, 2006	Anbinder, Stephen E.	10,000	\$67.65 - \$69.15	\$684,000
October 10, 2006	Anbinder, Stephen E.	10,000	\$70.46 - \$70.46	\$705,000
September 27, 2006	Anbinder, Stephen E.	10,000	\$69.10 - \$69.1	\$691,000
September 26, 2006	Anbinder, Stephen E.	10,000	\$65.12 - \$65.82	\$655,000
September 15, 2006	Alexander, Leslie L.	134,700	\$59.91 - \$61.37	\$8,168,000
September 15, 2006	Alexander, Leslie L.	18,800	\$61.39 - \$61.62	\$1,156,000
September 15, 2006	Alexander, Leslie L.	36,100	\$59.60 - \$59.6	\$2,152,000
September 15, 2006	Anbinder, Stephen E.	10,000	\$59 - \$59.47	\$592,000
September 14, 2006	Anbinder, Stephen E.	10,000	\$52.80 - \$52.93	\$529,000
September 13, 2006	Alexander, Leslie L.	142,000	\$53.07 - \$53.35	\$7,556,000
September 13, 2006	Alexander, Leslie L.	4,000	\$53.38 - \$53.45	\$214,000
September 12, 2006	Alexander, Leslie L.	170,500	\$53.01 - \$53.3	\$9,063,000

September 11, 2006	Alexander, Leslie L.	108,000	\$53.01 - \$53.25	\$5,738,000
September 5, 2006	Alexander, Leslie L.	130,000	\$52.80 - \$53.89	\$6,935,000
September 1, 2006	Alexander, Leslie L.	85,000	\$52.57 - \$53.12	\$4,492,000
August 31, 2006	Alexander, Leslie L.	25,000	\$52.50 - \$52.54	\$1,313,000
August 30, 2006	Alexander, Leslie L.	25,000	\$52.67 - \$53.02	\$1,321,000
August 29, 2006	Alexander, Leslie L.	98,900	\$53.12 - \$53.31	\$5,263,000
August 29, 2006	Anbinder, Stephen E.	10,000	\$53.30 - \$53.65	\$535,000
August 28, 2006	Anbinder, Stephen E.	10,000	\$52.95 - \$53.25	\$531,000
August 17, 2006	Anbinder, Stephen E.	10,000	\$50.80 - \$51.18	\$510,000
August 16, 2006	Anbinder, Stephen E.	10,000	\$48.98 - \$49.99	\$495,000
	TOTAL:	3,797,528		\$209,251,476

103. During the Relevant Period, defendant Anbinder sold 969,100 shares, representing approximately 23.9% of his total shares, reaping proceeds of approximately \$41.3 million.

104. During the Relevant Period, defendant Berkley sold 694,180 shares, representing approximately 15.3% of his total shares, reaping proceeds of approximately \$38.7 million.

105. During the Relevant Period, defendant Alexander sold 2,106,900 shares, representing approximately 10.9% of his total shares, reaping proceeds of approximately \$127.8

million.

106. During the Relevant Period, defendant Hansen sold 4,000 shares, representing 100% of his shares, reaping proceeds of \$301,000 and reducing his holdings to zero.

107. For all of the reasons discussed above, all of the Individual Defendants face a substantial likelihood of liability on the claims asserted in this action, making them materially interested with respect to consideration of a pre-suit demand. Accordingly, such demand would be futile, rendering pre-suit demand excused for the purposes of this derivative action.

FIRST CAUSE OF ACTION
Against All Defendants for Breach of Fiduciary Duty

108. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

109. The Individual Defendants breached their fiduciary duties to the Company and its shareholders by failing in their responsibility to maintain adequate accounting controls and by employing improper accounting and audit practices and procedures, which artificially inflated the value of the Company's common stock.

110. All of the Individual Defendants, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of FMD in manner consistent with the operations of a publicly held company.

111. All of the Individual Defendants failed to properly consider the interests of the Company and its public shareholders and failed to exercise proper supervision and wasted corporate assets by paying bonuses to certain of its executive officers while inflating corporate earnings and putting the Company at risk for millions of dollars of legal liability and/or legal costs to defend the Company.

112. Individual Defendants' misconduct described above constituted an abuse of their ability to control and influence the Company, for which they are legally responsible.

113. All of the Individual Defendants owe and owed a fiduciary duty to FMD to supervise issuance of its press releases and public filings to ensure that they were truthful and accurate and that they conformed to federal and state law. The Individual Defendants breached their fiduciary duty by failing to properly supervise and monitor FMD's accounting practices and the adequacy of its internal financial controls and audits and by allowing misleading statements and filings to be issued and made. These actions could not have been exercised in good faith or with the prudence required of the business judgment rule to protect the interests of the Company and its shareholders.

114. Nevertheless, the Individual Defendants have engaged in a sustained and systematic failure to exercise their oversight responsibilities to ensure that FMD complied with Federal and State Laws, rules and regulations and to ensure the integrity of its financial reporting and statements to the public.

115. As a direct result of the Individual Defendants' breaches and ancillary conduct, FMD has been the subject of securities fraud class action lawsuits by allegedly defrauded investors, has lost market share, has had its reputation in the business community tarnished and has thus been damaged.

116. As a result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

117. Plaintiff on behalf of FMD has no adequate remedy at law.

**SECOND CAUSE OF ACTION
Against All Defendants for Abuse of Control**

118. Plaintiff incorporates by reference and realleges each and every allegation

contained above, as though fully set forth herein.

119. The Individual Defendants' misconduct alleged herein constituted an abuse of their ability to control and influence FMD, for which they are legally responsible.

120. As a direct and proximate result of the Individual Defendants' abuse of control, FMD has sustained significant damages.

121. As a result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

122. Plaintiff on behalf of FMD has no adequate remedy at law.

**THIRD CAUSE OF ACTION
Against All Defendants for Gross Mismanagement**

123. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

124. By their actions alleged herein, the Individual Defendants, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of FMD in a manner consistent with the operations of a publicly held corporation.

125. As a direct and proximate result of the Individual Defendants gross mismanagement and breaches of duty alleged herein, FMD has sustained significant damages in excess of hundreds of millions of dollars.

126. As a result of the misconduct and breaches of duty alleged herein, the Individual Defendants are liable to the Company.

127. Plaintiff on behalf of FMD has no adequate remedy at law.

**FOURTH CAUSE OF ACTION
Against All Defendants for Waste of Corporate Assets**

128. Plaintiff incorporates by reference and realleges each and every allegation

contained above, as though fully set forth herein.

129. As a result of the improper accounting, and by failing to properly consider the interests of the Company and its public shareholders by failing to conduct proper supervision, defendants have caused FMD to waste valuable corporate assets by paying incentive based bonuses to certain of its executive officers and incur potentially millions/billions of dollars of legal liability and/or legal costs to defend defendants' unlawful actions.

130. As a result of the waste of corporate assets, the Individual Defendants are liable to the Company.

131. Plaintiff on behalf of FMD has no adequate remedy at law.

FIFTH CAUSE OF ACTION
Against the Insider Selling Defendants for Breach of Fiduciary
Duties for Insider Selling and Misappropriation of Information

132. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

133. At the time of the stock sales set forth herein, the Insider Selling Defendants knew the information described above, and sold FMD common stock on the basis of such information.

134. The information described above was proprietary non-public information concerning the Company's financial condition and future business prospects. It was a proprietary asset belonging to the Company, which the Insider Selling Defendants used for their own benefit when they sold FMD common stock.

135. At the time of their stock sales, the Insider Selling Defendants knew that the Company's revenues were materially overstated. The Insider Selling Defendants sales of FMD common stock while in possession and control of this material adverse non-public information was a breach of their fiduciary duties of loyalty and good faith.

136. Since the use of the Company's proprietary information for their own gain

constitutes a breach of the Insider Selling Defendants fiduciary duties, the Company is entitled to the imposition of a constructive trust on any profits the Insider Selling Defendants obtained thereby.

**SIXTH CAUSE OF ACTION
Against All Defendants for Unjust Enrichment**

137. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

138. By their wrongful acts and omissions, defendants were unjustly enriched at the expense of and to the detriment of FMD.

139. Plaintiff, as a shareholder and representative of FMD, seeks restitution from these defendants, and each of them, and seek an order of this Court disgorging all profits, benefits and other compensation obtained by these defendants, and each of them, from their wrongful conduct and fiduciary breaches.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment as follows:

A. Against all of the Individual Defendants and in favor of the Company for the amount of damages sustained by the Company as a result of the Individual Defendants breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, insider selling and unjust enrichment;

B. Extraordinary equitable and/or injunctive relief as permitted bylaw, equity and state statutory provisions sued hereunder, including attaching, impounding, imposing a constructive trust on or otherwise restricting the proceeds of defendants' trading activities or their other assets so as to assure that Plaintiff on behalf of FMD have an effective remedy;

C. Awarding to FMD restitution from the defendants, and each of them, and ordering disgorgement of all profits, benefits and other compensation obtained by the defendants;

D. Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants and experts' fees, costs, and expenses; and

E. Granting such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: June 18, 2008

/s/ Noah Rosmarin
Noah Rosmarin, Esq.
Adkins Kelston and Zavez, P.C.
90 Canal Street, 5th Floor
Boston, MA 02114
Tel: (617) 367-1040
Fax: (617) 742-8280

Joshua M. Lifshitz, Esq.
Bull & Lifshitz, LLP
18 East 41st Street, 11th Floor
New York, NY 10017
Tel: (212) 213-6222
Fax: (212) 213-9405

Counsel for Plaintiff