UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC. ERISA LITIGATION	Civil Action No. 1:07-CV-00952-RWS CONSOLIDATED AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

I. INTRODUCTION

1. Plaintiffs Patrick Denning and Lorene De Stefano ("Plaintiffs") allege the following based upon personal information as to themselves and the investigation of Plaintiffs' counsel, which included a review of U.S. Securities and Exchange Commission ("SEC") filings by Beazer Homes USA, Inc. ("Beazer" or the "Company"), including the Company's proxy statements (Form 14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports (Form 8-K), and the annual reports (Form 11-K) filed on behalf of the Beazer Homes USA, Inc. 401(k) Plan (the "Plan"); a review of the Forms 5500 filed by the Plan with the U.S. Department of Labor ("DOL"); interviews with participants of the Plan; and a review of available documents governing the operations of the Plan. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

II. NATURE OF THE ACTION

2. This is a class action brought on behalf of the Plan, pursuant to §§ 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plan for violations of ERISA.

3. The Plan is a retirement plan sponsored by Beazer.

4. Plaintiffs' claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan's assets during the period July 28, 2005 to May 12, 2008 (the "Class Period").

5. Defendants allowed the imprudent investment of the Plan's assets in Beazer common stock throughout the Class Period, even though they knew or should have known that such investment was unduly risky and imprudent. The Company's serious mismanagement and improper business practices – including fraudulent and high-risk lending, inadequate internal controls over its lending practices, and misleading statements and misrepresentations regarding the Company's net income and financial results – led to the artificial inflation of Beazer stock, even as the risk of defaults and foreclosures rose, and created dire financial circumstances for the Company. As a result, Beazer stock was an unduly

risky and inappropriate investment option for Plan participants' retirement savings during the Class Period.

6. Therefore, Plaintiffs allege in Count I that Defendants who were responsible for the investment of Plan assets breached their fiduciary duties to the Plan's participants in violation of ERISA by failing to prudently and loyally manage the Plan's investment in Beazer stock. In Count II, Plaintiffs allege that Defendants who were responsible for the selection, monitoring, and removal of the Plan's other fiduciaries failed to properly monitor the performance of their fiduciary appointees and remove and replace those whose performance was inadequate, as well as provide them with the necessary information to fulfill their fiduciary duties. In Count III, Plaintiffs allege that Defendants with knowledge of the risks associated with Beazer stock breached their duty to disclose necessary information to co-fiduciaries. In Count IV, Plaintiffs allege that Defendants breached their duty to inform the Plan's participants by failing to provide complete and accurate information regarding the soundness of Beazer stock and the prudence of investing and holding retirement contributions in Beazer equity. Finally, in Count V, Plaintiffs allege that Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, adequate monitoring, and

complete and accurate communications to co-fiduciaries and Plan participants and beneficiaries.

7. As is more fully explained below, during the Class Period, Defendants with responsibility for the Plan's investments imprudently permitted the Plan to hold and acquire millions of dollars in Beazer stock despite the Company's serious mismanagement, improper business practices, and dire financial circumstances. Based on publicly available information for the Plan, Defendants' breaches have caused an estimated principal loss of at least ***$46 million*** of retirement savings.

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

9. ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. Pursuant to that authority, Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23 on behalf of all participants and

beneficiaries of the Plan whose Plan accounts were invested in Beazer stock during the Class Period.

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

III. JURISDICTION AND VENUE

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

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

13. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and Beazer has its principal place of business in this district.

IV. PARTIES

A. Plaintiffs

14. **Plaintiff Patrick Denning** is a resident of Santa Fe, Tennessee. He worked for Beazer beginning in April 1997, and left the Company in November 2007. He was a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7), and held Beazer shares in the Plan during the Class Period.

15. **Plaintiff Lorene De Stefano** is a resident of Holly Springs, North Carolina. She worked for Beazer beginning in 2002, and left the Company in October 2006. She is a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1102(7), and held Beazer shares in the Plan during the Class Period.

B. Defendants[1]

16. **Defendant Beazer Homes USA, Inc.** Beazer is a Delaware corporation with its principal place of business at 1000 Abernathy Road, Suite

---

[1] Plaintiffs have determined to dismiss Defendants Laurent Alpert and Peter G. Leemputte without prejudice.

1200, Atlanta, Georgia. Beazer is one of the 10 largest residential homebuilders – designing, selling, and building primarily single-family homes in various locations within the United States. The Company builds economy homes for entry-level buyers, value homes for entry-level and move-up buyers, and homes for luxury and retirement-oriented buyers. Beazer Annual Report, Form 10-K (Sept. 30, 2007) ("2007 Form 10-K") at 6. Beazer common stock is listed on the New York Stock Exchange and trades under the ticker symbol "BZH."

17. During the Class Period, the Company also engaged in mortgage origination services, extending loans to Beazer home buyers through its wholly-owned subsidiary, Beazer Mortgage Corporation ("Beazer Mortgage").[2] Beazer Mortgage "finance[d] certain of [the Company's] mortgage lending activities with borrowings under its warehouse line of credit or from general corporate funds prior to selling the loans and their servicing rights shortly after origination to third-party investors." Beazer Annual Report, Form 10-K (Sept. 30, 2006) ("2006 Form 10-K") at 8. Thus, Beazer did not generally retain or service the mortgages that it originated.

18. In 2005 and 2006, Beazer originated mortgages for 62% and 65% of

[2] On February 1, 2008, Beazer exited the mortgage origination business and entered into an exclusive preferred lender relationship with a national mortgage provider. 2007 Form 10-K at 7.

its home sales, respectively. *Id*. at 28.

19. **Defendant Ian J. McCarthy:** As is explained in more detail below, the Chief Executive Officer of the Company has certain appointment and oversight responsibilities with respect to the Plan. On information and belief, Defendant McCarthy served as the CEO during the Class Period.

20. **Defendant Brian C. Beazer:** As is explained in more detail below, Defendant Brian Beazer is the Non-Executive Chairman of the Company's Board of Directors (the "Board") and has certain appointment and oversight responsibilities with respect to the Plan.

21. **Compensation Committee Defendants.** As is explained in more detail below, the Compensation Committee of the Board has certain appointment and oversight responsibilities with respect to the Plan. On information and belief, the Compensation Committee members during the Class Period were:

a. **Defendant Katie J. Bayne**, who served as a member of the Compensation Committee during the Class Period;

b. **Defendant Larry T. Solari**, who served as the chairman of the Compensation Committee during the Class Period; and

c. **Defendant Stephen P. Zelnak, Jr.**, who served as a member of the Compensation Committee during the Class Period.

22. Defendants Bayne, Solari and Zelnak are referred to collectively as the "Compensation Committee Defendants."

23. **401(k) Committee Defendants:** As is explained in more detail below, the 401(k) Committee was assigned certain fiduciary responsibilities and duties with respect to the Plan. The Compensation Committee appoints the members of the 401(k) Committee, who are responsible for administering the Plan, selecting the Plan investment options, and monitoring the performance of those options. *See* 401(k) Committee Charter at BZH-ERISA 0000005-06. During the Class Period, the members of the 401(k) Committee included the Senior Vice President of Human Resources, three non-executive officers, and a Secretary. *See* 401(k) Plan Retirement Committee Structure (Dec. 20, 2004), BZH-ERISA 0000010-15. On information and belief, the members of the 401(k) Committee during the Class Period included:

a. **Defendant Fred Fratto**, who served as the Company's Senior Vice President, Human Resources during the Class Period. Defendant Fratto also served as the Chairperson of the 401(k) Committee during the Class Period**;**

b. **Defendant Jennifer Jones**, who served as the Company's Vice President, Employee Services during the Class Period;

c. **Defendant George Schulmeyer**, who served as the Company's Southeast Regions CFO during the Class Period; and

d. **Defendant Peggy Caldwell**, who served as the Company's Vice President and Assistant Counsel during the Class Period.

24. Defendants Fratto, Jones, Schulmeyer, and Caldwell are referred to collectively as the "401(k) Committee Defendants."

V. THE PLAN

25. The Plan, sponsored by Beazer, is a defined contribution plan. The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

26. The Plan, established effective July 1, 1993, provides benefits, except in limited circumstances, for all employees. An employee must be 21 years of age and complete one month of service to become eligible to participate in the Plan. *See* Summary Plan Description Beazer Homes USA, Inc. 401(k) Plan (Jan. 1, 2006) ("2006 SPD") at BZH-ERISA 0000483; *see also* Beazer Homes USA, Inc. 401(k) Plan Summary Plan Description (Sept. 2003) ("2003 SPD") at BZH-ERISA 0000520.

27. The assets of an employee benefit plan, such as the Plan here, must be "held in trust by one or more trustees." ERISA § 403(a), 29 U.S.C. § 1103(a). The assets of the Plan were held in trust by AMVESCAP National Trust Company from the beginning of the Class Period until January 3, 2006. *See* AMVESCAP Institutional Retirement Trust, Declaration of Trust (Mar. 31, 2002), BZH-ERISA 0000387-411. The assets of the Plan were subsequently held in trust by Fidelity Management Trust Company, effective January 3, 2006. *See* Service Agreement Between Beazer Homes USA, Inc. and Fidelity Management Trust Company (Jan. 3, 2006), BZH-ERISA 0000079-153.[3]

28. The Trustee has certain authority and duties as described in the Trust Agreements with respect to the Company stock held in trust pursuant to the terms of the Trust Agreements. The Trustee has the authority to hold, manage and control the assets of the Plan held in trust pursuant to the terms of the Trust Agreements.

[3] AMVESCAP National Trust Company and Fidelity Management Trust Company are collectively referred to as the "Trustee." The AMVESCAP Institutional Retirement Trust, Declaration of Trust (Mar. 31, 2002) and the Service Agreement Between Beazer Homes USA, Inc. and Fidelity Management Trust Company (Jan. 3, 2006) are collectively referred to as the "Trust Agreements."

29. Under the Plan, an account is maintained for each participant, reflecting all contributions made on the participant's behalf and related income, expenses, gains, or losses. 2006 SPD at BZH-ERISA 0000480.

30. Participants can elect to annually contribute up to 80% of their eligible compensation, up to the maximum amount permitted by law. 2006 SPD at BZH-ERISA 0000484; 2003 SPD at BZH-ERISA 0000521.

31. The Company may make two types of contributions: (1) Employer Matching Contributions; and (2) Profit Sharing Contributions. 2006 SPD at BZH-ERISA 0000484-485; 2003 SPD at BZH-ERISA 0000523-524.

32. Employer Matching Contributions consist of Discretionary Matching Contributions which may be made in an amount determined annually and are based on a percentage of a participant's contributions. 2006 SPD at BZH-ERISA 0000485; 2003 SPD at BZH-ERISA 0000523. The Company may designate all or a portion of its matching contributions as Qualified Matching Contributions in order to help the Plan pass one or more required Internal Revenue Code nondiscrimination tests. 2006 SPD at BZH-ERISA 0000485.

33. Historically, the Company has made Employer Matching Contributions equal to 50% of the first 6% of annual earnings contributed by the participants. Beazer Homes USA, Inc. 401(k) Plan, Annual Report (Form 11-K)

(Dec. 31, 2007) ("2007 Form 11-K") at 6; s*ee also* Beazer Homes USA, Inc. 401(k) Plan, Annual Report (Form 11-K)(Dec. 31, 2006) ("2006 Form 11-K") at 6.

34. On information and belief, Employer Matching Contributions were made in Beazer common stock from the beginning of the Class Period until January 1, 2006. *See* Memo Re: 401(k) – Investment Elections for Company Match (Nov. 4, 2005), BZH-ERISA 0000061-65.

35. The amount of the Profit Sharing Contributions is determined annually by the Board. 2006 SPD at BZH-ERISA 0000485; 2003 SPD at BZH-ERISA 0000524. The Company did not make any Profit Sharing Contributions for years ended December 31, 2005, 2006 and 2007. 2006 Form 11-K at 6; 2007 Form 11-K at 6.

36. Participants become vested in the Discretionary Matching Contributions and the Profit Sharing Contributions according to the following schedule:

Years of Service	**Vested Percentage**
Less than 2 years	0%
2 but less than 3	25%
3 but less than 4	50%
4 but less than 5	75%
5 years or more	100%

2006 SPD at BZH-ERISA 0000488; 2003 SPD at BZH-ERISA 0000527. Participants are fully vested in their own contributions and in the Company's Qualified Matching Contributions, and in any earnings, at all times. 2006 SPD at BZH-ERISA 0000488.

37. Participants direct the investment of assets in their account into various investment options offered by the Plan. *Id*. at BZH-ERISA 0000487.

38. Significantly, the Plan does not require Beazer stock as an investment option, regardless of circumstances, nor does it mandate any investment in Beazer stock by the Plan fiduciaries. Instead, the 401(k) Committee has the discretion to include and continue the Fund as an investment alternative. 401(k) Committee Charter at BZH-ERISA 0000005. Additionally, on information and belief, the decision about whether and what portion of a participant's account may be allocated to the Company Stock Fund was left to the discretion of the 401(k) Committee.

A. The Plan Incurred Significant Losses during the Class Period.

39. During the Class Period, a significant amount of the Plan's assets were invested in Beazer common stock. As of December 31, 2005, the Plan held approximately 559,449 units (equal to approximately 815,230 shares) of Beazer stock, valued at its market price of over $59 million. Beazer Homes USA, Inc. 401(k) Plan, Annual Report (Form 11-K) (Dec. 31, 2005) at BZH-ERISA

0000834. Following revelations that Beazer engaged in fraudulent loan origination, predatory lending, and other improper practices, the price of Beazer stock decreased dramatically. At the end of the Class Period, Beazer company stock traded at approximately $9.46 per share, representing a decline of over 85% from the beginning of the Class Period. As a result, the Plan incurred substantial losses due to its investment in Beazer stock.

40. Despite the Plan's substantial investment in Beazer stock, Defendants failed to protect the Plan from the risks that the Company's reckless and improper conduct created. Defendants continued to hold the Plan's shares of Beazer stock and compounded the problem (and the losses) by purchasing additional shares during the Class Period. Plaintiffs estimate a principal loss of over ***$46 million***.

VI. DEFENDANTS' FIDUCIARY STATUS

A. The Nature of Fiduciary Status.

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

42. ***De Facto* Fiduciaries**. ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who

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

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

44. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan's investments solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

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

46. Instead of delegating all fiduciary responsibility for the Plan to external service providers, Beazer chose to delegate its responsibility regarding the administration of the Plan to the 401(k) Committee. 401(k) Committee Charter at BZH-ERISA 0000004-07. Beazer chose to assign the appointment and removal of fiduciaries to the Compensation Committee, which, in turn, selected the members of the 401(k) Committee. *Id.* at BZH-ERISA 0000006.

47. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). However, insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the Plan sponsor.

B. Beazer's Fiduciary Status.

48. Pursuant to the Plan documents, Beazer was the "administrator" and "plan administrator" with respect to the Plan, as that term is defined in ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and in the Internal Revenue Code of 1986

§ 414(g), respectively. 2006 SPD at BZH-ERISA 0000483; 2003 SPD at BZH-ERISA 0000542.

49. The Company, as the plan administrator, "has the power and discretionary authority to construe the terms of the Plan based on the Plan document, existing laws and regulations and to determine all questions that arise under it." 2006 SPD at BZH-ERISA 0000497. Thus, Beazer has a duty and the authority to interpret the terms of the Plan, administer the Plan, and carry out Plan provisions.

50. During the Class Period, the Company exercised its plan administrator functions through the 401(k) Committee. 401(k) Committee Charter at BZH-ERISA 0000007.

51. On information and belief, in order to comply with ERISA, the Company exercised responsibility through the 401(k) Committee for communicating with participants regarding the Plan in a plan-wide, uniform, mandatory manner by providing participants with information and materials required by ERISA. *See*, *e.g.*, ERISA § 101(a)(1), 29 U.S.C. § 1101(a)(1) (requiring the plan administrator to furnish to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan a summary plan description). In this regard, the Company and the 401(k) Committee

disseminated the Plan's documents and related materials, which incorporated by reference, among other things, Beazer's misleading SEC filings, thus converting such materials into fiduciary communications.

52. On information and belief, the Company is also charged with the appointment, monitoring, and removal of the Trustee and execution of the Trust documents with the Trustee to provide for the investment, management, and control of the assets of the Plan. On information and belief, the Company also designated this responsibility to the 401(k) Committee.

53. Moreover, on information and belief, Beazer exercised control over the activities of its employees who performed fiduciary functions with respect to the Plan, including the 401(k) Committee Defendants. Beazer, on information and belief, can hire or appoint, terminate, and replace such employees at will. Thus, Beazer is responsible for the activities of its employees as fiduciaries with respect to the Plan through traditional principles of agency and *respondeat superior* liability.

54. Finally, under basic tenets of corporate law, Beazer is imputed with the knowledge its officers and employees (including other Defendants) had regarding the misconduct alleged herein, even if such knowledge is not communicated to Beazer.

55. Consequently, in light of the foregoing duties, responsibilities, and actions, Beazer was both a named fiduciary of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and a *de facto* fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period because it exercised discretionary authority or discretionary control over the management of the Plan, exercised authority or control over the management or disposition of the Plan's assets, and/or had discretionary authority over or discretionary responsibility for the administration of the Plan.

C. Defendant Ian J. McCarthy's Fiduciary Status.

56. The Plan documents provide that the CEO of the Company has "the discretion to act on behalf of the Compensation Committee to (i) suspend a member of the 401(k) Committee for any reason that the Chief Executive Officer may consider prudent, (ii) as needed, to appoint interim members of the 401(k) Committee to fill vacancies pending action by the Compensation Committee, and (iii) take any other actions on behalf of the Compensation Committee that may be necessary or proper under exigent circumstances that do not permit the Compensation Committee to act promptly." 401(k) Committee Charter at BZH-ERISA 0000005. Thus, according to DOL regulations, the CEO exercises a fiduciary function under ERISA. 29 C.F.R. § 2509.75-8 (D-4).

57. In light of the foregoing duties and responsibilities, Defendant McCarthy is a *de facto* fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), because he exercises discretionary authority or discretionary control over the management of the Plan, exercises authority or control over the management or disposition of the Plan's assets, and/or has discretionary authority over or discretionary responsibility for the administration of the Plan.

D. Defendant Brian C. Beazer's Fiduciary Status.

58. The Company, as a corporate entity, cannot act on its own without any human counterpart. During the Class Period, upon information and belief, the Company relied on Defendant Brian Beazer to carry out certain of its fiduciary responsibilities under the Plan and ERISA. Therefore, Defendant Brian Beazer is a functional fiduciary under ERISA.

59. Moreover, on information and belief, Defendant Brian Beazer is required to appoint, monitor, and replace the members of the Compensation Committee, which constitute fiduciary duties with respect to the Plan. Thus, according to DOL regulations, Defendant Brian Beazer exercised a fiduciary function under ERISA. *See* 29 C.F.R. § 2509.75-8 (D-4) (explaining that board members who select and retain plan fiduciaries "exercise 'discretionary authority or discretionary control respecting management of such plan' and are, therefore, fiduciaries with respect to the plan").

60. In light of the foregoing duties and responsibilities, Defendant Brian Beazer is a *de facto* fiduciary within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), because he exercises discretionary authority or discretionary control over the management of the Plan, exercises authority or control over the management or disposition of the Plan's assets, and/or has discretionary authority over or discretionary responsibility for the administration of the Plan.

E. The Compensation Committee Defendants' Fiduciary Status.

61. During the Class Period, the Company relied on the Compensation Committee Defendants and the 401(k) Committee Defendants to carry out its fiduciary responsibilities under the Plan and ERISA. As a result, the Compensation Committee Defendants are functional fiduciaries under ERISA.

62. Moreover, the Compensation Committee Defendants are required to appoint, monitor, and replace the members of the 401(k) Committee, which constitute fiduciary duties with respect to the Plan. 401(k) Committee Charter at BZH-ERISA 0000005. Thus, according to DOL regulations, the Compensation Committee Defendants exercise a fiduciary function under ERISA. *See* 29 C.F.R. § 2509.75-8 (D-4) (explaining that board members who select and retain plan fiduciaries "exercise 'discretionary authority or discretionary control respecting management of such plan' and are, therefore, fiduciaries with respect to the plan").

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

F. The 401(k) Committee Defendants' Fiduciary Status.

64. The Plan documents provide that the Compensation Committee appoint, monitor, and replace the members of the 401(k) Committee. 401(k) Committee Charter at BZH-ERISA 0000005. The 401(k) Committee is the "named fiduciary" and administers the Plan on behalf of the Company. *Id.* at BZH-ERISA 0000005 & 7.

65. The 401(k) Committee has the full and complete discretionary power to administer the Plan, which includes being responsible for:

> (1) making all decisions relating to the administration of the 401(k) Plan, including, but not limited to decisions relating to eligibility, vesting, plan investments, benefit payments, and any other responsibilities of the plan administrator;
>
> (2) amending the 401(k) Plan to the limited extent that the 401(k) Committee determines that an amendment is (i) either required by law or necessary for the administration

of the 401(k) Plan, and (ii) without more than an incidental benefit and cost to the Company;

(3) on or before December 31, 2005, amending the 401(k) Plan to the extent the 401(k) Committee considers it necessary or proper to harmonize its terms with those of this Charter;

(4) appointing, monitoring, and replacing the 401(k) Plan's fiduciaries, plan record-keepers, third party administrators, or service providers, or their delegates (subject, however, to Subsection III.A.); and

(5) taking any other actions to permit, implement, or enhance any of the foregoing actions, including negotiating and executing contracts with persons or firms providing services to the 401(k) Plan (subject to prior approval of the Compensation Committee if the Committee determines in its discretion that a contract would have a material effect on the Company).

Id. at BZH-ERISA 0000005-6.

66. Additionally, the 401(k) Committee is the "named fiduciary" with respect to the Plan's investments. *Id.* at BZH-ERISA 0000006. On information and belief, the 401(k) Committee is responsible for the Plan's investments, including selecting prudent investment options, eliminating imprudent options, determining how to invest employer contributions to the Plan, and directing the Trustee regarding same. Pursuant to the 401(k) Committee Charter, the 401(k) Committee shall, if feasible and administratively practicable, conduct:

(1) a quarterly review of the financial suitability and performance of all investments;

(2) an annual review of all investment policies;

(3) an annual review of Section 404(c) safe harbor eligibility for the 401(k) Plan; and

(4) more frequent performance of the above functions when warranted by unusual facts or circumstances.

Id.

67. Moreover, on information and belief, the 401(k) Committee exercised responsibility for communicating with participants regarding the Plan, and providing participants with information and materials required by ERISA. In this regard, the 401(k) Committee disseminated the Plan documents and related materials on behalf of the Company, which incorporated by reference, among other things, Beazer's misleading SEC filings.

68. Consequently, in light of the foregoing duties, responsibilities, and actions, the 401(k) Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period because they exercised discretionary authority or discretionary control over the management of the Plan, exercised authority or control over the management or disposition of the Plan's assets, and/or had discretionary authority over or discretionary responsibility for the administration of the Plan.

VII. FACTS BEARING ON FIDUCIARY BREACH

A. Beazer's Stock Was an Imprudent Investment for the Plan during the Class Period Because of Serious Mismanagement and the Precipitous Decline in the Company's Stock Price.

69. During the Class Period, Beazer stock became an imprudent investment for participants' retirement savings. The Company was financially mismanaged, and it engaged in highly risky and inappropriate loan origination practices, creating dire financial circumstances that exposed the Plan to the risk of huge losses.

70. While a fiduciary's duty of prudence does not include a general duty to diversify with respect to company stock in an ERISA-governed retirement plan, a fiduciary may not ignore circumstances, such as those here, that increase the risk of loss to participants and beneficiaries to an imprudent and unacceptable level.

71. Beazer's false and misleading statements contributed to the artificial inflation of the value of the Company stock, increasing the risk of loss. As the DOL, the agency charged with responsibility for enforcing ERISA, has stated, it is never prudent for a retirement plan fiduciary to purchase company stock that he knows or should know is artificially inflated. Brief of the Secretary of Labor as Amicus Curie Supporting Appellants and Requesting Reversal at 15-16, *Phelps v. Calpine Corp., et al.*, (9^{th} Cir. 2006) (No. 06-15013).

72. A variety of circumstances contributed to the unacceptable level of risk borne by Plan participants as a result of the Plan's investment in Beazer stock, including, but not limited to:

(1) the Company's fraudulent and high-risk subprime loan origination practices;

(2) the lack of adequate internal controls over the Company's improper lending practices, which contributed to high foreclosure rates among borrowers;

(3) the Company's failure to acknowledge, manage, and accurately disclose the risks associated with its origination of subprime mortgages;

(4) the false, misleading, and incomplete statements regarding the Company's net income and financial results;

(5) the artificial inflation of Beazer stock caused by these circumstances; and

(6) the dire financial circumstances created by Beazer's improper business and accounting practices.

73. The risk of loss to the Plan was further exacerbated by the fact that Beazer stock constituted a significant portion of the Plan's total assets, as illustrated above, *supra* ¶ 38. Given the purpose of the Plan – to allow employees to save for retirement – the Plan's fiduciaries did not undertake any meaningful action to protect the Plan from the losses caused by the Plan holding millions of dollars of Beazer stock and acquiring even more Beazer stock during the Class Period. The Plan's fiduciaries continued to offer Beazer stock as an investment

option and purchase additional shares even while the stock was plunging in value. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan lost millions of dollars.

1. Background: The Rise and Risk of Subprime Mortgage Lending

74. The term "subprime" generally refers to "borrowers who do not qualify for prime interest rates because they exhibit one or more of the following characteristics: weakened credit histories typically characterized by payment delinquencies, previous charge-offs, judgments, or bankruptcies; low credit scores; high debt-burden ratios; or high loan-to-value ratios." Sandra F. Braunstein, Dir., Div. of Consumer and Cmty. Affairs, Fed. Reserve Bd., *Subprime Mortgages: Testimony Before the Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services,* Mar. 27, 2007, http://www.federalreserve.gov/newsevents/testimony/Braunstein20070327a.htm.

75. Subprime mortgage originations became increasingly popular in recent years – climbing from $120 billion in 2001 to $625 billion in 2005. Ruth Simon and James Hagerty, *More Borrowers With Risky Loans Are Falling Behind – Subprime Mortgages Surged As Housing Market Soared; Now, Delinquencies Mount*, Wall St. J., Dec. 5, 2006, at A1.

76. In order to take advantage of this new market, some lenders began weakening their underwriting standards. For example, lenders lowered the

minimum credit score borrowers needed to qualify for certain loans, allowed borrowers to finance a greater percentage of their home's value, and, in some cases, allowed borrowers to carry a higher debt load (*e.g.*, "no money down"). *See* Ruth Simon, *Mortgage Lenders Loosen Standards – Despite Growing Concerns, Banks Keep Relaxing Credit-Score, Income and Debt-Load Rules*, Wall St. J., July 26, 2005, at D1; *see also* Noelle Knox, *43% of First-time Home Buyers Put No Money Down*, USA Today, Jan. 18, 2006, at A1.

77. In addition to lowering underwriting standards, lenders began offering novel loan products to entice borrowers. Typical subprime mortgages include: interest-only mortgages that allow borrowers to make interest only payments for a period of years before the payments significantly increase when the principal is added; "pick-a-payment" loans, where borrowers choose their monthly payment (full payment, interest-only, or a minimum payment that might be lower than the payment required to reduce the balance of the loan); and adjustable rate loans that are initially fixed but then convert to variable rates, which are oftentimes highly unfavorable. Sandra Block, *"Pick-a-Payment" Mortgage Risks are High*, USA Today, July 18, 2005, at B3; *see also* Ruth Simon, *New Type of Mortgage Surges in Popularity – Fixed-Rate Interest-Only Loans Offer Lower Initial Payments but*

Delay Debt Reduction, Wall St. J., Apr. 19, 2006, at D1. These novel terms combined with lowered lending standards, led to high rates of borrower defaults.

78. Consequently, in late 2004 and early 2005, industry watchdogs began expressing growing fears that relaxed lending practices had increased "risks for borrowers and lenders in the overheated housing markets." Simon, *Mortgage Lenders Loosen Standards*, *supra*.

79. Trouble in the housing market emerged in 2005 when home values began to decline and the Federal Reserve instituted a series of interest rate hikes which caused the interest rates on variable rate loans, including mortgage loans, to rise. In response, "bank regulators issued their first-ever guidelines for credit-risk management for home-equity lending" in May 2005. *Id*.

80. However, most subprime lenders failed to heed these and other warnings. "Despite rising interest rates and general housing market cooling in 2005, many lenders continued to offer borrowers credit under weakened lending standards. Many lenders kept introductory 'teaser' rates low even after short-term interest rates began rising in June 2005." Simon & Hagerty, *supra*. Subprime borrowers, in particular, had difficulty meeting their monthly payment obligations after their introductory "teaser" rate expired. And because housing prices were falling, borrowers could not readily re-sell their property for a profit when they

could not pay their increased monthly payments, causing mortgage defaults to increase significantly.

81. In 2006, subprime mortgage exposure grew even riskier as lenders originated a large number of "liar loans" (no-documentation and low-documentation loans). This practice constituted as much as 40% of subprime mortgages issued in 2006, up from 25% in 2001. Gretchen Morgenson, *Crisis Looms In Market for Mortgages*, N.Y. Times, Mar. 11, 2007, at 1. In April 2006, mortgage industry research revealed that 90% of borrowers had overstated their incomes by 5% or more and had inflated their incomes by more than half in 60% of these cases. *Id.*

2. Published Warnings Place Plan Fiduciaries on Notice of Need to Investigate Risks at Beazer.

82. On July 26, 2005, the *Wall Street Journal* warned that "[m]ortgage lenders are continuing to loosen their standards, despite growing fears that relaxed lending practices could increase risks for borrowers and lenders in overheated housing markets." Simon, *Mortgage Lenders Loosen Standards, supra*.

83. Only two months later, *Reuters* reported that "rising delinquencies and forecasts of a deepening deterioration in housing have prompted big investors, including hedge funds, to bet against subprime-related securities since late 2005."

Al Yoon, *"Irrational" Mortgage Bond Prices Polarize Market*, Reuters, Sept. 25, 2006.

84. In response to the increasing risks inherent in subprime lending, "the Federal Reserve and the other banking agencies issued guidance on nontraditional mortgage products." Testimony of Sandra L. Thompson, *supra*. The "Interagency Guidance on Nontraditional Mortgage Product Risks" sent a warning to the marketplace that bank regulators were concerned about the lessened underwriting standards and general lax risk management practices of subprime lenders. *See* Office of the Comptroller of the Currency Board of Governors of the Federal Reserve System, *Interagency Guidance on Nontraditional Mortgage Product Risks,* Sept. 29, 2006, http://www.federalreserve.gov/BoardDocs/SRLetters/2006/SR0615a2.pdf.

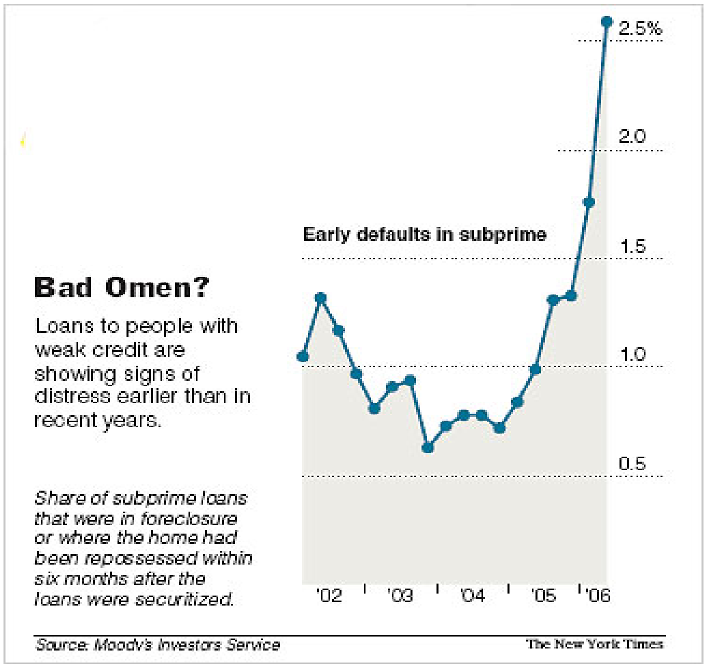
85. After experiencing a sharp increase in defaults from new borrowers, Ownit Mortgage Solutions, Inc. closed its doors in early December and filed for Chapter 11 bankruptcy just a few weeks later. E. Scott Reckard, *Demise of Ownit Mortgage Hits Home*, L.A. Times, Jan. 3, 2007, at C1.

86. On December 20, 2006, the Center for Responsible Lending issued a report predicting the worst foreclosure crisis in the modern mortgage market. Ron Nixon, *Study Predicts Foreclosure for 1 In 5 Subprime Loans*, N.Y. Times, Dec.

20, 2006, at C1. Shortly thereafter, several major mortgage lenders disclosed extraordinary rates of loan defaults, triggering inquiries from the SEC and FDIC, and resulting in several bankruptcy filings. *Id*.

87. On January 3, 2007, *Consumer Affairs* published an article that warned that "as the housing market slows to a crawl, many subprime lenders are collapsing faster than homes made of substandard materials, and the signs point to even more pain in the housing market as a result." Martin H. Bosworth, *Subprime Lender Implosion: Bad Omen For Housing*, Consumer Affairs, Jan. 3, 2007, http://www.consumeraffairs.com/news04/2007/01/mln_subprime.html.

88. Indeed, by early 2007, the collapse of the subprime lending industry was well underway. "Across the industry, 2.6 percent of the subprime loans securitized in the second quarter of 2006 had been foreclosed on or repossessed within six months. That is up from 1 percent for loans securitized in the second quarter of 2005," as reflected in the chart below:



Vikas Bajaj and Christine Haugheny, *Tremors at the Door - More People With Weak Credit Are Defaulting on Mortgages*, N.Y. Times, Jan. 26, 2007, at C2.

89. On March 11, 2007, the *New York Times* reported that more than two dozen subprime mortgage lenders had failed or filed for bankruptcy. Morgenson, *Crisis Looms In Market for Mortgages*, *supra*.

90. Two weeks later, the *Wall Street Journal* reported that New Century Financial Corp., the largest U.S. subprime lender, was on the "brink of bankruptcy," because it could not pay back loans it took from Wall Street banks. Gregory Zuckerman, *How Street Hit Lender – 'Subprime' King New Century Was Down but Not Quite Out; Then, Banks Shut Cash Spigot*, Wall St. J., Mar. 29, 2007, at C1.

91. Four days later, New Century filed for Chapter 11 bankruptcy. Julie Creswell and Vikas Bajaj, *Home Lender is Seeking Bankruptcy*, N.Y. Times, April 3, 2007, at C1.

92. On August 6, 2007, American Home Mortgage filed for Chapter 11 bankruptcy. Associated Press, *American Home Mortgage Seeks Chapter 11 Bankruptcy Protection*, N.Y. Times, Aug. 7, 2007, at C3.

93. Three days later, French bank BNP Paribas froze three of its funds exposed to United States subprime mortgages, blaming "a complete evaporation of liquidity." Anuj Gangahar and Adam Jones, *BNP Paribas Investment Funds Hit by Volatility*, Fin. Times, Aug. 9, 2007, http://www.ft.com/cms/s/0/9a4cabc4-464d-11dc-a3be-0000779fd2ac.html.

94. On August 16, 2007, Countrywide Financial Corporation, the biggest U.S. mortgage lender, narrowly avoided bankruptcy by taking out an emergency loan of $11 billion from a group of banks. Evelyn M. Rusli, *Countrywide Breaks Into the Piggy Bank*, Forbes.com, Aug. 16, 2007, http://www.forbes.com/2007/08/16/countrywide-mortgage-credit-markets-equity-cx_er_0816markets13.html. Pundits noted that "[i]n the wake of the subprime meltdown, Countrywide Financial – along with many other mortgage lenders – finds itself with a heavily

devalued loan portfolio." *Id*. The price of Countrywide stock dropped 20.9% in one day after news of its liquidity problems was released.

95. On August 31, 2007, President Bush announced a limited bailout of U.S. homeowners unable to pay the rising costs of their debts. Steven R. Weisman, *Bush Plans a Limited Intervention on Mortgages*, N.Y. Times, Sept. 1, 2007, at C1.

96. That same day, Ameriquest, the largest subprime lender in the United States in 2005, announced it was going out of business. Jonathan Stempel, *Ameriquest Closes, Citigroup Buys Mortgage Assets*, Reuters, Sept.1, 2007, http://www.reuters.com/article/businessNews/idUSN31284193200 70901.

97. On December 22, 2007, the *Economist* estimated subprime defaults would reach a level between $200-300 billion. *The Credit Crunch: Postcards From the Ledge*, The Economist, Dec. 19, 2007.

98. Throughout this period, notwithstanding the dire financial circumstances faced by the Company, Defendants continued to offer Beazer stock as a Plan investment option, to maintain Plan investments in Beazer stock, and to make additional Plan investments in Beazer stock.

B. Defendants Cause or Permit the Purchase of Beazer Stock as Defendants Beazer and McCarthy Tout Beazer's Financial Health, Despite Knowledge of Beazer's Inadequately Disclosed Stock Risk.

99. Beazer's seemingly strong financial picture in recent years was based in part on its strategy to market and build homes for low-income homebuyers who obtained subprime loans. As this strategy faltered, so too did the Company.

100. To combat the growing default rate in the subprime market, Beazer repeatedly made false statements regarding its financial condition and false assurances to the Plan's participants and the public regarding the sufficiency of its risk-management processes. These false statements caused the price of Beazer stock to be artificially inflated during the Class Period.

101. The Company necessarily knew of its own financial condition, and Defendant McCarthy's position as CEO and Defendant Brian Beazer's position as Chairman of the Board indicate that they had access to adverse undisclosed information about the Company's business, operations, products, operational trends, financial statements, markets, and present and future business prospects via access to internal corporate documents (including the Company's operating plan, budgets and forecasts, and reports of actual operations compared thereto), conversations and connections with other corporate officers and employees, attendance at management and Board meetings, and receipt of reports and other information provided in connection with these meetings. Because of their access

to this information, Defendants McCarthy and Brian Beazer knew or should have known that Beazer's common stock was an imprudent investment for the Plan's assets during the Class Period.

102. In light of the steady drumbeat of published warnings as well as their own knowledge of the Company's financial condition, the remaining Defendants should have conducted an independent investigation of the risks posed by Beazer stock during the Class Period. No prudent fiduciary would allow employees to invest in a company facing (and hiding) the tremendous risks Beazer took on during the Class Period.

103. Nonetheless, the Plan's fiduciaries continued to offer Beazer stock as an investment option and permitted the Plan to purchase additional shares. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets inevitably decreased in value.

104. Despite Defendants' knowledge or what should have been their knowledge of Beazer's risky business practices during the Class Period, the Company presented a positive outlook regarding Beazer stock as an investment for the Plan's assets. Management, including Defendant McCarthy, publicized strong Company performance and stock benefits.

105. Beazer publicly and repeatedly highlighted favorable operating results and revenue growth trends, as well as other positive financial indicators, which were later found to be misleading and forced the Company to restate its financial statements for fiscal years 2004 through 2006 and the interim periods of fiscal years 2006 and 2007. *See* Beazer Current Report, Form 8-K, Oct. 11, 2007, at Ex. 99.1.

106. For example, at the beginning of the Class Period, Beazer issued a press release touting its record earnings. It highlighted quarterly revenues of $1.2 billion on 4,631 home closings, up 14% from the third quarter of fiscal 2004. Beazer Current Report, Form 8-K, July 28, 2005, at Ex. 99.1. The Company expressed "confidence in [its] future growth opportunities" and predicted "diluted earnings per share from a range of $7.00 - $7.25 to a range of $8.00 - $8.25 in fiscal 2005 before the goodwill impairment charge." *Id*.

107. On November 2, 2005, Beazer again proclaimed record earnings, including quarterly revenues of $1.8 billion on 6,339 home closings, up almost 50% from the fourth quarter of fiscal 2004. Beazer Current Report, Form 8-K, Nov. 2, 2005, at Ex. 99.1. For the year ended September 30, 2005, the Company reported net income of $262.5 million, or $5.87 per diluted share compared to $235.8 million or $5.59 per diluted share in fiscal 2004. *Id*. The Company's total

revenue was $5.0 billion in fiscal 2005, compared to $3.9 billion in the previous year. *Id*.

108. Beazer's January 19, 2006 press release also announced record earnings, including quarterly revenues of $1.1 billion on 3,829 home closings, up 21% from the first quarter of fiscal 2005. Beazer Current Report, Form 8-K, Jan. 19, 2006, at 99.1. The Company expressed "confidence in [its] future growth opportunities" and predicted "diluted earnings per share to meet or exceed $10.50 per share." *Id*. The press release also stated:

> "We are pleased to announce record results for our first quarter of fiscal 2006," said President and Chief Executive Officer, Ian J. McCarthy.
>
> * * *
>
> "These results illustrate the effectiveness of our Profitable Growth Strategy aimed at achieving greater profitability by optimizing efficiencies, selectively increasing market penetration, and leveraging our national brand," McCarthy continued. "Beazer Homes believes its ongoing commitment to execution of this strategy will position the company well in both the near-term environment and long-term environment. Presently, while certain housing markets are experiencing a return to normalized levels of activity, compared to recent years, the long-term industry fundamentals remain extremely compelling."

Id.

109. Beazer continued its positive statements regarding the Company's financial position, reporting record second quarter 2006 earnings and earnings per

share over the prior year's results, as well as increased closings and revenue from home sales. Beazer Current Report, Form 8-K, Apr. 27, 2006, at Ex. 99.1. The Company also projected that its fiscal 2006 diluted per share earnings would be \$10.00 - \$10.50. *Id*.

110. Although Defendant McCarthy acknowledged that the housing market was becoming turbulent, he dismissed concerns about decreased closings, stating that the Company's business philosophy, national status, and product diversity would insulate them in both the short and long term, and that the outlook was good, because "we continue to believe that the long-term industry fundamentals, including increased demand driven by demographic and employment trends coupled with further supply constraints in our major markets, remain compelling." *Id*.

111. For the quarter ended June 30, 2006, Beazer reported a downturn in its revenue but still remained positive about the future. Beazer Current Report, Form 8-K, July 27, 2006, at Ex. 99.1. The related press release stated:

> "Beazer Homes delivered solid fiscal third quarter financial results in an increasingly difficult housing market," said President and Chief Executive Officer, Ian J. McCarthy. "Across the country, the housing markets that had experienced rapid price appreciation have seen significant increases in cancellation rates and resale home inventories. While it is difficult to predict the duration of these current market trends, our broad geographic and product diversity, coupled with our

> commitment to profitability and prudent capital allocation, should position us well for the future. We continue to believe that the long-term industry fundamentals, based on demographic driven demand and employment trends, together with further supply constraints, remain compelling."
>
> *   *   *
>
> "While the current market environment is more challenging than anticipated earlier in the year, we remain focused on the value drivers which we believe will benefit us in the long term," said James O'Leary, Executive Vice President and Chief Financial Officer. "During the quarter, we exited a number of less profitable markets and positions while raising the liquidity required to take advantage of the opportunities that will generate meaningfully higher returns in the future. The increase in our revolving credit facility and the two debt offerings completed this quarter meaningfully strengthened our financial position and liquidity, positioning us for the eventual upturn. We will continue to focus on opportunistically growing our business while prudently returning capital to our shareholders during this more challenging period."
>
> *   *   *
>
> McCarthy concluded, "We expect continued execution of our Profitable Growth Strategy, including our share repurchase program, to result in continued profitability and enhanced shareholder value in the near and long term. Looking ahead, we do not see conditions in the housing markets improving significantly in the remainder of the fiscal year. As such, we have adjusted our expectation for our fiscal 2006 diluted earnings per share to be in a range of $9.25-$9.75. This compares to adjusted earnings per share of $8.72 in fiscal 2005."

Id.

112. On November 7, 2006, Beazer issued a press release in which it reported total revenues for the quarter ended September 30, 2006 of $1.88 billion as compared to $1.81 billion for the prior year. Beazer Current Report, Form 8-K, Nov. 7, 2006, at Ex. 99.1. Additionally, the Company reported 6,411 home closings, down from 6,339 in the prior year and 2064 new home orders, down more than 58% from the prior year. For the year ended September 30, 2006, the Company reported net income of $388.8 million or $8.89 per diluted share, compared to $262.5 million or $5.87 per diluted share in fiscal 2005. The Company's total revenue was $5.46 billion in fiscal 2006, compared to $5.0 billion in the prior year. The press release stated in part:

> "Beazer Homes had record fourth quarter closings and revenues in fiscal 2006 as we focused on converting our existing backlog in what remains a challenging housing market," said President and Chief Executive Officer, Ian J. McCarthy. "Despite our strong close of fiscal 2006, most markets across the country continue to experience higher levels of resale home inventories, lower levels of demand for new homes, significant increases in cancellation rates and significantly higher discounting. As it is difficult to predict the duration of these factors, we have proactively taken steps to align our overhead structure and capital spending with our expectations for a reduced level of home closings in fiscal 2007. We believe this disciplined commitment to profitability and prudent capital allocation, coupled with our broad geographic and product diversity, will position us well for the continuing difficult market environment and the eventual upturn. We continue to believe that the long-term industry fundamentals, based on demographic driven

> demand and employment trends, together with further supply constraints, remain compelling."
>
> *   *   *
>
> During this period, the Company is focused on maintaining balance sheet strength, reducing costs, and maximizing its financial resources to better position the company to take advantage of those opportunities that will arise when conditions stabilize. The steps taken in September and October to align the company's cost structure with the current environment are consistent with the company's goal to be in the top quartile of its peer group with respect to margins and returns.

Id.

113. However, just two months later, on January 25, 2007, Beazer revised its first quarter 2007 financial results, stating that it would report a net loss of $59 million, compared to net income of $89.9 million in the first quarter of fiscal 2007. Beazer Current Report, Form 8-K, Jan. 25, 2007, at Ex. 99.1. The Company's total revenues dropped almost 93% from $1.1 billion in the first quarter of the prior fiscal year to $806.4 million. The accompanying press release stated:

> "Operating conditions remained extremely challenging for the housing industry during our first quarter of fiscal 2007," said President and Chief Executive Officer, Ian J. McCarthy. "Most markets across the country continue to experience lower levels of demand for new homes, high cancellation rates and significant levels of discounting. At this point, we have yet to see any meaningful evidence of a sustainable recovery in the housing market, although we would expect to gain a better read on the market as the traditional spring selling season gets underway."
>
> *   *   *

> The current market environment continues to be characterized by weak demand, with heavy discounting required to drive meaningful sales volume. While this could improve as the year progresses, the Company currently believes that the low end of its previously announced outlook of 12,000 - 13,500 closings is now a more reasonable target in fiscal 2007. At this level of closings and the current conditions in the marketplace, the Company currently expects fiscal 2007 diluted earnings per share to be in the range of $1.25 - $1.50 prior to any impact of inventory impairments and abandonment of land option contracts.
>
> During this period, the Company will focus on maintaining balance sheet strength, continue to reduce costs, and maximize its financial resources to better position the Company to take advantage of those opportunities that will arise when conditions stabilize. Steps taken to date to align the Company's cost structure with the current environment are consistent with the Company's goal to be in the top quartile of its peer group with respect to margins and returns.

Id.

114. Notwithstanding the downturn in the housing market, Defendant McCarthy implied that first quarters were historically weak and steps had been taken to reduce overhead, convert backlog into closings, and reduce inventory. *Id*. McCarthy suggested that these steps would provide positive results and "an anticipated increase in activity as we enter the spring selling season." *Id*.

115. McCarthy sought to decrease concern by stating: "We believe this disciplined approach, coupled with our broad geographic and product diversity, will position us well for a continuing difficult market environment and the eventual

upturn. We maintain that the long-term industry fundamentals, based on demographic driven demand and employment trends, together with further supply constraints, remain compelling." *Id*.

116. At no time during this period did Defendants address the risk of loss associated with their risky loan origination and business practices.

117. One month after the issuance of the January 25, 2007 press release, Beazer's General Counsel, Kenneth J. Gary, was fired because of "a pattern of personal conduct which includes violations of company policies." Beazer Current Report, Form 8-K, Feb. 9, 2007.

C. The Truth Begins to Emerge: Beazer's Fraudulent and Inappropriate Lending Practices Come to Light.

118. On March 18, 2007, the *Charlotte Observer* published the first story of a four-part investigative series shedding light on Beazer's questionable home sales and loan origination practices in the Charlotte, North Carolina area. *See* Binyamin Appelbaum, Lisa Hammersly Munn, & Ted Mellnik, *Sold a Nightmare: Concord Subdivision Proves Lucrative For Builder and Costly for 1st-Time Owners*, Charlotte Observer, Mar. 18, 2007, at A1. The *Observer* found that Beazer had "experimented in selling low-cost homes to low-income families." *Id*. Additionally, Beazer not only built the homes in question but "arranged mortgage loans for two-thirds of the buyers," allowing Beazer to arrange "larger loans than

some buyers could afford." *Id*. Since the majority of the loans were insured by the Federal Housing Administration ("FHA"), "Beazer and the lender had little to lose if the borrower could not afford the loan." *Id*.

119. The article detailed the marketing practices Beazer employed to lure low-income buyers, which included holding pizza parties at apartment complexes and taking renters to see new developments. *Id*. Beazer's marketing materials at the time stated: "We believe in the dream . . . We believe that everyone deserves to own their own home." *Id*.

120. Unfortunately, not everyone could pay for their new home. Foreclosure rates in several Beazer developments in North Carolina ran from 20-34%, compared with a national average of 3%. *Id*. In one Beazer subdivision in North Carolina where the Company had financed most of the homes and the FHA had insured most of the mortgage loans, 77 out of the 406 homes were in foreclosure. *Id*. In fact, by 2007, the FHA had paid out $5 million to cover foreclosures in this subdivision alone. *Id*.

121. The *Observer* also found that Beazer participated in the falsification of loan applications, encouraging borrowers to omit negative information and, in some cases, altering the application without the borrower's knowledge. *Id*.

122. Part Two of the series explored foreclosures in Mecklenburg County, North Carolina. *See* Binyamin Appelbaum, Lisa Hammersly Munn, & Ted Mellnik, *Starter Homes, Sad Endings: Number of Foreclosures Climbs as 1st-Time Buyers Lose Low-Priced Houses,* Charlotte Observer, Mar. 19, 2007, at A1. The *Observer* revealed:

> Two kinds of home purchase loans are associated with many of the problems, according to an Observer analysis of foreclosures in 2003 and 2004. Subprime loans accounted for at least 24 percent of Mecklenburg foreclosures. Government-insured loans accounted for almost 30 percent.
>
> The same companies often arrange both kinds of loans. They work with homebuyers who don't get loans from conventional sources such as banks. Some of those people have bad credit, others have little savings or income, some simply don't know that they could get a better deal somewhere else.

Id.

123. Two days later, Beazer announced the resignation of James O'Leary, Beazer's Chief Financial Officer and Executive Vice President. Beazer Current Report, Form 8-K, Mar. 22, 2007, at Ex. 99.1.

D. Beazer's Improper and Highly Risky Practices Lead to Lawsuits and Governmental Investigations.

124. Beazer is the subject of numerous civil suits and is under investigation by several state and federal authorities for fraud related to its mortgage origination practices.

125. On March 28, 2007, the *Charlotte Observer* reported Federal investigators – including the FBI, IRS, and Department of Housing and Urban Development – had launched a criminal inquiry into Beazer's business and loan origination practices. Binyamin Appelbaum, *Home Builder Under Investigation by FBI*, Charlotte Observer, Mar. 28, 2007, at A1. According to an FBI spokesperson, the agencies were concerned that "[t]here [was] potentially all sorts of fraud issues associated with Beazer to include corporate, mortgage or investments in varying degrees." Michael Corkery, *Beazer Home's Lending Practices Draw FBI Focus*, Wall St. J., Mar. 28, 2007, at A3.

126. In response, Beazer issued a press release:

> At this time, Beazer Homes can not [sic] comment on or verify any investigation. However, we will fully cooperate with any investigation by any government agency.
>
> We build homes nationwide. The allegation by the Charlotte Observer focused primarily on one Charlotte subdivision, Southern Chase. In that subdivision, Beazer Mortgage Corporation originated the loans for the borrowers and served as a broker, not a lender. We were involved on the front end of the loan transaction process, compiling the necessary information, which we then submitted to the lender for underwriting review. The ultimate underwriting decision for the loan rested with the lender.
>
> Based on our internal investigations to date, we have not found any evidence to support the allegation in the Charlotte Observer.

Beazer Current Report, Form 8-K, Mar. 29, 2007, at Ex. 99.1.

127. Beazer also reported that it had received a grand jury subpoena from the U.S. Attorney's Office in the Western District of North Carolina seeking documents related to its mortgage origination services. Beazer Current Report, Form 8-K, Mar. 29, 2007.

128. Additionally, numerous class action and shareholder derivative lawsuits were filed against Beazer and many of the Defendants in this case, alleging, among other things, unfair or fraudulent lending practices. *See* Beazer Current Report, Form 8-K, Apr. 26, 2007, at Ex. 99.1; *see also* Beazer Current Report, Form 8-K, Mar. 29, 2007.

129. In response to these investigations and allegations, the Audit Committee of Beazer's Board of Directors "initiated an internal review of Beazer Homes' mortgage origination business and related matters and [] retained independent legal counsel and an independent financial consultant to assist with that review." Beazer Current Report, Form 8-K, Apr. 26, 2007, at Ex. 99.1.

130. Finally, Beazer announced that it had received notice on May 1, 2007, that the SEC was "conducting an informal inquiry to determine whether any person or entity related to Beazer Homes has violated federal securities laws." Beazer Current Report, Form 8-K, May 3, 2007. Almost three months later, the SEC

informed Beazer that it had raised its informal inquiry to a formal order of private investigation. Beazer Current Report, Form 8-K, July 23, 2007.

131. In the meantime, Beazer announced that its Senior Vice President and Chief Accounting Officer, Michael T. Rand, had been terminated due to his "attempts to destroy documents in violation of the Company's document retention policy." Beazer Current Report, Form 8-K, June 27, 2007. The Company stated that "the Audit Committee, with the assistance of independent legal counsel, [was] conducting an internal investigation of the Company's mortgage origination business and related matters and recently became aware of Mr. Rand's actions during that investigation." *Id*.

E. Beazer's Stock Price Drops Further as Its Troubles Continue.

132. On July 2, 2007, Beazer common stock closed at $24.27 per share, down 63% from the beginning of the Class Period.

133. On July 26, 2007, Beazer issued a press release announcing financial results for the third fiscal quarter ended June 30, 2007, that reported a net loss of $123 million. Beazer Current Report, Form 8-K, July 26, 2007, at Ex. 99.2. Beazer had closed only 2,666 homes for the quarter, compared to 4,156 in third quarter 2006, and had achieved only $761 million in total revenues, compared to $1.2 billion in third quarter 2006. *Id.*

134. Beazer also announced that financial lenders had cut Beazer's line of credit in half: from $1 billion to $500 million. Beazer Current Report, Form 8-K, July 26, 2007, at Ex. 99.1.

135. The *Atlanta Journal-Constitution* reported that "[w]ith investigations by the U.S. Attorney's Office in Charlotte, N.C. and the federal Securities and Exchange Commission ongoing, news of a second consecutive quarter of losses last week appear to have triggered Wall Street rumors that Beazer was preparing to file bankruptcy." Julie B. Hairston, *Beazer Shares Pounded After Rumor of Bankruptcy Filing*, Atlanta J.-Const., Aug. 2, 2007, at C1.

136. In response to these rumors, Beazer stated:

> We have become aware of rumors circulating in the market about Beazer Homes' liquidity and a prospective bankruptcy filing. We do not know where these scurrilous and unfounded rumors started. For an accurate representation of the company's financial position, including the company's liquidity and near-term prospects, we encourage investors to refer to the company's recently released third quarter earnings release and the script of our conference call with analysts and investors.

Beazer Current Report, Form 8-K, Aug.1, 2007, at Ex. 99.1.

137. The next day, Standard & Poor's Rating Services lowered Beazer's ratings further into junk from BB to BB- and reported a continuing negative outlook. Stephen Taub, *The Beazer Factor*, CFO.com, Aug. 2, 2007, www.cfo.com/article.cfm/9607220?f=related.

138. The following day, Beazer common stock closed at $11.20 per share.

139. Days later, on August 10, 2007, Beazer reported that it would delay filing its quarterly report, because it had found that "its former Chief Accounting Officer may have caused reserves and other accrued liabilities, relating primarily to land development costs and costs to complete houses, to have been recorded in prior accounting periods in excess of amounts that would have been appropriate under generally accepted accounting principles." Notice of Late Filing, Form NT 10-Q, Aug. 10, 2007.

140. Beazer, however, was not "able to predict or determine whether any adjustments will be required with respect to the Company's previously issued financial statements or whether the release of any portion of these reserves or accrued liabilities will have any impact on the Company's financial results for the quarterly period ended June 30, 2007." *Id*.

141. Soon thereafter, Fitch Ratings downgraded Beazer's credit rating from BB+ to BB, sending it further into junk and placing it on Rating Watch Negative. John Spence, *Credit Fears Knock Beazer's Shares,* MarketWatch, Aug. 14, 2007, http://www.marketwatch.com/news/story/beazer-homes-under-more-pressure/ story.aspx?guid=%7BE7E7032A%2DC4A5%2D44E0%2DAB82%2D4C8E4283F 17%7D.

142. Two days later, Beazer reported on the status of its internal investigation and delayed SEC filings:

> As previously disclosed in the Company's Form 12b-25 Notification of Late Filing filed with the Securities and Exchange Commission (the "SEC") on August 10, 2007, the Company has not yet filed with the SEC the Company's Quarterly Report on Form 10-Q for the quarterly period ended June 30, 2007. The Company's delay in filing the Form 10-Q is the result of an independent internal investigation being conducted by the Audit Committee of the Beazer Homes Board of Directors into Beazer Homes' mortgage origination business, including, among other things, an investigation of certain evidence that the Company's subsidiary, Beazer Mortgage Corporation, violated U.S. Department of Housing and Urban Development ("HUD") regulations and may have violated certain other laws and regulations in connection with certain of its mortgage origination activities. The Audit Committee has retained independent legal counsel which, in turn, has retained independent forensic accountants, to assist with the investigation. During the course of the investigation, it was also discovered that the Company's former Chief Accounting Officer caused reserves and other accrued liabilities, relating primarily to land development costs and costs to complete houses, to have been recorded in prior accounting periods in excess of amounts that would have been appropriate under generally accepted accounting principles. These reserves and other accrued liabilities, if reversed in subsequent accounting periods, could have been used to reduce the Company's operating expenses by amounts that would not have been appropriate under generally accepted accounting principles. Other accounts and amounts reported in prior period financial statements may also have been affected.
>
> The Company is not, at this time, able to predict or determine whether the ultimate outcome of the internal investigation will necessitate any adjustments with respect to the Company's previously issued financial statements or whether the matters

> under investigation will have any impact on the Company's financial results for the quarterly period ended June 30, 2007 or on the Company's balance sheet as of such date. However, at this time, the Company does not believe that the amounts at issue with respect to the reserves and accrued liabilities described above during the three and nine month periods ended June 30, 2007 and 2006 are quantitatively material. The Company will complete a qualitative assessment of all identified errors and any resulting effects on the June 30, 2007 quarterly period or any prior periods upon completion of the internal investigation. In addition, at this time, the Company does not believe that the resolution of the investigation will result in an adjustment to the Company's previously reported cash position. The internal investigation is ongoing and, at this time, the Audit Committee has not been able to reach any prediction or conclusion with respect to the quantitative materiality of the mortgage origination issues under investigation.
>
> Due to the internal investigation, the financial information in Exhibit 99.1 to this Form 8-K has not been reviewed by the Company's independent registered public accounting firm and the Company's financial results contained therein are subject to change to reflect any necessary corrections or adjustments resulting from the outcome of the investigation. As stated above, no determination has been made as to whether any adjustments will be required with respect to the Company's previously filed financial statements.
>
> The Company's Audit Committee and its independent counsel are working expeditiously to complete the internal investigation as soon as practicable.

Beazer Current Report, Form 8-K, Aug. 15, 2007, at Ex. 99.2.

143. On August 24, 2007, Moody's Investor Service cut Beazer's credit ratings and downgraded them further into junk from Ba2 to B1. Gabriel Madway,

Moody's Downgrades Beazer Homes Ratings, MarketWatch, Aug. 24, 2007, http://www.marketwatch.com/news/story/moodys-downgrades-beazer-homes-ratings/story.aspx?guid=%7B6C0438D6%2DEB4A%2D441E%2D9A9B%2DEE5F25B1040D%7D&dist=FSQ. Moody's indicated that "[t]he ratings remain on review for possible further downgrade." *Id*.

144. By the end of the month, the Company stock had fallen to $10.47 per share. Over the course of just one year, Beazer stock had dropped 74% in value. Despite this precipitous decline and the serious mismanagement and dire financial circumstances that caused the decline, Defendants failed to take any action to protect the Plan from huge losses.

F. The Results of the Audit Committee's Internal Investigation Necessitate a Restatement, Warning that Earlier Financial Statements are Unreliable.

145. On October 11, 2007, Beazer issued a press release announcing the interim findings of the Audit Committee's independent internal investigation. *See* Beazer Current Report, Form 8-K, Oct. 11, 2007, at Ex. 99.1. After examining the Company's mortgage origination business, accounting procedures, and financial reporting practices, "the Audit Committee [] determined that it [would] be necessary for the Company to restate its financial statements for fiscal years 2004 through 2006 and the interim periods of fiscal years 2006 and 2007." *Id*. The

Company explained that the restatement would also affect the financial results for fiscal years 1999 through 2003. *Id*.

146. During its investigation, the Audit Committee "found evidence that employees of the Company's Beazer Mortgage Corporation subsidiary violated certain U.S. Department of Housing and Urban Development ('HUD') regulations, particularly in relation to Down Payment Assistance programs, in certain Federal Housing Administration ('FHA') insured loans originated by Beazer Mortgage Corporation dating back to at least 2000." *Id*.

147. Additionally, the Committee reported that the Company had improperly recorded revenue and engaged in inaccurate accounting procedures in violation of generally accepted accounting principles ("GAAP"). *Id*.

148. As a result, the Company warned that "the Company's previously issued financial statements for the periods impacted by the restatement as described above and the related audit reports of the Company's independent registered public accounting firm ***should no longer be relied upon***." *Id*. (emphasis added).

149. Pundits noted that "the real story is how 'stunningly poor' the company's performance has been in the fourth quarter." Ruthie Ackerman, *Wheezing Beazer Gets a Break*, Forbes.com, Oct. 11, 2007,

http://www.forbes.com/2007/10/11/beazer-mortgage-investigation-markets-equity-cx_ra_1011markets28.html. And that Beazer had effected "a huge departure from internal controls, and [CEO Ian McCarthy]'s going to have to take the blame." Julie B. Hairston & Bill Torpy, *Beazer Faces Tough Chore: Reviving Builder After Admission of Violating Federal Lending Standards Will Require Months, if Not Years*, Atlanta J.-Const., Oct. 13, 2007, at C1.

150. Credit agencies Fitch and Standard & Poor's downgraded Beazer securities further into junk, citing "'the uncertain economic impact stemming from accusations of fraud in the Beazer Mortgage Co. subsidiary.'" Stacy-Marie Ishmael, *Beazer Suffers Rating Downgrade*, Fin. Times, Oct. 13, 2007, at 8.

151. In early November, Beazer explained that it had "reduced overall headcount by approximately 650 positions, or 25%. Since reaching peak headcount in March 2006, overall headcount has declined by over 50% through reductions in force and attrition." Beazer Current Report, Form 8-K, Nov. 6, 2007, at Ex. 99.1. The Company also announced that it had suspended its fourth quarter dividend in an attempt to conserve cash. *Id*. Nonetheless, Defendant McCarthy stressed a long term positive outlook:

> "We maintain the view that the long term fundamentals for housing remain compelling and that our strategic initiatives to differentiate Beazer Homes in the eyes of the consumer and to allocate capital and resources in order to enhance long term

> shareholder value will position us well for the future. At the same time, we must continue to adapt to the realities of the current market by remaining disciplined in our operating approach and continuing to focus on initiatives aimed at responding to what we believe will continue to be a challenging environment in the near term. These initiatives include reductions in direct costs, overhead expenses and land spending, and an intense focus on sales and marketing efforts to reduce unsold home inventories, all with the aim of generating cash."

Id.

152. At the same time, "a shareholder advisory group turned up the pressure on the board of Beazer . . . to fire CEO Ian McCarthy and name an independent board chair, accusing him of 'the most stunning leadership failure in the entire homebuilding industry.'" Ruthie Ackerman, *Calls Rise to Oust Beazer CEO*, Forbes.com, Nov. 6, 2007, http://www.forbes.com/2007/11/06/beazer-ctw-closer-markets-equity-cx_ra_1106markets47.html.

153. On February 1, 2008, Beazer announced it had closed Beazer Mortgage and was discontinuing its mortgage origination services. Beazer Current Report, Form 8-K, Feb. 1, 2008, at Ex. 99.1. The Company also stated that it expected to release financial data for the periods subject to restatement by May 15, 2008. *Id*.

154. On May 12, 2008, Beazer filed its long overdue Form 10-K for the year ended September 30, 2007, which also included restated consolidated

financial statements for fiscal 2005 and 2006 and restated Selected Financial Data for fiscal years 2003 and 2004. *See* Beazer Current Report, Form 8-K, May 12, 2008, at Ex. 99.1. In addition, Beazer filed its Form 10-Q for the quarter ended June 30, 2007, and amended quarterly reports for the quarters ended December 31, 2006 and March 31, 2007. *Id*. These reports reflected the completed restatement, which also stated:

> As previously announced, during the course of its independent investigation, the Audit Committee determined that the Company's mortgage origination practices related to certain loans in prior periods violated certain applicable federal and/or state origination requirements. The Audit Committee also discovered accounting errors and/or irregularities that required restatement resulting primarily from (1) inappropriate accumulation of reserves and/or accrued liabilities associated with land development and house costs ("inventory reserves") and the subsequent improper release of such reserves and accrued liabilities and (2) inaccurate revenue recognition with respect to certain model home sale lease-back transactions.
>
> *   *   *
>
> The Company's management performed an assessment of the effectiveness of the Company's internal control over financial reporting as of September 30, 2007. Management concluded that, as of September 30, 2007, the Company did not maintain effective internal control over financial reporting because of the identification of material weaknesses in its internal control over financial reporting.

Id.

155. Three days later, Beazer filed its delayed quarterly reports for the quarters ended December 31, 2007 and March 31, 2008. For the first quarter of 2008, Beazer reported a net loss of $138.2 million. Beazer Quarterly Report, Form 10-Q, Dec. 31, 2007. For the second quarter of 2008, Beazer reported a net loss of $229.9 million. Beazer Quarterly Report, Form 10-Q, Mar. 31, 2008.

156. At the time the restatement was released, Beazer common stock had fallen to $9.46 per share, a drop of over 85% in value from the beginning of the Class Period. Even Still, Defendants took no action to protect the Plan.

G. Defendants Knew or Should Have Known that Beazer Stock Was an Imprudent Investment.

157. Given the facts described above, it is clear that since the beginning of the Class Period, the Company's stock was an imprudent investment for the Plan because of, among other things, the Company's: (1) high-risk loan origination practices, (2) lack of adequate internal controls over its improper loan origination practices; (3) mismanagement of risk and liquidity, (4) inaccurate accounting and financial reporting; (5) misleading statements and persistent refusal to disclose all material information regarding its true financial condition; (6) consequential artificial inflation of its stock price; and (7) dire financial circumstances created by Beazer's improper business and accounting practices.

158. Due to their positions within the Company, Defendants knew or should have known that Beazer stock was an unduly risky investment option. They knew or should have known that the Company was extending below-standard mortgages that were at a high risk of default, the Company lacked adequate internal controls, and statements regarding the Company's net income and financial results were misleading and inaccurate.

159. Defendants had substantial warnings of the impending subprime crisis, because as early as 2006 the imminent collapse of the subprime lending industry was widely documented. To the extent that some of the Defendants did not have actual knowledge of the degree to which Beazer stock was inflated due to the Company's undisclosed subprime exposure, those Defendants were on notice of several "red flags" that should have caused them to investigate the risks posed by Beazer stock. However, they conducted no such investigation.

160. The red flags included the following:

- On July 26, 2005, the *Wall Street Journal* warned that "[m]ortgage lenders are continuing to loosen their standards, despite growing fears that relaxed lending practices could increase risks for borrowers and lenders in overheated housing markets";

- On September 25, 2006, *Reuters* reported that "rising delinquencies and forecasts of a deepening deterioration in housing have prompted big investors, including hedge funds, to bet against the securities since late 2005";

- On September 29, 2006, the Federal Reserve and other banking agencies issued the "Interagency Guidance on Nontraditional Mortgage Product Risks" in response to the lessened underwriting standards and general lax risk management practices of subprime lenders;

- In early December, Ownit Mortgage Solutions, Inc. closed its doors and filed for Chapter 11 bankruptcy just a few weeks later;

- On December 20, 2006, the Center for Responsible Lending issued a report predicting the worst foreclosure crisis in the modern mortgage market;

- On January 3, 2007, *Consumer Affairs* warned that "as the housing market slows to a crawl, many subprime lenders are collapsing faster than homes made of substandard materials, and the signs point to even more pain in the housing market as a result";

- On February 9, 2007, Beazer's General Counsel, Kenneth J. Gary, was fired because of "a pattern of personal conduct which includes violations of company policies";

- On March 11, 2007, the *New York Times* reported that more than two dozen subprime mortgage lenders had failed or filed for bankruptcy;

- Beginning March 18, 2007, the *Charlotte Observer* published a four-part investigative series highlighting Beazer's questionable home sales and loan origination practices in North Carolina;

- On March 21, 2007, James O'Leary, Beazer's Executive Vice President and Chief Financial Officer, resigned;

- On March 27, 2007, the *Charlotte Observer* reported Federal investigators – including the FBI, IRS, and HUD – had launched a criminal inquiry into Beazer's business and loan origination practices;

- Also on March 27, 2007, Beazer received a grand jury subpoena from the U.S. Attorney's Office in the Western District of North Carolina seeking documents related to its mortgage origination services;

- On March 29, 2007, the *Wall Street Journal* reported that New Century Financial Corp., the largest U.S. subprime lender at the time, was on the "brink of bankruptcy" because it could not pay back loans taken out from Wall Street banks;

- On April 2, 2007, New Century filed for Chapter 11 bankruptcy;

- On April 26, 2007, the Audit Committee of Beazer's Board of Directors "initiated an internal review of Beazer Homes' mortgage origination business and related matters and [] retained independent legal counsel and an independent financial consultant to assist with that review";

- On May 1, 2007, the SEC began an "informal inquiry to determine whether any person or entity related to Beazer Homes has violated federal securities laws";

- On June 27, 2007, Michael T. Rand, Beazer's Chief Accounting Officer, was terminated for cause due to his "attempts to destroy documents in violation of the Company's document retention policy";

- On July 20, 2007, the SEC raised its informal inquiry to a formal order of private investigation;

- On July 26, 2007, Beazer announced that financial lenders had cut Beazer's line of credit in half: from $1 billion to $500 million;

- On August 6, 2007, American Home Mortgage filed for Chapter 11 bankruptcy;

- On August 9, 2007, French bank BNP Paribas froze three of its funds exposed to United States subprime mortgages, blaming "a complete evaporation of liquidity";

- On August 15, 2007, Beazer explained that it was delaying filing its quarterly report due to "certain evidence" that Beazer Mortgage "violated U.S. Department of Housing and Urban Development ('HUD') regulations and may have violated certain other laws and regulations in connection with certain of its mortgage origination activities";

- On August 16, 2007, Countrywide Financial Corporation, the largest U.S. mortgage lender, narrowly avoided bankruptcy by taking out an emergency loan of $11 billion from a group of banks;

- On August 31, 2007, President Bush announced a limited bailout of U.S. homeowners unable to pay the rising costs of their debts;

- On August 31, 2007, Ameriquest, the largest subprime lender in the United States in 2005, announced it was going out of business;

- On October 11, 2007, Beazer announced that it would have to restate its financial statements for certain fiscal years, including years within the Class Period;

- Also on October 11, 2007, Beazer stated that "the Company's previously issued financial statements for the periods impacted by the restatement . . . and the related audit reports of the Company's independent registered public accounting firm should no longer be relied upon";

- On December 22, 2007, the *Economist* estimated subprime defaults would reach a level between $200-300 billion; and

- On February 1, 2008, Beazer closed Beazer Mortgage and discontinued its mortgage origination services.

161. Furthermore, a prudent fiduciary in like circumstances would have evaluated objective measures of Beazer's financial condition and acted accordingly

to protect the Plan from large losses. A variety of such measures are readily available, including the ones set forth below.

162. The Altman Z-Score, developed in 1968 by Prof. Edward I. Altman of the Stern School of Business at New York University, is a bankruptcy prediction model commonly accepted and used by financial analysts. *See Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 565-66 (D.C. Cir. 2002) (upholding Federal agency's use of Altman Z-Score analysis for predicting likelihood of bankruptcy and accepting that it "has been quite accurate over these last 25 years and remains an objective, established tool" (internal quotes and citations omitted)). During the Class Period, Beazer's Altman Z-Score was as follows:

Beazer's Altman Z-Score
during the Class Period

Q3 2005	3.58
Q4 2005	3.69
Q1 2006	3.85
Q2 2006	3.69
Q3 2006	3.31
Q4 2006	2.99
Q1 2007	3.11
Q2 2007	2.77
Q3 2007	2.58
Q4 2007	2.08
Q1 2008	1.94
Q2 2008	1.78

163. Companies with Altman Z-Scores above 3.0 are considered to be at a low risk of bankruptcy, while those with scores between 2.99 and 2.71 are on alert

and a score between 2.7 and 1.81 indicates that there is a good chance the company will file for bankruptcy within two years. *Measuring the "Fiscal-Fitness" of a Company: The Altman Z-Score*, CreditGuru.com, http://www.creditguru.com/CalcAltZ.shtml (last visited on June 26, 2008). Companies with Altman Z-Scores below 1.81 are objectively regarded to be likely to go bankrupt. *Id*.; *see also Nat'l Wildlife Fed'n*, 286 F.3d at 564.

164. Credit ratings provide another widely recognized measure of a company's financial condition and risk of bankruptcy. During the Class Period, Beazer's financial deterioration was not unnoticed by the major credit rating agencies. Although Beazer's issuer rating was rated below investment grade prior to the beginning of the Class Period, Moody's, Standard &Poor's, and Fitch all downgraded Beazer's ratings further into junk status during the Class Period, as detailed below:

Moody's ratings of Beazer during Class Period		**S&P's ratings of Beazer during Class Period**		**Fitch's ratings of Beazer during Class Period**	
Beginning	Ba2	Beginning	BB	Beginning	BB+
8/24/2007	B1	8/1/2007	BB-	8/13/2007	BB
3/26/2008	B2	10/12/2007	B+	10/12/2007	BB-
		2/15/2008	B	3/5/2008	B+

165. The lowering of bond ratings has a spiraling effect, as the downgrades increase a company's cost of borrowing, which results in increased cash interest expense when circumstances are already difficult, as reflected by the downgrades.

166. According to Moody's, "Obligations rated Ba are judged to have speculative elements and are subject to substantial credit risk." Moody's Investor Service, Moody's Rating Symbols & Definitions (Aug. 2003) at 6.

167. According to Standard & Poor's, "Obligations rated 'BB', 'B', 'CCC', 'CC', and 'C' are regarded as having significant speculative characteristics." Standard & Poor's, Standard & Poor's Ratings Definitions (Mar. 17, 2008), http://www2.standardandpoors.com/portal/site/sp/en/us/page.article/2,1,1,4,1204834067208.htm.

168. According to Fitch, obligations rated "BB" and "B" are speculative and below investment grade. Fitch Ratings, Fitch Ratings Definitions, http://www.fitchratings.com/corporate/fitchResources.cfm?detail=1 (last visited on June 24, 2008).

169. Debt-equity ratio is another objective measure of financial condition that demonstrates the undue risk posed by the Plan's huge investment in Beazer stock. It is calculated by dividing total liabilities (short-term and long-term) by total shareholder's equity (invested capital and retained earnings). An increasing debt-equity ratio indicates that a company is becoming more heavily leveraged and financially dependent on debt, on which interest and principal must be paid. If the ratio is greater than one, the majority of assets are financed through debt rather

than equity. Therefore, the significance of the debt-equity ratio to the Plan participants holding Beazer stock is that an increasing ratio indicates that the lenders to the Company hold an increasing share of economic rights. Because debt of a company has a senior claim over equity to the company's value, the increased ratio represents a diminution in the value of the Plan participants' Company stock.

Beazer's debt-equity ratio
<u>during the Class Period</u>

Q3 2005	0.94
Q4 2005	0.94
Q1 2006	0.88
Q2 2006	0.90
Q3 2006	0.94
Q4 2006	1.10
Q1 2007	1.06
Q2 2007	1.08
Q3 2007	1.10
Q4 2007	1.20
Q1 2008	1.32
Q2 2008	1.51
Q3 2008	1.76

Bloomberg, L.P., June 23, 2008.

170. The above measures were readily available to all Defendants and, individually and taken together, they signal that Beazer was in dire financial straits. On information and belief, notwithstanding these objective measures and the aforementioned red flags, Defendants failed to fulfill their fiduciary obligation to

investigate risks posed by Beazer stock. Instead, they stood idly by as the stock price plummeted and the Plan suffered huge losses.

171. Defendants had available to them several options for satisfying their fiduciary duties, including: (1) making appropriate public disclosures, as necessary; (2) divesting the Plan of Beazer stock; (3) discontinuing further contributions and/or investment in Beazer stock under the Plan; (4) consulting independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan; and/or (5) resigning as fiduciaries of the Plan to the extent that as a result of their employment by or association with Beazer they were unable to loyally serve the Plan and its participants in connection with the Plan's acquisition and holding of Beazer stock.

172. In the end, when the severity of the circumstances came to light, the Plan suffered significant losses, all or some of which could have been avoided had the Plan's fiduciaries acted prudently and loyally to protect the interests of Plan participants, as required by ERISA.

H. Defendants Failed to Provide the Plan's Participants, Beneficiaries, and their Co-Fiduciaries with Complete and Accurate Information about the True Risks of Investment in Beazer Stock in the Plan.

173. ERISA mandates that plan fiduciaries have a duty of loyalty to the plan, its participants, and co-fiduciaries, which includes the duty to speak truthfully to the plan, its participants, and co-fiduciaries when communicating with them.

A fiduciary's duty of loyalty under ERISA includes an obligation not to materially mislead or knowingly allow others to materially mislead plan participants, beneficiaries, or co-fiduciaries. *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361, 1369 (N.D. Ga. 2004) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)).

174. During the Class Period, on information and belief, Defendants regularly made direct and indirect communications to Plan participants through numerous employee newsletters, memos and letters, and other public statements regarding the financial health of the Company. These communications also included, but were not limited to, SEC filings, annual reports, press releases, and Plan documents, in which Defendants failed to disclose that Company stock was an imprudent retirement investment, and which were incorporated by reference in Plan-related documents. The Company regularly communicated with employees, including participants in the Plan, about the performance, future financial and business prospects of the Company, and Company stock which was the single largest asset of the Plan.

175. Further, Defendants, as the Plan's fiduciaries, knew or should have known certain basic facts about the characteristics and behavior of the Plan's participants – well-recognized in the 401(k) literature and the trade press – concerning investment in company stock, including that:

(1) employees tend to interpret a match in company stock as an endorsement of the company and its stock;

(2) out of loyalty, employees tend to invest in company stock;

(3) employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;

(4) employees tend not to change their investment option allocations in the plan once made;

(5) lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk; and

(6) even for risk-tolerant investors, the risks inherent in company stock are not commensurate with it rewards.

Bridgitte C. Mandrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. Econ. 4, 1149 (2001), http://mitpress.mit.edu/journals/pdf/qjec_116_04_1149_0.pdf; *see also* Nellie Liang & Scott Weisbenner, *Investor Behavior and the Purchase Of Company Stock in 401(k) Plans the Importance of Plan Design*, Board of Governors for the Federal Reserve System Finance and Economics Discussion Series, No. 2002 36 (2002), http://www.federalreserve.gov/pubs/feds/ 2002/200236/200236pap.pdf.

176. Even though Defendants knew or should have known these facts, and even though Defendants knew of the high concentration of the Plan's funds in Company stock during the Class Period, Defendants failed to take any meaningful

ameliorative action to protect the Plan and its participants from the heavy investment in Beazer stock.

177. In particular, Defendants failed to provide participants, and the market as a whole, with complete and accurate information regarding the true financial condition of the Company, which was affected by, among other things, the Company's: (1) high-risk loan origination practices, (2) lack of adequate internal controls over its improper loan origination practices; (3) mismanagement of risk and liquidity, (4) inaccurate accounting and financial reporting; (5) misleading statements and persistent refusal to disclose all material information regarding its true financial condition; (6) consequential artificial inflation of its stock price; and (7) dire financial circumstances created by Beazer's improper business and accounting practices.

178. As a result, participants in the Plan could not appreciate the true risks presented by investments in Company stock and, therefore, could not make informed decisions regarding their Plan investments in Company stock.

179. Additionally, Defendants with knowledge of adverse information relevant to the Plan had a duty to provide such information to their co-fiduciaries if they knew that such information was unavailable to the co-fiduciaries and was critical to the prudent administration of the Plan and management of Plan assets.

180. Nonetheless, certain Defendants failed to provide co-fiduciaries with adverse information regarding the risks of investing in Beazer stock.

I. Defendants Suffered from Conflicts of Interest.

181. As ERISA fiduciaries, Defendants were required to manage the Plan's investments, including the investment in Beazer stock, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries. This duty of loyalty requires fiduciaries to avoid conflicts of interest and to resolve them promptly when they occur.

182. Conflicts of interest arise when a company that invests plan assets in company stock founders. As the situation deteriorates, plan fiduciaries are torn between their duties as officers and directors for the company on the one hand, and to the plan and plan participants on the other. As courts have made clear, "[w]hen a fiduciary has dual loyalties, the prudent person standard requires that he make a careful and impartial investigation of all investment decisions." *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir.1992) (citation omitted). Fiduciaries must avoid "placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

183. Beazer's SEC filings, including proxy statements, during the Class Period make clear that a significant percentage of the Company's officers and directors' compensation is stock-based. Beazer Definitive Proxy Statement, Form 14A, Jan. 3, 2007.

184. For fiscal 2006, the Board approved awards of over 184,000 restricted shares of Beazer stock and grants of 400,000 stock options to Defendant McCarthy alone. *Id*. at 20-21.

185. Moreover, under Beazer's Director Stock Purchase Program, the Company's directors may elect to defer receipt of up to 50% of their annual compensation. *Id*. at 12. For fiscal 2006, non-employee directors received annual compensation of $35,000, except Defendant Brian Beazer, who received $225,000. *Id*. Deferred fees are represented by restricted stock units which vest over three years. *Id*. For fiscal 2006, the number of units received was determined based on a 20% discount from the actual closing stock price of Beazer's common stock on November 15, 2006. *Id*.

186. In addition, during fiscal 2006, the Board granted each of Defendants Solari, Zelnak, and Bayne 1,500 stock options and 1,500 shares of restricted stock pursuant to the Amended and Restated 1999 Stock Incentive Plan. *Id*.

187. Under that same plan, the Board granted Defendant Brian Beazer 2,490 stock options and 1,992 restricted shares in fiscal 2006. Additionally, the Company paid Defendant Beazer "incentive compensation based on predetermined criteria relating to, among other things, the performance of the market price of Beazer Homes' common stock and the total return to Beazer Homes' stockholders relative to a selected peer group as well as additional criteria related to the Company's financial performance under the Executive Value Created Incentive Plan." *Id*. For fiscal 2006, Defendant Brian Beazer received $316,605 in incentive compensation. *Id*.

188. Because the compensation of several Defendants was significantly tied to the price of Beazer stock, Defendants had an incentive to keep the Plan's assets heavily invested in Beazer stock on a regular, ongoing basis. Elimination of Company stock as an investment option for the Plan would have reduced the overall market demand for Beazer stock and sent a negative signal to Wall Street analysts and the market overall. Both results would have adversely affected the price of Beazer stock, resulting in lower compensation for the Defendants.

189. Some Defendants may have had no choice in tying their compensation to Beazer stock (because compensation decisions were out of their hands), but Defendants did have the choice of whether to keep the Plan's participants' and

beneficiaries' retirement savings invested in Beazer stock or whether to properly inform participants of material negative information concerning the above-outlined Company problems.

190. Finally, any signal to the market that the Company was not a sound, long term investment, such as the Plan's divestiture of Beazer stock, would have called into question the Defendants' job performance as corporate officers. Rather than have anyone question their soundness as leaders of Beazer, Defendants chose to remain silent and let the Plan continue to hold and acquire Beazer stock.

191. These conflicts of interest put the Defendants in the position of having to choose between their own interests as directors, executives, and stockholders, and the interests of the Plan's participants and beneficiaries, in whose interests the Defendants were obligated to loyally serve with an "eye single."

192. Yet, Defendants did nothing to protect the Plan and the Plan's participants from the inevitable losses the Plan would suffer.

193. While the above Defendants protected themselves, they stood idly by as the Plan lost millions of dollars because of its investment in Beazer stock.

VIII. THE RELEVANT LAW

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

195. An individual may be a fiduciary for ERISA purposes either because the plan documents explicitly describe fiduciary responsibilities or because that person functions as a fiduciary. *See* U.S.C. § 1002(21)(A); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995).

196. When fiduciaries put the interests of the company or their own interests ahead of the interests of plan participants, they violate ERISA. A fiduciary may, therefore, be personally liable to plan participants for breaching the responsibilities, obligations, or duties imposed under the plan and must restore any losses to the plan with any profits the fiduciary made through use of plan assets. ERISA § 409(a), 29 U.S.C. § 1109(a).

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

198. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provide, in pertinent part:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and

> diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

199. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose, and prudence and are the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

200. A fiduciary breaches the duty of loyalty when the fiduciary withholds information that the fiduciary knows or should know a participant would need to make an informed decision. Therefore, the duty of loyalty includes: (1) a negative duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

201. A fiduciary must avoid conflicts of interest and resolve them promptly when they do occur. As such, a plan fiduciary must always administer a plan with an exclusive purpose or "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. *Bierwirth*, 680 F.2d at 271.

202. A plan fiduciary is also responsible for the investment and monitoring of plan investments, ensuring that only prudent investments are offered as plan options, and monitoring such investments to ensure that they *remain* prudent and suitable for the plan. *In re ADC Telecomm, ERISA Litig.,* No. 03-2989, 2004 U.S. Dist. LEXIS 14383 (D. Minn. July 26, 2004). This includes the duty to conduct an independent and thorough investigation into, and to continually monitor, the merits of all the investment alternatives of a plan to ensure that each investment is a suitable option for the plan.

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

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:
>
> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

204. Co-fiduciary liability is an important part of ERISA's regulation of fiduciary responsibility. Because ERISA permits the fractionalization of a fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given decision, such as the role of company stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary did not participate in a breach, if he knows of a breach, he must take steps to remedy it.

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

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

205. Plaintiffs bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out

of the breaches of fiduciary duties by the Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

IX. ERISA § 404(C) DEFENSE INAPPLICABLE

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

207. Here, ERISA § 404(c) does not apply for several reasons.

208. First, ERISA § 404(c) does not and cannot provide any defense to the fiduciaries' imprudent decision to select and continue offering Beazer stock as an investment option in the Plan or to continue making Employer Matching Contributions in Company stock during part of the Class Period, because participants neither made these decision nor had control over them. *See* Final Reg. Regarding Participant Directed Individual Account Plan (ERISA Section 404(c) Plan) ("Final 404(c) Reg."), 57 Fed. Reg. 46906-01, 1992 WL 277875, at *46924 n.27 (Oct. 13, 1992) (codified at 29 C.F.R. pt. 2550) (noting that "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA § 404(c) plan is a fiduciary function

which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan").

209. Second, ERISA § 404(c) does not apply to any Company stock in the Plan over which the participants had no control, such as the Employer Matching Contributions. At times during the Class Period, participants' ability to divest their Plan investments in Beazer stock was restricted, which prevents true participant control over their Plan investment in Beazer stock.

210. Third, ERISA § 404(c) does not apply to participant directed investment in Beazer stock, because Defendants failed to ensure effective participant control by providing complete and accurate material information to participants regarding Beazer stock. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (stating that the participant must be provided with "sufficient information to make informed decisions"). Indeed, pursuant to the DOL's regulation, a participant's "exercise of control is not independent in fact if . . . (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information . . . would violate [applicable law]." § 2550.404c-1(c)(2). Here at least the Company and Defendants McCarthy and Brian Beazer have concealed such facts, as detailed previously. As a consequence, participants in the Plan did not have informed

control over the portion of the Plan's assets invested in Beazer stock, and the Defendants remain entirely responsible for losses that resulted from such investment.

211. Fourth, in order to be a § 404(c) plan that provides a participant or beneficiary with an opportunity to exercise control over the assets in his account, an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf) must provide participants and beneficiaries with "a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible." 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(vii). On information and belief, no such information was provided to Plan participants.

212. Because ERISA § 404(c) does not apply here, the Defendants' liability to the Plan, the Plaintiffs, and the Class for losses caused by the Plan's investment in Beazer stock is established upon proof that such investment was or became imprudent and resulted in losses to the Plan during the Class Period.

X. PLAINTIFFS ARE NOT OBLIGATED TO EXHAUST ADMINISTRATIVE REMEDIES

213. On May 30, 2007, Plaintiff Denning submitted an administrative demand to the Plan Administrator prior to submission of his complaint. Soon thereafter, Defendants stipulated that the fiduciaries of the Plan, including the Company, Katie J. Bayne, Brian C. Beazer, Ian J. McCarthy, Larry T. Solari, and Stephen P. Zelnak, Jr., would not require Plaintiff Denning to exhaust his administrative remedies as to the claims in his complaint. *See* Letter from Cari Campen Laufenberg, July 13, 2007 (attached hereto as Exhibit A). Accordingly, Plaintiffs are not obligated to exhaust administrative remedies if any exist in this case.

XI. DEFENDANTS' INVESTMENT IN BEAZER STOCK IS NOT ENTITLED TO A PRESUMPTION OF PRUDENCE

214. Some courts have applied a presumption of prudence to decisions by plan fiduciaries to invest plan assets in company stock in plans that qualify as Employee Stock Ownership Plans ("ESOPs") under the Internal Revenue Code and rules of the Department of the Treasury promulgated thereunder. The presumption is based on the ESOP's dual purpose of allowing employee stock ownership on the one hand and providing retirement savings on the other. *Moench v. Robertson*, 62 F.3d 553, 569, 571 (3d Cir. 1995) (explaining dual purpose of ESOPs and adopting presumption of prudence to balance these concerns).

Plaintiffs dispute that the presumption of prudence applies to the Plan, which is a 401(k) Plan and not an ESOP.

215. Even if a presumption of prudence were to apply to the Plan, it is not a viable defense in this case. First, the presumption of prudence is an evidentiary presumption not appropriately applied to the allegations of a complaint before evidence is adduced. Second, Plaintiffs overcome the presumption as this Complaint sufficiently alleges that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995)..

216. Specifically, the facts supporting the conclusion that Beazer stock was an inappropriate and imprudent investment for the Plan include, as detailed previously:

- a precipitous stock price decline from over $65 to under $10 per share during the Class Period;
- risk of imminent further collapse of the Company's stock price based on the Company's risky business practices;
- the Company's deteriorating financial condition as well as Defendants' conflicted status;
- serious mismanagement prompting several governmental investigations and evidenced by, among other things, inappropriate and potentially unlawful loan origination practices;
- imprudent management of operational and financial risk;

- misrepresentations regarding Beazer's financial condition;
- the consequential artificial inflation of Beazer's stock; and
- dire financial circumstances causing Beazer to be on the brink of collapse, as evidenced by, among other things: (1) the steady decline in Beazer's Altman Z-Score; (2) the steady decline in Beazer's credit ratings; and (3) the steady climb of Beazer's debt-equity ratio.

217. In light of these circumstances, Plaintiffs overcome the presumption of prudence regarding investment in Beazer stock during the Class Period to the extent that the presumption applies at all.

218. The imprudence of continued investment by Defendants in Beazer stock during the Class Period under the circumstances present here is recognized in DOL regulations.

> [B]ecause every investment necessarily causes a plan to forego other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

29 C.F.R. 2509.94-1.

219. Defendants had available to them investment alternatives to Beazer stock that had either a higher rate of return with risk commensurate to Beazer stock or an expected rate of return commensurate to Beazer stock but with less risk. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 547 (S.D.

Tex. 2003). Based on these circumstances, and the others alleged herein, it was imprudent and an abuse of discretion for Defendants to continue to make and maintain investment in Beazer stock, and, effectively, to do nothing to protect the Plan from significant losses as a result of such investment during the Class Period.

XII. CAUSES OF ACTION

A. Count I: Failure to Prudently and Loyally Manage the Plan and Assets of the Plan

220. Plaintiffs incorporate by this reference the paragraphs above.

221. This Count alleges fiduciary breach against the following Defendants: the Company, Defendant McCarthy, the Compensation Committee Defendants, and the 401(k) Committee Defendants (collectively, the "Prudence Defendants").

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

223. As alleged above, the scope of the Prudence Defendants' fiduciary duties and responsibilities included managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. Therefore, the Prudence Defendants

were directly responsible for selecting prudent investment options, eliminating imprudent options, determining how to invest employer contributions to the Plan, and directing the Trustee regarding same. The Prudence Defendants were also responsible for, among other things, evaluating the merits of the Plan's investments on an ongoing basis, and taking all necessary steps to ensure that the Plan's assets were invested prudently.

224. Yet, contrary to their duties and obligations under ERISA, the Prudence Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, these Defendants knew or should have known that Beazer no longer was a suitable and appropriate investment for the Plan, but was, instead, a highly speculative and risky investment in light of the Company's fundamental weaknesses. Nonetheless, during the Class Period, these Defendants continued to offer Beazer stock as an investment option for participant Plan contributions, and for part of the Class Period, as the sole investment receptacle for matching contributions. They did so despite evidence that the Company was engaged in fraudulent and highly risky business practices, including widespread predatory lending, and had ignored industry regulations and laws, as well as sound business practices in order to extend mortgages that were at high risk of default.

225. The Prudence Defendants were obliged to prudently and loyally manage all of the Plan's assets. However, their duties of prudence and loyalty were especially significant with respect to Company stock because: (1) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and (2) participants tend to underestimate the likely risk and overestimate the likely return of investment in company stock. In light of this, the Prudence Defendants were obliged to institute a regular, systematic procedure for evaluating the prudence of investment in Company stock.

226. Moreover, these Defendants failed to conduct an appropriate investigation of the merits of continued investment in Beazer stock, even though the Company's highly risky and inappropriate practices posed a great danger to the Plan. Such an investigation would have revealed to a reasonably prudent fiduciary the imprudence of continuing to maintain investment in Beazer stock under these circumstances.

227. The Prudence Defendants' decisions regarding the Plan's investment in Beazer stock described above, under the circumstances alleged herein, constituted an abuse of fiduciary discretion because a prudent fiduciary acting under similar circumstances would have made different investment decisions. A prudent fiduciary would not have reasonably believed that continued investment

of the Plan's contributions and assets in Beazer stock was in keeping with the Plan settlor's expectations of how a prudent fiduciary would operate.

228. The Prudence Defendants were obligated to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

229. According to DOL regulations and case law interpreting the statutory provision above, a fiduciary's investment or investment course of action is prudent if: (1) he has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (2) he has acted accordingly.

230. Again, according to DOL regulations, "appropriate consideration" in this context includes, but is not necessarily limited to:

> (1) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment

duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and

(2) consideration of the following factors as they relate to such portion of the portfolio:

a. the composition of the portfolio with regard to diversification;

b. the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

c. the projected return of the portfolio relative to the funding objectives of the plan.

231. Given the conduct of the Company as described above, the Prudence Defendants did not act prudently when they continued to invest the Plan's assets in Beazer stock because, among other reasons, these Defendants knew of and failed to investigate the failures of the Company, which included: (1) high-risk loan origination practices, (2) lack of adequate internal controls over its improper loan origination practices; (3) mismanagement of risk and liquidity, (4) inaccurate accounting and financial reporting; (5) misleading statements and persistent refusal to disclose all material information regarding its true financial condition; (6) consequential artificial inflation of its stock price; and (7) dire financial circumstances created by Beazer's improper business and accounting practices.

232. As such, the risk associated with the investment in Beazer stock during the Class Period was far above the normal, acceptable risk associated with investment in company stock. Yet, Plan participants were unaware of this risk. The Prudence Defendants knew participants were unaware of the risk – as was the market generally – because these Defendants never disclosed it.

233. Thus, given this inequity, the Prudence Defendants had a duty to avoid permitting the Plan or any participant to invest Plan assets in Beazer stock.

234. Further, knowing the Beazer Company Stock Fund in the Plan was not a diversified portfolio but was heavily invested in Company stock, these Defendants had a heightened responsibility to divest the Plan of Company stock if it became or remained imprudent.

235. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts of interest and to resolve conflicts promptly when they occur. A fiduciary must always administer a plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. On information and belief, at least some of these Defendants acted in their own self-interest by benefiting from the sale of large amounts of Company stock at fraudulently inflated values. Fiduciaries laboring under such conflicts must, in order to comply with the duty of

loyalty, make special efforts to assure that their decision-making process is untainted by the conflict and is made in a disinterested fashion, typically by seeking independent financial and legal advice obtained only on behalf of the plan.

236. The Prudence Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by: (1) failing to engage independent advisors who could make independent judgments concerning the Plan's investment in Beazer stock; (2) failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made Beazer stock an unsuitable investment for the Plan; (3) failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served; (4) failing to disregard the impact of their duty to avoid conflicts of interest on their own compensation; and (5) placing their own and Beazer's improper interests above the interests of the participants with respect to the Plan's investment in Beazer stock.

237. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants or beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to

an imprudent result or that would harm plan participants or beneficiaries, nor allow others, including those who they direct or who are directed by the plan, to do so.

238. The Prudence Defendants breached this duty by: (1) continuing to offer Beazer stock as an investment option for participants of the Plan; (2) continuing to invest assets of the Plan in Beazer stock rather than in cash or other short-term investment options; and (3) engaging in this course of conduct when the Defendants knew or should have known that Beazer stock no longer was a prudent investment for participants' retirement savings.

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

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

B. Count II: Failure to Monitor Fiduciaries

241. Plaintiffs incorporate by this reference the allegations above.

242. This Count alleges fiduciary breach against the following Defendants: the Company, Defendant McCarthy, Defendant Brian Beazer, and the Compensation Committee Defendants (collectively, the "Monitoring Defendants").

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

244. The scope of the Monitoring Defendants' fiduciary responsibilities includes the responsibility to appoint and remove, and thus monitor the performance of other fiduciaries. The Company, as the Plan Administrator, exercises its plan administrator functions through the 401(k) Committee Defendants with respect to the Plan. Thus, it has a duty to monitor the 401(k) Committee Defendants. On information and belief, Defendant Brian Beazer was responsible for appointing, replacing, and monitoring the members of the Compensation Committee. Additionally, the Compensation Committee Defendants and Defendant McCarthy were responsible for appointing, replacing,

as well as monitoring the members of the 401(k) Committee with respect to the Plan. 401(k) Committee Charter at BZH-ERISA 0000005-06.

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

246. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

247. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order

to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

248. On information and belief, the Monitoring Defendants breached their fiduciary monitoring duties by, among other things: (1) failing, at least with respect to the Plan's investment in Company stock, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and inaction with respect to Company stock; (2) failing to ensure that the monitored fiduciaries appreciated the true extent of Beazer's highly risky and inappropriate business practices, and the likely impact of such practices on the value of the Plan's investment in Beazer stock; (3) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan's assets; and (4) failing to remove appointees whose performance was inadequate in that they continued to maintain investments in Beazer stock despite their knowledge of practices that rendered Beazer stock an imprudent investment during the Class Period for participants' retirement savings in the Plan, and who breached their fiduciary duties under ERISA.

249. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly the Plaintiffs and the other Class members, lost over $46 million of retirement savings.

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

C. Count III: Failure to Disclose Necessary Information to Co-Fiduciaries.

251. Plaintiffs incorporate by this reference the allegations above.

252. This Count alleges fiduciary breach against the following Defendants: the Company, Defendant McCarthy, and Defendant Brian Beazer (collectively, the "Disclosure Defendants").

253. As previously alleged, the Disclosure Defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), during the Class Period. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

254. Pursuant to the duties of prudence and loyalty, fiduciaries are required to disclose to their co-fiduciaries information that they know is unavailable to their co-fiduciaries, but that such co-fiduciaries need to protect the interests of the plan. *See Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities*, 93 F.3d 1171 (3rd Cir. 1996).

255. The Disclosure Defendants were fiduciaries of the Plan who possessed non-public information during the Class Period about the risks posed by Beazer stock, which they knew could be used by other fiduciaries of the Plan (in particular the Compensation Committee Defendants and the 401(k) Committee Defendants) to protect the Plan and its participants and beneficiaries.

256. While the Compensation Committee Defendants and the 401(k) Committee Defendants should have sought sufficient information concerning the risks posed by investment in Company stock, those fiduciaries in possession of such knowledge should have supplied that information to the Compensation Committee Defendants and the 401(k) Committee Defendants voluntarily in the fulfillment of the fiduciary duties they owed to the Plan. To the extent disclosure of such information was necessary before taking action to protect the Plan, such disclosure should have been made.

257. The Disclosure Defendants profited from their breach of this duty.

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

D. Count IV: Failure to Provide Complete and Accurate Information to the Plan's Participants and Beneficiaries.

259. Plaintiffs incorporate by this reference the allegations above.

260. This Count alleges fiduciary breach against the following Defendants: the Company, Defendant McCarthy, and the 401(k) Committee Defendants (collectively, the "Communications Defendants").

261. At all relevant times, as alleged above, the Communications Defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

262. On information and belief, at all relevant times, the scope of the fiduciary responsibility of the Communications Defendants included the duty to communicate and provide material disclosures to the Plan's participants and beneficiaries.

263. The duty of loyalty under ERISA requires fiduciaries to speak

truthfully to participants, not to mislead them regarding the plan or plan assets, and to disclose information that participants need in order to exercise their rights and interests under the plan. This duty to inform participants includes an obligation to provide participants and beneficiaries of the plan with complete and accurate information and to refrain from providing false information or concealing material information regarding plan investment options so that participants can make informed decisions with regard to the prudence of investing in such options made available under the plan. This duty applies to all of the Plan's investment options, including investment in Beazer stock.

264. Because Plan assets were heavily invested in Beazer stock, the Plan's investment carried with it an inherently high degree of risk. This inherent risk made the Communications Defendants' duty to provide complete and accurate information particularly important with respect to Beazer stock.

265. The Communications Defendants breached their duty to inform participants by failing to provide complete and accurate information regarding Beazer's serious mismanagement and improper business practices and public misrepresentations, and the consequential artificial inflation of the value of Beazer stock, and, generally, by conveying incomplete information regarding the soundness of Beazer stock and the prudence of investing and holding retirement

contributions in Beazer equity. These failures were particularly devastating to the Plan and its participants because a heavy percentage of the Plan's assets were invested in Beazer stock during the Class Period. Thus, the effect of the artificial inflation of Beazer stock significantly impacted the value of participants' retirement assets.

266. The Communications Defendants' omissions clearly were material to participants' ability to exercise informed control over their Plan accounts, as in the absence of the information, participants did not know the true risks presented by the Plan's investment in Beazer stock.

267. The Communications Defendants' omissions and incomplete statements were Plan-wide and uniform in that the Communications Defendants failed to provide complete and accurate information to any of the Plan's participants.

268. The Communications Defendants in this Count were unjustly enriched by the fiduciary breaches described in this Count.

269. As a direct and proximate result of these breaches of fiduciary duties, the Plan, and indirectly the Plaintiffs and the Class, lost a significant portion of their retirement investment.

270. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA

§ 409(a), 29 U.S.C. § 1109(a), the Communications Defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

E. Count V: Co-Fiduciary Liability

271. Plaintiffs incorporate by this reference the allegations above.

272. This Count alleges co-fiduciary liability against all Defendants.

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

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

275. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has knowledge of a breach by such

other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Each Defendant knew of the breaches by the other fiduciaries and made no effort to remedy those breaches. In particular, they did not communicate their knowledge of the Company's illegal activity to the other fiduciaries.

276. Beazer, through its officers and employees, was unable to meet its business goals, engaged in highly risky and inappropriate business practices, withheld material information from the market, and profited from such practices. Thus, knowledge of such practices is imputed to Beazer as a matter of law.

277. Because Defendants knew of the Company's failures and inappropriate business practices, they also knew that Defendants were breaching their duties by continuing to maintain Plan investments in Company stock. Yet they failed to undertake any effort to remedy these breaches. Instead, they compounded them by downplaying the significance of Beazer's failed and inappropriate business practices and by obfuscating the risk that these practices posed to the Company, and, thus, to the Plan.

278. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he participates knowingly in,

or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. Beazer knowingly participated in the fiduciary breaches of Defendants who failed to prudently and loyally manage the Plan in that it benefited from the sale or contribution of its stock at prices that were disproportionate to the risks for Plan participants. Likewise, the Monitoring Defendants knowingly participated in the breaches of Defendants who failed to loyally and prudently manage the Plan because, as alleged above, they had actual knowledge of the facts that rendered Beazer stock an imprudent retirement investment and yet, ignoring their oversight responsibilities, permitted these Defendants to breach their duties.

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

280. The Monitoring Defendants' failure to monitor the 401(k) Committee Defendants enabled that Committee to breach its duties.

281. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly the Plaintiffs and the Plan's other participants and beneficiaries, lost over $46 million of retirement savings.

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

XIII. CAUSATION

283. The Plan suffered more than $46 million in principal losses because Defendants imprudently invested the Plan's assets in Beazer stock during the Class Period, in breach of Defendants' fiduciary duties.

284. Defendants are liable for the Plan's losses in this case because the Plan's investment in Beazer stock was the result of Defendants' decision to imprudently maintain the assets of the Plan in Beazer stock. Thus, Defendants are liable for these losses because they failed to take the necessary and required steps to ensure effective and informed independent participant control over the investment decision-making process, as required by ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations promulgated thereunder.

285. Had Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy

their ERISA-mandated duties of prudence and loyalty, eliminating Beazer stock as an investment alternative when it became imprudent, and divesting the Plan of Beazer stock when maintaining such an investment became imprudent, the Plan would have avoided some or all of the losses that it, and indirectly, the participants suffered.

XIV. REMEDY FOR BREACHES OF FIDUCIARY DUTY

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

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

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

289. With respect to calculation of the losses to the Plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty,

the Plan would not have maintained its investments in the challenged investment and, instead, prudent fiduciaries would have invested the Plan's assets in the most profitable alternative investment available to them. The Court should adopt the measure of loss most advantageous to the Plan. In this way, the remedy restores the Plan's lost value and puts the participants in the position they would have been in if the Plan had been properly administered.

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

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

XV. CLASS ACTION ALLEGATIONS

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

293. All persons, other than Defendants, who were participants in or beneficiaries of the Plan at any time between July 28, 2005 and May 12, 2008, and whose accounts included investments in Beazer stock.

294. **Class Period.** The fiduciaries of the Plan knew or should have known at least by July 28, 2005 and through May 12, 2008, that the Company's material weaknesses were so pervasive that Beazer stock could no longer be offered as a prudent investment for the retirement Plan.

295. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to the Plaintiffs at this time, and can only be ascertained through appropriate discovery, Plaintiffs believe there are, based on the Plan's Form 5500 for Plan year 2005, over 5,800 participants or beneficiaries in the Plan.

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

(1) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;

(2) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plan's participants and beneficiaries;

(3) whether Defendants violated ERISA; and

(4) whether the Plan has suffered losses and, if so, what is the proper measure of damages.

297. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class because: (1) to the extent Plaintiffs seek relief on behalf of the Plan pursuant to ERISA § 502(a)(2), their claim on behalf of the Plan is not only typical to, but identical to a claim under this section brought by any Class member; and (2) to the extent Plaintiffs seek relief under ERISA § 502(a)(3) on behalf of themselves for equitable relief, that relief would affect all Class members equally.

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

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

300. **Other Rule 23(b) Requirements.** Class action status is also warranted under the other subsections of Rule 23(b) because: (1) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; (2) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (3) questions of law or fact common to members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

XVI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

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

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

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

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

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

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

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

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

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

Dated: June 27, 2008.

Respectfully submitted,

s/ Michael I. Fistel

HOLZER HOLZER & FISTEL LLC
Michael I. Fistel, Jr. (GA Bar No. 262062)
Corey D. Holzer (GA Bar No. 364698)
1117 Perimeter Center West, Suite E-107
Atlanta, GA 30338
Telephone: (770) 392-0090
Facsimile: (770) 392-0029
mfistel@holzerlaw.com

Interim Liaison Counsel for Plaintiffs

s/ Derek W. Loeser

KELLER ROHRBACK L.L.P.
Lynn Lincoln Sarko
Derek W. Loeser
Gary A. Gotto
Erin M. Riley
Sarah H. Kimberly
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Telephone: (206) 623-1900
Facsimile: (206) 623-3384
lsarko@kellerrohrback.com

dloeser@kellerrohrback.com
ggotto@kellerrohrback.com
eriley@kellerrohrback.com
skimberly@kellerrohrback.com

SCHIFFRIN BARROWAY TOPAZ & KESSLER, LLP
Joseph H. Meltzer
Edward W. Ciolko
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
jmeltzer@smtk.com
eciolko@smtk.com

Interim Co-Lead Counsel Plaintiffs