UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

JOHN J. GORMAN, individually and derivatively on behalf of FIRSTMARK CORP., KURT J. RECHNER, individually and derivatively on behalf of FIRSTMARK CORPORATION, and PHIL A. WHITNEY and KARIN WHITNEY, individually on behalf of themselves and all others similarly situated and derivatively on behalf of FIRSTMARK CORP.,	)	
Plaintiffs,	)	
v.	)	
H. WILLIAM COOGAN, JR., SUSAN C. COOGAN, ROBERT R. KAPLAN, SR., JOHN T. WYAND, DONALD V. CRUIKSHANKS, JOHN MCCOWN, and R. BRIAN BALL,	)	Civil Action No.
Defendants	)	INJUNCTIVE RELIEF SOUGHT
and	)	
FIRSTMARK CORPORATION,	)	
Nominal Defendant.	)	

PLAINTIFFS' VERIFIED COMPLAINT, INCLUDING DERIVATIVE CLAIMS
JURY TRIAL DEMANDED

Plaintiffs allege the following based in part upon their own personal knowledge and in part upon the investigation of plaintiffs' counsel, which included a review of the Securities and Exchange Commission ("SEC") filings by the Defendants and by Firstmark Corporation ("Firstmark" or the "Company"), press releases and other public statements by the Company, as well as deposition transcripts and pleadings from prior litigation relating to the Company, interviews with and documents from the Maine Securities Division, interviews of insider

witnesses including former Firstmark Board members and officers and former officers of Tecstar Electro Systems, Inc. (the company whose assets Firstmark acquired in 2002), and inspection of Firstmark's books and records including its board minutes and records of the Maine Secretary of State's office. Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. Since 1996, defendant H. William Coogan, Jr. ("Coogan") and the other defendants as his Co-conspirators have been engaged in a systematic campaign of self dealing and corporate looting of Firstmark, a Maine corporation that currently owns and operates an aerospace parts manufacturer in Durham, North Carolina. This past year, Coogan succeeded at last in seizing complete control of Firstmark, when through fraud and violation of the federal Williams Act provisions governing contests for corporate control, Coogan purchased a majority interest in Firstmark's common stock. Absent the intervention of this Court, Coogan will have successfully entrenched himself as chief executive officer, chairman and majority shareholder of Firstmark, all accomplished though fraud, deception and self dealing. Coogan's latest machination took effect on June 24, 2003 when the Company was deregistered with the Securities and Exchange Commission ("SEC"). This final step in Coogan's self-dealing program will give him a "license to steal" the assets of the corporation, as Firstmark will no longer be obligated to publicly disclose its financial results. Plaintiffs ask that this Court: (1) to enjoin Firstmark's invalidly constituted Board of Directors from engaging in any extraordinary corporate transactions and from taking any action to regulate, restrict or otherwise manipulate Firstmark's corporate machinery; (2) declare 2,180,286 shares of Coogan's, his wife's and

Cruickshanks' common stock in the Company null and void; (3) award the plaintiffs damages in an amount sufficient to compensate them for their losses; (4) award the plaintiffs their attorneys fees and costs; and (5) enter such other and further relief as the Court deems just.

SUMMARY OF PRINCIPAL ALLEGATIONS

2. In late May 1996, Coogan, Susan Coogan, Donald Cruickshanks, and their lawyer Brian Ball unlawfully packed the board and took control of Firstmark in connection with the merger of Coogan's title insurance business into Firstmark pursuant to a fraudulent, unauthorized amendment of Firstmark's Articles of Incorporation.

3. On June 7, 1996, as Firstmark directors, Coogan and his Co-conspirators wrongfully enforced the unconscionable merger agreement. Pursuant to a fraudulent and void amendment of Firstmark's Articles of Incorporation, this invalidly constituted Board issued 40,000 shares of facially void convertible preferred stock to Coogan, Susan Coogan and Cruickshanks.

4. Through a series of false and materially misleading representations to stockholders and the investing public, in February 1997, Coogan and his Co-conspirators improperly secured two amendments to Firstmark's Articles of Incorporation in order to evade Maine's control transaction appraisal rights statute.

5. Coogan manipulated the price of the Firstmark common stock in order to increase the number of shares to be received upon conversion of the void preferred stock through a series of false and/or self-dealing public disclosures. Not content with having manipulated the share price, Coogan, Susan Coogan and Cruickshanks, on conversion of the void preferred stock took 630,000 shares more than were called for by the terms of their unconscionable preferred share

contract.

6. In 1999, Coogan and his Co-conspirators caused Firstmark to sell the title insurance business in a self-dealing transaction in connection with which they engaged in proxy fraud.

7. In spring 2002, Coogan intentionally withheld material information from the Firstmark Board in connection with Firstmark's acquisition of Tecstar Electro Systems, Inc.

8. In mid June 2002, Coogan bought a controlling interest in the Company pursuant to an unlawful and fraudulent tender offer.

9. After seizing control of the Company, Coogan purported to elect himself and a slate of six other directors to Firstmark's Board in an election that is void for fraud and lack of a valid quorum.

10. Since seizing control of the Company, Coogan has inflicted and continues to inflict irreparable harm on the Company and its shareholders. He has caused the Company to pay his personal legal expenses and to pay him an excessive salary. He has purported to amend the Company's Bylaws. He has de-registered the Company with the SEC and ceased making public filings. He has fired the Company's management, and caused the Company to commence a baseless lawsuit against them in order to conceal his own wrongdoing. Four of the six other directors whom Coogan himself picked have already resigned from the Board.

11. Coogan is currently entrenched, has ceased making public filings with the SEC, and has driven the price of Firstmark's stock down to $0.26 per share. Absent the intervention of this Court, Coogan will have succeeded in his scheme and will continue to loot the Company until he drives it into insolvency.

PARTIES

12. The plaintiff, John Joseph Gorman ("Gorman"), is an individual residing in Austin, Texas. Gorman is a good faith purchaser for value who has been an owner of varying amounts of Firstmark's common stock since approximately December 1998. Gorman sues in his individual capacity as well as derivatively on behalf of Firstmark seeking damages and equitable relief. Gorman will fairly and adequately represent the interests of the corporation in enforcing its rights. As of July 1, 2003, Gorman is the beneficial owner of 1,286,788 shares of Firstmark common stock.

13. The plaintiff, Kurt J. Rechner, is an individual residing in Austin, Texas. Rechner, jointly with his wife, is the beneficial owner of 20,000 shares of Firstmark common stock, which they have owned since May 29, 2002.

14. The plaintiffs Phil A. Whitney and Karin Whitney together, the "Whitneys," are husband and wife residing in Cranberry Island, Maine. Mr. Whitney, the former Chief of Police of Bar Harbor, Maine, is a retired Department of State security executive. Mr. Whitney, jointly with his wife, is the record owner of 3,289 shares of Firstmark common stock. The Whitneys' shareholder status devolved to them by operation of law through an inheritance from Mr. Whitney's parents in the mid to late 1990s. Mr. Whitney's parents owned the shares beginning prior to January 1, 1996. The Whitneys sue in their individual capacity as well as derivatively on behalf of Firstmark, and on behalf of all other common stock holders similarly situated seeking damages and equitable relief. The Whitneys will fairly and adequately represent the interests of the Corporation in enforcing its rights and will fairly and adequately represent the shareholders in the class claims.

15. The nominal defendant, Firstmark Corp. is a corporation organized under the laws of the State of Maine and having a principal place of business at 921 Holloway Street, Durham, North Carolina ("Firstmark").

16. Defendant H. William Coogan, Jr. is an individual residing, upon information and belief, in Richmond, Virginia and with a place of business at 1801 Libbie Avenue, Suite 801, Richmond, Virginia ("Coogan"). Coogan has previously served as an officer and director of Firstmark, and currently holds himself out as the Chairman and CEO of the Company pursuant to an invalid shareholder election challenged in this Action.

17. Defendant Susan C. Coogan is an individual, married to William Coogan residing, upon information and belief at 47 Charmian Road, Richmond, Virginia 23226 ("Susan Coogan"). Susan Coogan previously served as a director of Firstmark from June 1996 to 1998-99 and again in August and September 2002. Susan Coogan is sued both individually and as Trustee of the H. William Coogan Irrevocable Trust.

18. Defendant R. Brian Ball is an individual residing, upon information and belief, in Richmond, Virginia, and maintaining a place of business c/o Williams Mullen Clark & Dobbins, Esquires, 1021 East Cary Street, Richmond, Virginia ("Ball"). Ball has previously served as a director of Firstmark and as its counsel.

19. Defendant Donald V. Cruikshanks is an individual residing at, upon information and belief, 100 Westham Parkway, Richmond, Virginia 23229-7528 ("Cruickshanks"). Cruikshanks has previously served as a director and CEO of Firstmark.

20. Defendant Robert R. Kaplan, Sr. is an individual residing, upon information and belief, in Richmond, Virginia and has a place of business c/o LeClair Ryan, Esquires, 707 East

Main Street, Richmond, Virginia 23219 ("Kaplan"). Kaplan has previously served as Firstmark's Secretary and its counsel.

21. Defendant John McCown is an individual residing, upon information and belief, at 15 Miller Road, Pound Ridge, New York 10576 ("McCown"). McCown currently holds himself out as a director of the Company pursuant to an invalid shareholder election challenged in this Action.

22. Defendant John T. Wyand is an individual residing, upon information and belief, at 2960 Longleat Woods, Sarasota Florida 34235-6865 ("Wyand"). Wyand currently holds himself out as a director of the Company pursuant to an invalid shareholder election challenged in this Action.

JURISDICTION AND VENUE

23. This Court has jurisdiction under 28 U.S.C. § 1331, 15 U.S.C. § 78aa, 15 U.S.C. § 78m and 15 U.S.C. § 78n, as this Complaint asserts claims for an unlawful tender offer and proxy fraud in violation of federal securities laws. This Court also has jurisdiction over the declaratory judgment claims pursuant to 28 U.S.C. § 2201 and has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. 1367 (supplemental jurisdiction).

24. Venue is appropriate pursuant 28 U.S.C. § 1391(b).

25. In connection with the acts, transactions and conduct alleged herein, defendants used the means and instrumentalities of interstate commerce, including the United States mails, interstate telephone communications and the facilities of the national securities exchanges and markets.

DEMAND FUTILITY

26. Making a demand upon Firstmark's Board of Directors to pursue the derivative claims asserted in this action would be futile because this Complaint asserts, *inter alia*, that the purported Board members have no authority to act for the Corporation because they were elected in an unlawful and invalid election, and that the Board currently lacks sufficient members to conduct any lawful business in any event. As part of the relief sought in this Complaint, the plaintiffs ask that the Court declare the election of the current board members invalid, and enter preliminary and permanent injunctive relief prohibiting them from conducting or purporting to act on behalf of the Company. Moreover, as set forth in greater detail herein, the Company and its shareholders are currently suffering irreparable harm as a result of the defendants' actions.

BACKGROUND

27. Coogan is a sophisticated party with extensive experience in corporate governance and finance. Coogan graduated from the University of Vermont in 1976 and worked for several years as an assistant vice president for the Irving Trust Company, a division of the Bank of New York, before returning to graduate school in 1980. He obtained his MBA from the University of Virginia in 1982. Coogan spent nearly the next twenty years as an investment banker, working on mergers, acquisitions, financing and advisory assignments for generally large companies. For all his financial sophistication, however, Coogan has no prior experience running the day-to-day business of a manufacturing company of any kind, let alone an aerospace parts manufacturer such as Firstmark Aerospace.

28. Prior to Coogan's involvement with the Company, Firstmark was principally engaged in financial services business through several subsidiaries. As of May 1, 1996, Firstmark had 5,000,000 duly authorized shares of $.20 par value Common Stock of which as of

March 31, 1996, approximately 2,080,634 shares were validly issued and outstanding. Firstmark also had duly authorized 250,000 shares of Preferred Stock of which as of May 1, 1996, there were 62,000 duly authorized shares of $2.40 cumulative, convertible, non-voting Preferred Stock of which as of May 1, 1996, upon information and belief, 57,000 shares were validly issued and outstanding. As of May 1, 1996, upon information and belief, Firstmark also had 570,000 duly authorized, and duly issued and outstanding warrants to purchase a share of the authorized but unissued Common Stock of Firstmark at a price of $6.00 per share with said rights to so purchase expiring on the third anniversary of the issuance of said warrants. The said 570,000 warrants were held proportionately by the holders of the 57,000 shares of $2.40 cumulative, convertible, non-voting Preferred Stock.

29. As of May 1, 1996, Firstmark's Common Stock was registered with the Securities and Exchange Commission pursuant to Section 12(g) of the Exchange Act and was listed on the NASDAQ SMALL CAP Market. On June 7, 1996, the common Stock of Firstmark traded in a range of approximately $4.375 and $4.75 and the Company had a total market capitalization of approximately $9.0 - 9.8 million.

I. Coogan Takes Advantage of Firstmark's Former Management to Secure an Unconscionable Deal.

30. In or about the spring of 1996, Coogan negotiated a deal to sell to Firstmark a title insurance company, a subsidiary of Southern Capital Corp. ("SCC") that he owned along with Susan Coogan and Cruickshanks.

A. The Economic Terms of the Firstmark-SCC Merger are Unconscionable.

31. On or about April 30, 1996, Firstmark and Southern Capital Corp. ("SCC")

owned by Coogan, Susan Coogan and Cruikshanks entered into an agreement (the "Agreement") pursuant to which Firstmark would acquire SCC, and Firstmark would issue 40,000 shares of series B preferred stock to Coogan, Susan Coogan and Cruickshanks. Moreover, pursuant to section 1.2 of the Agreement, Coogan, Cruickshanks, Ball and Susan Coogan were to be "elected and appointed to serve on the [Firstmark] FMC Board of Directors on the Effective Date." Section 5.2 provided that, subject to shareholder approval of amendments to the Articles of Incorporation increasing the common stock and opting out of section 910 of the Business Corporation Act, "the [Firstmark] Board of Directors shall vote to convert the [Firstmark] preferred stock…no later than January 1, 1997." Section 6.1(b) provided that the preferred stock could not be issued until the Federal Communication Commission approved the change of ownership of Champion Broadcasting Corporation, an SCC subsidiary.

32. Also in connection with the Merger, Ball became counsel to the Company and continued as counsel to Firstmark through approximately March 2001.

33. The economic terms of this transaction were unconscionable because, *inter alia*:

(i) Firstmark then had a realizable liquidated net asset value of approximately 6 million dollars while SCC had a book value of about 2.05 million dollars and a corresponding realizable liquidation net value of approximately 3.3 million dollars.

(ii) the consideration to be received by Coogan, Susan Coogan and Cruikshanks consisted of the Preferred B Stock which, according to its terms, had a stated value and liquidation preference of 8 million dollars plus accrued dividends at eight percent in 1997, ten percent in 1998 and twelve percent thereafter.

(iii) The redemption feature of the Series B Preferred Stock contract constituted

commercial extortion. If stockholders declined to approve the two amendments required by the Agreement, Coogan, Susan Coogan and Cruikshanks could force Firstmark to redeem all of the outstanding Series B preferred stock. Firstmark (controlled by Coogan, Susan Coogan, Cruikshanks and Ball) would then be forced to suffer, at its election, one of two extortionate alternatives. Either it could redeem the Preferred B by paying no less than $9,040,000 in cash or by distributing to Coogan, Susan Coogan and Cruikshanks 100% of the stock of SCAC, the subsidiary into which Coogan's company had been merged.

(iv) The $9 million cash payment option would have forced Firstmark to liquidate its assets. Even if the Company had sufficient assets to generate $ 9 million, this payment would have stripped the existing 1994 preferred stockholders of their contractual liquidation preference of over $2.2 million and the common stockholders would have received nothing.

(v) The stock distribution option was also extortionate. The Series B contract called for delivery of the ownership of the holding company subsidiary without adjustment. As first revealed in the Company's 10k for December 1997, between June 7, 1996 and December 31, 1997 Coogan dropped down to SCAC financial assets valued between $1.5 to $2.0 million. Moreover, the Series B preferred share contract entitled Coogan, Susan Coogan and Cruikshanks to collect accrued dividends right up to the closing date, regardless of whether the redemption was in cash or stock of the subsidiary. This provision entitled the Co-Conspirators to strip the Company of no less than $1,040,000, plus $66,667 for each month between June 30 to December 31, 1998 and $80,000 for each month thereafter before redemption.

(vi) The conversion feature was unconscionable because dividends on the preferred stock were to be paid twice as the accrued dividend was added to the conversion price and also to be

paid in cash;

(vii) the nominal conversion factor market determinant of $4.00 per share was unconscionable because while the outstanding 2,069,490 shares on June 7, 1996 traded at approximately $4.50 per share with a market capitalization of between 9.0 and 9.8 million dollars, the $4.00 market conversion price factor did not account for dilution and an assumed 2,000,000 share conversion was based on no less than an assumed 4,069,490 shares in the market place and hence with an assumed market capitalization of $16.3 million (vii) given the near economic certainty that warrants (with no anti dilution protection) expiring in June 1997 would not be exercised at $6.00 per share and that convertible notes due in April 1997 would not convert at $5.00, the nominal minimum conversion of 2,000,000 common shares constituted 49.15 percent of Firstmark common stock.

B. An Improperly Constituted Board of Directors Files Unauthorized, Facially Void Amendments of Firstmark's Articles of Organization.

34. In connection with taking control of Firstmark's Board in 1996, Coogan, Susan Coogan and Cruikshanks caused the Board to file an unauthorized, patently void Amendment of Firstmark's Articles of Organization. The amendment was unauthorized on several independent grounds. The purported amendment was void because it constituted an invalid control transaction void for lack of stockholder approval. The transaction failed as a de facto merger unauthorized by stockholders. The amendment also failed because the Series B Preferred Stock as purportedly authorized impaired the preferences of the existing 1994 $2.40 convertible, cumulative preferred stock and, therefore, was void for lack of approval of the preferred stock voting as a separate class. Finally, the amendment was void on its face as its provisions as to

convertibility, redemption and dividends were each violative of the Maine Business Corporation Statute.

35. According to the records of the Secretary of State of the State of Maine on May 7, 1996, Firstmark filed as a purported amendment to its articles of incorporation, the April 29, 1996 director resolution purporting to authorize the issuance of series B preferred stock upon closing of the April 30, 1996 agreement.

36. The May 7, 1996 filing constitutes an unauthorized and void purported amendment of Firstmark's articles of organization as a matter of law, *inter alia*, for violation of 13-A M.R.S. § 910 ("Section 910") because, *inter alia*, (i) it violated the fifteen-day notice to stockholders requirement; and/or (ii) it unlawfully sought to evade the control acquisition transaction requirements of the statute by issuance of additional shares and/or by means of a two-step process.

37. The Firstmark-SCC merger was a Section 910 control transaction because, *inter alia*, without the consent of Firstmark's shareholders, Coogan, Susan Coogan and Cruikshanks could force the liquidation of the Corporation and/or pursuant to the terms of the preferred share contract, in conjunction with their control of the Board of Directors, compel a *de facto* liquidation by requiring a redemption of their preferred stock.

38. The Firstmark-SCC merger was also a control transaction because Coogan, Susan Coogan and Cruikshanks thereby purportedly procured the beneficial ownership of no less than forty-nine percent of the voting common stock effective upon conversion; and with their control of the Board, coupled with the terms of the series B preferred share contract, Coogan, Susan Coogan and Cruikshanks had a blocking power equivalent to voting control.

39. The Firstmark-SCC merger was also a control transaction constituting a de facto merger under 13-A M.R.S. § 902, *et seq* triggering dissenters' rights under section 909 in that the *de facto* merger required amendment of Firstmark's articles of organization and required more than fifteen percent of the Firstmark voting common stock to be issued pursuant to the transaction. On June 10, 1996, in exhibit 99 to Firstmark's 8K dated June 12, 1996, Coogan, on behalf of himself and Cruickshanks, admitted the transaction was a merger, as Coogan is quoted: "both Mr. Cruikshanks and I have been looking for a solid public vehicle to merge our company into. We've looked at Firstmark and found a quality company with top quality management."

40. The Firstmark-SCC transaction was a de facto merger unlawfully structured to evade a stockholder approval of a control/merger transaction.

41. The May 7, 1996 filing of the purported authorization of the series B preferred stock was also void as an unauthorized amendment of the articles of incorporation for lack of approval by the 1994 preferred stock, voting as a separate class, because the series B preferred stock impaired one or more of the dividend and liquidation preferences of the 1994 preferred stock.

42. The May 7, 1996 filing also constituted an unauthorized and void purported amendment of Firstmark's articles of organization, as the preferred share contract thereby purportedly authorized was patently violative of the Maine Business Corporation statute because, *inter alia*:

(i) section 524 provides that "a corporation may, if authorized by the articles of incorporation, issue shares convertible, at the option of the <u>holder only</u>…," but paragraph 4(a) of the preferred share contract specifies that

"the Corporation shall have the right...to convert" (emphasis added).

(ii) section 515 authorizes the Board of Directors to declare stock dividends subject to limitations including *inter alia*, being declared and paid only "out of any unreserved and unrestricted surplus," but paragraph 1(b) of the preferred stock contract provides:

> If the Board of Directors shall not declare and pay a cash dividend for any dividend period, the Corporation, upon receipt of a written demand signed for any dividend by holders of at least eighty percent (80%) of the issued and outstanding shares of series B preferred stock, shall pay a dividend to the holders of series B preferred stock in shares of series B preferred stock.

(iii) section 515 and section 517 provide no distribution from capital surplus may be paid "to the holders of any class of shares unless all cumulative dividends accrued on all preferred…shall have been fully paid," but the payment of the stock dividend on demand by Coogan, Susan Coogan and Cruikshanks was required to be paid, even out of capital.

(iv) section 519 restricts redemption of shares, if "such redemption…would reduce the remaining net assets of the Corporation below the aggregate preferential amount payable in the event of voluntary liquidation to the holders of shares having preferential rights to the assets of the corporation," but paragraph 5 of the series B preferred stock contract required Firstmark to establish a sinking fund of one million dollars per year regardless of impairment of the liquidation value of the 1994 preferred and the minimum nine million dollar mandatory redemption price was payable without regard to impairment of the 1994 preferred liquidation

preference.

C. <u>The Improperly Constituted Board Issues Void Preferred Stock.</u>

43. Pursuant to the Agreement, but in violation of Maine law, according to the minute book and a consent action dated May 22, 1996, the Board made the following resolution:

> WHEREAS, the merger agreement requires…[Firstmark] to elect…H. William Coogan, Jr., Donald V. Cruickshanks, R. Brian Ball and Susan C. Coogan prior to the effective time of the merger; WHEREAS, the Corporation currently has three directors;…RESOLVED that the Board of Directors…hereby increases the Board of Directors to the maximum [as permitted by the articles of incorporation] seven (7) directors and hereby elects and appoints each of the following persons to the Board of Directors of the Corporation, to hold office until their successors are duly elected and qualified: H. William Coogan, Jr., Donald V. Cruickshanks, R. Brian Ball and Susan C. Coogan: FURTHER RESOLVED, that at the next annual meeting of the shareholders of the Corporation, the Board of Directors will submit to the shareholders and recommend for election to the Board of Directors the names of the Directors appointed hereby…FURTHER RESOLVED, that the Board of Directors…hereby…calls a special meeting of the shareholders…to be held on July 11, 1996, or at the earliest possible date thereafter…for purposes of [the foregoing and] considering and acting upon [the requirement under the Agreement to opt out of section 910 and to increase the capitalization]…and…authorizes and instructs the Secretary of the Corporation to send out notices of such special meeting. . . .

44. As a matter of law all acts of that enlarged Board of Directors, controlled by Coogan, Susan Coogan, Cruikshanks and Ball (the "Co-conspirators") were void and unauthorized as the acts of an illegally constituted board. 13-A M.R.S. § 706(1)(A) required that vacancies on a board of directors created by enlargement of the board must be voted solely by stockholders unless "the power to fill specific newly created directorships is expressly delegated to the directors." Under Firstmark's then extant 1994 By-Laws article IV section 3, the directors were authorized only to fill vacancies but were not delegated the power to fill vacancies created by enlargement of the Board.

45. On June 7, 1996, Coogan, Susan Coogan, Cruikshanks and Ball acting as

controlling directors of Firstmark merged SCC into a newly created Firstmark subsidiary, Southern Capital Acquisition Corp. ("SCAC"), in return for 40,000 shares of "Series B Preferred stock" in Firstmark (the "Merger").

46. The issuance of the 40,000 shares of Series B Preferred Stock to Coogan, Susan Coogan and Cruikshanks was void as the act of an improperly constituted Board of Directors.

47. The 40,000 shares of Series B Preferred Stock were also void because issued pursuant to a void, unauthorized amendment of Firstmark's Articles of Incorporation for each of the independent grounds described above.

48. The issuance of the 40,000 shares of Series B Preferred Stock was also voidable because the stock was issued in breach of the Agreement's requirement that the Company obtain certain governmental approvals, including the FCC approval of the change of ownership of the stock of Champion Broadcasting Corp., an SCC subsidiary.

49. The issuance of the 40,000 shares of the Series B Preferred Stock was also voidable as the issuance of said stock constituted a breach of fiduciary duty by Coogan, Susan Coogan, Cruikshanks and Ball for, among other things, enforcement of an unconscionable contract for their personal interests at the expense of Firstmark and its stockholders.

IV. Coogan Tries Unlawfully and Unsuccessfully to Procure Shareholder Ratification of His Fraud and Breach of Fiduciary Duty, and Manipulates the Market for Firstmark's Stock.

50. With Firstmark and its Board under his thumb, Coogan then launched a two-prong assault on the Company and its shareholders. Coogan sought to obtain shareholder approval of his improper takeover by means of false representations and material omissions. Coogan also fraudulently manipulated the market to secure a percentage ownership even larger

than called for under the unconscionable Agreement which he improperly enforced to the detriment of the corporation.

51. The terms of the Agreement, which Coogan and his Co-conspirators enforced in violation of their fiduciary duty, required that they propose to the Firstmark shareholders two amendments to the Company's Articles of Organization: (i) to increase the authorized common stock to thirty million shares; and (ii) to "opt out" of 13-A M.R.S. § 910 ("Section 910"), which provides shareholders of a Maine Corporation with appraisal rights when, as in June 1996, there is a twenty-five percent or more control transaction.

52. Coogan and the Co-conspirators baited the Firstmark stockholders by false and materially misleading proxy disclosures in October 1996, January 17, 1997, January 31, 1997 and February 5, 1997. The proxy statements were published in connection with a notice of special meeting of stockholders to consider and vote upon solely two proposals. Proposal number one was to approve an amendment to Firstmark's Articles of Incorporation to increase the amount of authorized common stock from five million shares to thirty million shares. The second proposal was to approve an amendment to Firstmark's Articles of Incorporation to opt out of Section 910.

53. In connection with the proposal to amend the Articles of Incorporation to opt out of Section 910, Coogan and his Co-conspirators falsely represented that the merger of his company into Firstmark "consummated on June 7, 1996" pursuant to which Coogan, Susan Coogan and Cruikshanks "received 40,000 shares of the [Series B] preferred stock," "did not require approval of the Company's stockholders." This statement was false for a number of reasons including:

(i) The May 7, 1996 purported amendment of Firstmark's Articles of Organization authorizing the issuance of the Series B preferred stock was void for lack of approval of the 1994 preferred stock, voting as a separate class, for such amendment;

(ii) The purported authorization of the Series B preferred stock and/or the issuance of the 40,000 shares were also void for lack of stockholder approval under Section 910;

(iii) The purported authorization and issuance of the Series B preferred stock were also void because the transaction constituted a de facto merger and hence void for lack of stockholder approval under the common law; and

(iv) The actions of Coogan's controlled Board were all unauthorized because the appointment of Coogan and his Co-conspirators to the vacancies created by enlargement of the Board required shareholder approval.

54. In October 1996, in the preliminary proxy statement, Coogan and his Co-conspirators falsely represented that, as a result of Firstmark's acquisition of his title insurance company, "the Company's assets increased $11.4 million dollars or 164 percent and its stockholders' equity by $8.75 million dollars or 154 percent." This was a materially false statement because the title insurance company's assets had a nominal book value of $2.05 million dollars and, upon information and belief, a net realizable book value of approximately $3.3 million dollars. The purported increase of assets of $11.4 million dollars is also false and materially misleading in that the $11.4 million dollar bookkeeping entry was not based on the fair value of the underlying assets, but rather was a derivative of the excessive, unconscionable

price in the Agreement. The Co-conspirators falsely represented that with the acquisition of Coogan's company, total stockholders' equity equaled $13.77 million dollars.

55. The statement that Firstmark's "stockholders' equity [was increased] by $8.75 million dollars or 154 percent" was false and materially misleading because, to the knowledge of Coogan and his Co-conspirators, the representation was not proper under generally accepted accounting principles and/or because it was not reflective of the fair value of the underlying assets.

56. When Coogan subsequently launched his precisely timed campaign to drive down the market price of Firstmark stock, he caused stockholders' total equity to be restated at five million dollars.

57. In each of the four January and February proxy solicitations, in describing the conversion rights of the preferred stock, the Co-conspirators made deceptive and/or materially misleading statements that, upon conversion of their preferred stock, Coogan, Susan Coogan and Cruikshanks would be holders of approximately forty-six percent of the common stock of Firstmark or approximately 2.67 million shares. This statement was false because, as alleged herein, it did not accurately recount the Co-conspirators' anticipated stake in the Company.

58. The Co-conspirators falsely represented to stockholders that a vote to opt the Company out of Section 910 on February 25, 1997 would allow the Board of Directors to convert the Series B preferred before dividends would accrue thereon. This was false and/or materially misleading because on March 12, 1997, the Co-conspirators caused the Board of Directors to authorize a cash dividend on the Series B preferred in the amount of $126,400.00. The statement was also materially misleading because on March 12, 1997, the Co-conspirators

caused the Board of Directors to authorize conversion of their preferred stock with the conversion price factor increased by the $126,400.00 accrued dividend.

59. In their disclosures to the public and Firstmark stockholders, Coogan, Susan Coogan, Cruikshanks and Ball, in connection with the proposed stockholder action to amend the Firstmark Articles of Incorporation, out of self interest and in breach of their fiduciary duties, failed to disclose their actual intentions and beliefs which were contrary to the reasons, opinion, and beliefs stated by them in recommending stockholder approval of the proposed amendments to Firstmark's Articles of Incorporation.

60. The Co-conspirators failed to fairly and adequately disclose to Firstmark stockholders that under their preferred stock contract, dividends would be paid both in cash and in additional stock.

61. The Co-conspirators falsely represented their belief that increasing capital six-fold was in the best interests of all stockholders. They falsely apprised stockholders that the title insurance subsidiary was "looking for growth and expansion" opportunities in part by "expanded operations and possible acquisitions." The Co-conspirators also explained that insurance regulations placed restrictions on balance sheets of insurers, which in 1998 they then explained prevented expansion of the title insurance business without an increase of capital. Therefore, when the Co-conspirators stated that they believed an increase in capital was in the best interests of the stockholders "by giving the Company needed flexibility in its corporate planning and responding to developments in the Company's business including possible financing and acquisition transactions," the Co-conspirators failed to disclose their true intentions of selling the title insurance business in lieu of expanding the business by selling shares of stock.

62. Other false, inaccurate, and/or materially misleading disclosures and omissions to Firstmark shareholders made to secure stockholder approval of the two amendments included, without limitation:

(a) inconsistent and deceptive statements concerning the redemption rights of the holders of the Preferred Stock suggesting the Preferred to be redeemable at the option of the holders;

(b) misleading statements that all dividends were payable solely at the discretion of the Board of Directors; and

(c) false representations concerning purportedly convertible debentures where such conversion rights were not authorized by Firstmark's Articles of Incorporation.

63. In their disclosures to the stockholders and the public in connection with the proposed stockholder action in February 1997, Coogan, Susan Coogan, Cruikshanks and Ball failed to disclose, *inter alia*, that*:*

(a) The authorization and the issuance of the June 1996 Preferred B Stock were each invalid;

(b) They had caused their appointment to the Board of Directors in violation of law;

(c) Under Maine common law the effect of the authorization and the issuance of the Series B Preferred Stock constituted a control transaction which required stockholder approval; and

(d) That they breached the promise of the prior Board to seek and obtain shareholder approval, and hence ratification, of the invalid appointment of the Co-

conspirators to the Board of Directors.

V. The Invalid February 25, 1997 Amendments

64. On February 25, 1997, Firstmark common stockholders were presented with and, according to the Co-conspirators and subsequent SEC disclosures, approved the two sole proposals to authorize amendments to Firstmark's Articles of Incorporation, to increase authorized common stock to thirty million shares and to opt out of Section 910. According to the Maine Secretary of State, amendments to Firstmark's Articles of Incorporation reflecting those two amendments were filed in late February 1997.

65. As a matter of law, the February 25, 1997 stockholder authorizations did not ratify the void, unauthorized amendment of the Articles of Incorporation purportedly authorizing the Series B preferred stock. The votes and approvals of the stockholders on February 25, 1997, as a matter of law, did not approve or ratify the prior void de facto merger or the void Section 910 appraisal rights transaction because they were obtained through the false and misleading representations by the Co-conspirators.

66. The votes and approvals of the stockholders on February 25, 1997 did not constitute a ratification of the acts of the improperly constituted Board of Directors because they were obtained trough the false and misleading representations by the Co-conspirators.

VI. Coogan Manipulates Firstmark's Share Price to Increase His Stake in the Company.

67. Coogan and his Co-conspirators intentionally and falsely delayed the meeting of stockholders and the subsequent Board authorization to convert the preferred stock. Coogan needed to delay because the market price was too high for his purposes in the period from July

through December 31, 1996. He scheduled the stockholder meeting and subsequent Board authorization for the conversion to dove-tail with his market manipulation scheme. By means of a series of fraudulent and misleading public disclosures, Coogan drove the price down. Coogan timed the disclosures to coincide with the twenty-day measuring period for calculation of the fair-market value of Firstmark common stock. Coogan compounded his wrongdoing by calculating the conversion on the basis of the average of only six days after the twenty day period, which unlawfully drove the conversion rate down to $2.525 per share. In March 1997, through fraud, stock price manipulation and gross breach of their fiduciary duties, the Co-conspirators authorized the conversion of the void preferred B stock into 3,230,286 shares or sixty percent of Firstmark's common stock.

A. Coogan Delays the Shareholder Meeting.

68. The Agreement required Firstmark's Board of Directors to call a meeting of the stockholders "as soon as practicable after the effective date [June 7, 1996] in order to approve the two proposed amendments to the Articles of Incorporation."

69. By consent action dated May 22, 1996, the Firstmark Board of Directors had enlarged the size of the Board to seven and without authority, appointed Coogan, Susan Coogan, Cruikshanks and Ball as Directors and resolved that "a special meeting of the shareholders [was] to be held on July 11, 1996 or the earliest possible date thereafter" to consider and vote upon the enlarged Board of Directors and the two proposed amendments to Firstmark's Articles of Incorporation.

70. Thereafter, the Firstmark Board, controlled by Coogan, Susan Coogan, Cruikshanks and Ball, filed proxy solicitations in October 1996, January 17, 1997, January 31,

1997, February 3, 1997 and February 5, 1997 noticing a special meeting of stockholders for February 25, 1997 to consider and vote upon solely the two proposals to amend the Articles of Incorporation.

B. Coogan's Economic Motive for Delay

71. If the stockholders had voted in July 1996, as the prior Board had authorized and directed, and the new Board, which Coogan now controlled, promptly authorized the conversion prior to September 30, 1996, the fair market value determinant of the conversion formula would have been approximately somewhere between $4.63 and $4.25 per share.

72. Had the stockholders voted and the Directors authorized the conversion as of December 31, 1996, the deadline for the conversion under the Agreement, the closing price of the stock was $3.50 per share.

C. Coogan and the Co-conspirators Breach Their Fiduciary Duties by Manipulating the Company's Financial Disclosures to Drive Down the Stock Price.

73. In making the Company's public financial disclosures immediately prior to the conversion period, Coogan and his Co-conspirators breached their fiduciary duties by intentionally making the most unfavorable accounting decisions possible in order to further their self interest by presenting the most unfavorable financial results possible, thereby driving down the stock price and obtaining more shares of the Company's common stock in the conversion.

74. Coogan's first step was the preparation of Firstmark's 10K for fiscal year ending June 30, 1996, which he filed on October 1, 1996. In doing so, Coogan furthered his self interests in breach of his fiduciary duty to the Company and the Firstmark stockholders.

75. The financial disclosure compared the 1995 fiscal year with the 1996 fiscal year.

Whereas for the year ending June 1995, Firstmark showed a profit of $324,146.00 or $0.45 per common share, for the fiscal year ending June 30, 1996, Coogan reported a loss on the common stock of ($615,243.00) or ($0.287) per common share.

76. In order to further his self interests, Coogan wrote down investments to produce a paper, unrealized loss of $1,249,347.00. While Firstmark carried investment securities and venture capital investments at fair market value or estimated fair value, according to the audited statement, a portion of the $1.2 million dollar loss was attributable to Coogan having carried certain venture capital investments at $1,850,676.00, which, according to Deloitte & Touche, had a fair value of $2,360,675.00. The $510,000.00 difference represented eighty-three percent of the reported loss on the common stock.

77. Upon information and belief, Coogan also reported as an expense $211,000.00 upon issuance of treasury stock for services which, upon information and belief, under generally accepted accounting principles was not required to be so reported.

78. Upon information and belief, Coogan failed to recognize a realized cash gain in excess of $200,000.00.

79. Not surprisingly, by December 31, 1996, Firstmark stock had fallen to a closing price of $3.50 per share when it had traded in a range of $4.375 to $4.75 on June 7th and at a high of $4.88 prior to the October 1, 1996 10K filing.

80. On the day before the commencement of the twenty-day measuring period for setting the conversion price, Coogan caused Firstmark to file an amended 10K with an amended audited financial statement for the year ending June 30, 1996. According to Deloitte & Touche, sometime after the October 1, 1996 filing of the annual report, Coogan had determined to restate

total stockholders' equity. Suddenly stockholder equity was reported to the investing public as having plummeted by $8.75 Million to a restated total of a paltry $5.01 million.

81. The day before commencement of the twenty-day measuring period of market value for conversion, Coogan also made false representations in an amended 10K for June 30, 1996 filed on February 3, 1997, in a February 3 1997 proxy statement and in an amended February 11, 1997 10QSB for the period ending September 30, 1996. To drive down the share price, Coogan falsely represented that: (i) Firstmark had liquidity concerns because, in part, it owed $1,035,000.00 in convertible notes due April 1, 1997; and (ii) it was not certain the Company could pay all its bills and pay the notes due on April 1, 1997. On February 3, 1997 in two separate filings, and again on February 11, 1997, Coogan stated that the Company "will attempt" to extend these notes but that "at this time…none of the convertible notes has been extended."

82. These representations of liquidity concerns were false and materially misleading because:

(i) In fact, the notes were due April 21, 1997, not April 1, 1997;

(ii) In Firstmark's original 10QSB for September 1996, Coogan had certified that as of November 14, 1996, "management is working on extensions of the current obligations [including "convertible notes issued April 1992 due April 1997" in the amount of $1,035,000.00]" but in the February 11, 1997 amendment of that report, without explanation that statement is deleted and replaced with the false statement that the Company in the future "will attempt to extend."

(iii) Upon information and belief, based on Maine Securities Division January 1999 published filing and based on a complaint brought by DiBello against Firstmark and Directors Vigue and Gilbert filed in Kennebec Superior Court in June 1997, several of these notes were owned of record by Firstmark or by Firstmark Director Vigue in a trustee capacity.

(iv) Upon information and belief based on a written agreement bearing an effective date of January 18, 1997 between Firstmark and Director Gilbert, obtained from the Maine Securities Division office, Firstmark in its own name and/or in the name of Vigue, controlled in excess of $500,000.00 of these convertible notes and hence controlled the extension of at least $500,000.00 of these notes.

(v) Upon information and belief based on the foregoing and the Maine Securities Division investigative findings published in January 1999, as of February 3, 1997 Coogan knew that Vigue and Gilbert had control over the extension of one or more those notes.

(vi) The statement as to liquidity concerns was also materially misleading for failure to have disclosed that management controlled one of more of these notes.

83. To further drive down the market price, in the February 5th management's discussion concerning pro forma financial information, Coogan falsely represented on a pro forma basis that combining his company with Firstmark for the year ending June 30, 1996, produced a loss on the common stock of ($1,038,000.00) or a loss per common share of

($.0483).

84. To further drive the price down, on February 4th, Coogan caused Firstmark to change its fiscal year end to December 31, 1996 in order to include additional losses in an accounting period prior to his planned conversion.

D. The Fraudulent Conversion

85. On March 12, 1997 the Board of Directors purported to authorize the conversion of the Series B Preferred into shares of Firstmark common stock effective April 2, 1997, subject to Federal Communications Commission approval. Pursuant to the terms of the Series B Preferred, the conversion ratio was to be based upon the average of the closing prices for twenty consecutive trading days commencing twenty-five days before the conversion date.

86. The 20-day period ran from February 4, 1997 through March 11, 1997.

87. Upon information and belief based on the forgoing allegations, Coogan intentionally manipulated the stock price during the 20-day period in order to drive the price down, and thus convert his Series B Preferred into a larger number of shares.

88. Coogan further manipulated the conversion rate for the Series B Preferred in his own interest and to the detriment of the Company by fraudulently calculating the fair market value component of the conversion formula based upon the average of the six consecutive trading days commencing March 5, 1997. This resulted in a conversion price factor of $2.525, yielding to Coogan, Susan Coogan, and Cruikshanks a total of 3,230,287 shares of common stock representing in excess of 60% of the common stock. If Coogan had used the 20-day period as provided in the terms of the Series B Preferred, then even based upon the fraudulently manipulated stock price, he would have received only 2,559,093 shares.

89. The March 12, 1997 purported authorization of conversion was void as a matter of law as the unauthorized void act of an improperly constituted Board of Directors.

90. The March 12, 1997 purported authorization of conversion was void as a matter of law because the Preferred Shares being converted were void as a matter of law for the individual reasons hereinabove alleged.

91. The March 12, 1997 purported authorization of Preferred Stock was void because it violated 13-A M.R.S. § 17 in that the conversion was not approved by a disinterested majority of Directors.

92. The March 12, 1997 purported authorization of conversion was voidable because Coogan, Susan Coogan and Cruikshanks enforced an unconscionable agreement to their individual pecuniary benefit to the detriment of the Company and its stockholders.

93. The March 12, 1997 purported authorization of conversion was also voidable for fraud because stockholders were never apprised until after the fact that each of the issuance of the Preferred Stock and the conversion of same to common stock had been subject to prior approval of the Federal Communications Comission because of a subsidiary's ownership interest in Champion Broadcasting Corporation of which Coogan was the Chairman of the Board.

94. On March 12, 1997, the Board of Directors purported to declare a cash dividend of $3.16 on each of the 40,000 shares of Series B Preferred Stock.

95. The March 12, 1997 declaration of dividend was void as the act of an unauthorized Board of Directors.

96. The March 12, 1997 declaration of dividend was null and void because the Preferred Stock was void.

VII. Securities Fraud; Fraudulent Concealment

97. As part of his continuing scheme and/or to buy time until he could sell the title insurance business, Coogan, along with his Co-conspirators, knowingly sold unregistered securities, the so-called 9% Convertible Notes, in violation of Federal and State securities laws. To ensure the successful sales of the "convertible" notes in the amount $585,000, Coogan and his Co-conspirators made false representations concerning the convertibility of those notes. Upon information and belief, Coogan and the Co-conspirators then fraudulently concealed or destroyed corporate minutes and records pertaining thereto.

A. Sales of Unregistered Securities

98. The exchange of the original 1992 8% notes for the March 1, 1997 9% notes constituted a sale of a security under the 1933 Act and also the Maine Securities Act. Pursuant to 32 M.R.S. sec. 10502 (2)(L) because the offering and sale of the 9% notes to existing Firstmark note holders entailed a payment of commissions to Gilbert, the offering and sale were illegal unless prior to the offer an appropriate notice was filed with the Maine Securities Division Director and not disallowed.

99. According to an affidavit of Ms. Christine V. Breen of the Maine Securities Division Office dated July 1, 2003, ("Breen Aff.") no filing for exemption under 32 M.R.S sec. 10502(2)(L) concerning the 1997 exchange of Firstmark notes was ever made.

100. As a matter of law, the offering and sale of the 9% notes to existing Firstmark Note Holders constituted sales of unregistered securities in violation of law.

101. The March 1997 sale of unregistered securities was a knowing and intentional violation because, upon information and belief based on the Breen affidavit, in connection with

its 1994 offering pursuant to Regulation D and 32 M.R.S.A. section 10502(2)(R) also involving payment of commissions, Firstmark filed for exemption under said section 10502(2)(R) which was applicable to Firstmark's 1994 offering.

B. <u>False Representations as to Convertibility</u>

102. In or about early February 1997, Susan Coogan, as a Firstmark Director, transmitted to the Holders of the 1992 Convertible Notes an offering memorandum called "Note Proposal." She apprised them that the purpose of the memorandum was to "review the terms of a new note that Firstmark is proposing to replace the Notes due 4/21/97 that you currently hold." She enclosed the Notice of Meeting of Stockholders to be held February 25, 1997, the Amended 10K for June 20, 1996 and the Amended 10QSB for September 30, 1996, and an "Extension Notice." Susan Coogan explained that it was "unlikely that the cash available to Firstmark will be sufficient to repay the Convertible Notes."

103. Susan Coogan's February 10, 1997 offering memorandum to "Holders of Firstmark Corp.'s Convertible Notes Due April 21, 1997" was false and materially misleading *inter alia*:

(i) She falsely represented the 1992 Notes to be convertible into Firstmark Common Stock when as a matter of the law, those notes were not so convertible.

(ii) The note dated March 1, 1997 actually delivered to investors was captioned **"CONVERTIBLE PROMISSORY NOTE"** but in Paragraph Three thereof the conversion feature is conditioned upon the Firstmark Shareholders authorizing such approval.

(iii) While Coogan's Board on March 12, 1997 authorized the sale of such "Convertible" Notes and directed that a meeting of the shareholders be called to ratify both the 1992 issuance and the 1997 notes and the convertibility feature, no such meeting of shareholders was ever called or convened.

104. Upon information and belief, to cover their tracks, the Co-conspirators concealed or destroyed the February 10, 1997 prospectus as well as the March 12, 1997 minutes which authorized the note exchange and the conversion of the void preferred stock.

VIII. False Filing of 13D; Failure to Amend 13D May 1997-March 1999

105. As part of his scheme to loot Firstmark, delist its common stock and eventually take the Company private Coogan: (i) filed with the SEC a false 13D; (ii) from at least August 1997 through March 1999, failed to amend his Form 13D to reveal his intent to sell the very title insurance business he had merged into Firstmark, to delist the common stock and cause the number of shareholders to be reduced below 300; and (iii) again from January 2002 through October 2002, failed to amend to reveal his intent to make a tender offer, to acquire control and to deregister. In the Forms 13D filed by each of Coogan, Susan Coogan and Cruikshanks on May 12, 1997 in item 4 each certified that

> there are no plans or proposals that [any of the three] may have that related to or would result in:…(c) a sale or transfer of a material amount of assets of the issuer or any of its subsidiaries;…(h) causing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association; (i) a class of equities securities of the issuer becoming eligible for termination of registration pursuant to section 12(g)(4) of the Securities Exchange Act of 1934.

106. Coogan advised stockholders he wanted to expand the title insurance business and hence in February 1997 sought shareholder approval to increase capital six fold to 30 million shares. But instead of selling stock to grow the business he had just merged into Firstmark, even before converting his preferred, he set out to sell the business and as of August 1997, formally commenced the sale process.

107. Given its high overhead, Firstmark continued to suffer losses and as controlling stockholders, directors and officers, Coogan, Susan Coogan and Cruikshanks were well aware of the stock price as it declined from $4.75 at the time of their takeover in June 1996, to $0.75 per share in late 1997, to low bid of $0.38 in the last quarter of 1998 and from January 1 to January 26, 1999 a high bid of $1.38 to a low bid of $0.63. Indeed, as set forth above, they knowingly caused a substantial reduction in the share price.

108. In September 1998, the NASDAQ Small Cap Market notified Coogan, Susan Coogan, Cruikshanks and Ball that, unless they took some action, the Firstmark stock would be delisted for failure to maintain an average bid price of $1.00 per share. Instead of taking action, to further Coogan's self dealing, they set out to sell Firstmark's operating assets, delay the delisting process until after the sale was concluded and falsely represent to stockholders that the Company would take all steps necessary to maintain the listing

109. Fully aware that the Company's stockholders had previously approved a reverse split in 1992, fully aware that there was a red light on the trading of Firstmark shares, fully aware that other than the average share price Firstmark fully qualified under the Exchange rules for maintaining a listing on the NASDAQ Small Cap Market, fully aware that most stockholders' holdings were in the hundreds or thousands, and fully aware that upon closing of

the Old Guard sale with a four-to-one reverse split, or even a two-to-one reverse split, given about $6.2 million net from the sale after paying debts, the per share price (on a book value basis) would be over $4.00 (4 to 1) and over $2.40 (2 to 1), Cruikshanks with the backing, and/or at the direction, of Coogan, and aided and abetted by Ball, called for a special stockholders meeting to approve the sale but not to approve a reverse split and never followed through on the representation to take all steps necessary to maintain the listing.

110. In violation of 15 U.S.C. § 78m(d), Coogan, Susan Coogan and Cruikshanks failed to file an amendment to their respective May 1997 Forms 13D to reflect their actions commencing in 1997 to sell substantially all Firstmark's assets or to reflect their intention to cause the delisting of the stock.

IX. Coogan Sells Off the Company's Operating Assets in a Fraudulent Self-Dealing Transaction.

111. Coogan and his Co-conspirators set out to sell Firstmark's title insurance business. Growing the title insurance business would require capital. Obtaining capital would most likely involve a stock offering. A stock offering would dilute Coogan's control percentage of the Company's common stock. Coogan's plan to dominate the Company and entrench himself accordingly required that he sell the title insurance business.

A. Self-Dealing in Connection with Old Guard Sale

112. In December 1998, the Firstmark Board of Directors remained under the control and domination of the Co-conspirators. In particular, Cruikshanks continued to serve as a Board member, and the three Co-conspirators owned over 60% of Firstmark's outstanding common stock. While there are no resignations in the Minute Book, Coogan and Susan Coogan purported to resign from the Board as of April 1998, but failed to report the purported resignation in a

public filing until April 23, 1999. In reality, the Co-conspirators continued to control Firstmark and its Board of Directors throughout 1999, 2000, and most of 2001.

113. On or about December 2, 1998, the Co-conspirators, acting primarily through Cruickshanks, caused Firstmark to enter into a Stock Purchase Agreement to sell Firstmark's title insurance subsidiary to Old Guard Group, Inc. ("Old Guard").

114. The Co-conspirators structured the Old Guard transaction to benefit themselves at the expense of the Company. As part of the transaction, Coogan received a side payment, styled as a "severance benefit" of $311,000. As part of the transaction, Cruikshanks secured a position to continue as the CEO of the title insurance company after the sale with ten percent of the post-sale profit for three years. The payments to Coogan and Cruikshanks of ten-percent profit kickers were purely self dealing.

B. <u>Proxy Fraud in Connection with the Old Guard Transaction</u>

115. In furtherance of their self-dealing scheme, the Co-conspirators subsequently engaged in proxy fraud and unlawfully evaded the shareholder approval provisions of 13-A M.R.S.A. § 611-A.

116. Pursuant to a preliminary proxy dated December 31, 1998, the Firstmark Board of Directors, called a special meeting of shareholders for February 17, 1999, for the sole stated purposes of electing three directors for Firstmark and approving the sale of the Firstmark title insurance subsidiary to Old Guard.

117. The Firstmark proxy statement issued by the Coogan-controlled Board to the shareholders dated December 31, 1998 ("Coogan's December 1998 Proxy") was false and misleading for at least the following reasons:

(a) It incorporated the prior 10K for December 31, 1997 which represented the stock to be traded on the NASDAQ Small Cap National Stock Exchange and omitted any disclosure of the potential delisting, of which Coogan and his Co-conspirators were well aware because on September 29, 1998, the NASDAQ Small Cap market notified the Company that "it would be subject to delisting."

(b) As more fully alleged above, Coogan, Susan Coogan, Cruickshanks, and Ball intended to allow the delisting in violation of their duty to shareholders.

118. On January 29, 1999, the Firstmark Board, still under the control and domination of the Co-conspirators, issued a definitive proxy ("Coogan's 1999 Definitive Proxy").

119. Coogan's 1999 Definitive Proxy was false and misleading for at least the following reasons:

(a) It falsely represented to stockholders that "the company expects to take all steps necessary to maintain the listing of the shares of common stock on the NASDAQ market" when Coogan and his Co-conspirators in fact intended to permit the delisting of the stock as part of their plan to entrench themselves and control the Company; this was a false statement of intention and materially misleading because, *inter alia*, as more fully alleged above, the defendants were aware in mid-January that: (i) there was a red flag on the trading of Firstmark stock; (ii) other than the share price, Firstmark fully qualified to maintain its listing; (iii) Firstmark stockholders had previously approved a reverse split; (iv) adding a proposal to the special stockholders meeting seeking approval of a two or four to one reverse split would put the stock well above the minimum $1.00 per share requirement.

(b) The Definitive Proxy was intentionally crafted to deceive those stockholders whose shares were held in street name. The Co-conspirators stated that under some circumstances Brokers cannot vote without instruction from the owner, but failed to disclose that the sale to Old Guard which involved appraisal rights was one of those circumstances. The form proxy card attached to Exhibit D of the March 5, 1999 Certificate of Vote, upon information and belief, sent on instruction of the Co-conspirators to all stockholders fraudulently specified that "if no direction is given this proxy will be voted for item 2 [to approve the sale]."

(c) The Definitive Proxy at page 6 fraudulently asserted that "the directors and executive officers of the company have indicated their intention to vote their shares of common stock in favor of the [sale to Old Guard] transaction. It is deceptive, *inter alia*, because: (i) the listing of directors and executive officers and their affiliates excludes Coogan and Susan Coogan; (ii) it failed to disclose that the directors and executive officers and affiliates own in excess of sixty percent of the common stock; and (iii) the statement is fraudulent because under 13-A M.R.S.A. § 611-A, the votes of the directors and officers and employees, as well as interested stockholders and affiliates and associates of interested stockholders, are not to be calculated.

(d) The Definitive Proxy falsely represented that Coogan, Susan Coogan and Cruikshanks had received 40,000 shares of series B preferred stock and that upon conversion of same, they were the record owners of 3,230,287 shares of common stock. This was a false statement because both the 40,000 shares of preferred stock and the 3,230,287 shares of common stock issued upon conversion thereof were void as a matter

of law. This was material because, *inter alia,* as the number of valid outstanding shares was reduced, each individual share had a greater proportion of the total market capitalization value of Firstmark, and would have enabled Firstmark to remain listed on the NASDAQ Small Cap Market.

(e) The Definitive Proxy was materially misleading because it concealed Coogan's role as director, a highly paid executive and/or interested shareholder under 13-A M.R.S. § 611-A. Page 7 stated that the "Board of Directors consists of Cruickshanks, Morrison and Settlage," but page 17 of the 10K for December 1997, incorporated by reference, described Coogan and Susan Coogan as Directors of Firstmark since June 1996, and on pages 18 and 19 identified Coogan as a highly paid executive who served the Company and/or its subsidiaries. The resignation of a director is a reportable event requiring the filing of an 8K, but each of the prior quarterly reports through June 30, 1998 incorporated by reference into the Definitive Proxy certified that there have been no resignations of directors or other 8K reportable events. Moreover, the 10QSB for September 31, 1998 dated November 16, 1998, at page 13 disclosed that: Vigue and Gilbert resigned effective November 10, 1998, that Morrison had been appointed to the Board of Directors on November 10, 1998, and certified that there were no other resignations or other 8K reportable occurrences. On page 10 of the Definitive Proxy, the executive compensation schedule listed only Cruikshanks and improperly omitted disclosure of all highly paid executives of both the Company and its subsidiaries, but eleven pages later, hidden in the section describing interests of certain persons in the transaction, with no explanation Coogan was described as "formerly a director of the

Company" and party to a previously undisclosed purported January 2, 1998 severance agreement entitling Coogan to $311,000.00 which as a condition of the sale, Firstmark must satisfy. Yet according to the required filings, Coogan's employment agreement with STIC had previously terminated on August 15, 1997.

(f) The Definitive Proxy failed to disclose the status of the transaction under 13-A M.R.S. § 611-A. This was material because the status of a section 611-A transaction necessarily would have assumed actual significance to a reasonable shareholder (e.g. fully and fairly disclosed status of Coogan as an executive, interested shareholder, associate and/or affiliate of an interested stockholder, calling attention to the $300,000.00 "severance" payment and Cruickshanks' three-year ten-percent profits kicker, each of which reduced the net economic benefit to stockholders); and

(g) The Definitive Proxy failed to disclose that in order to maintain their control of the Company: in January through March 1997, Coogan, Susan Coogan and Cruickshanks, aided by Ball, had manipulated the market, sold unregistered securities in violation of federal and state securities laws including, knowingly and intentionally falsely representing to investors that Firstmark notes were convertible into Firstmark common stock, and concealed an ongoing investigation by the authorities including the Maine Securities Division January 1999 formal published action.

C. Concealment of Prior Wrongdoing

120. In order to obtain Stockholder approval for the Old Guard sale without being forced to liquidate, Coogan concealed prior wrongdoing. As part of his scheme to maintain control and ultimately go private, Coogan settled a number of Shareholder lawsuits by buying

back stock, thereby lowering the number stockholders from the year end 1997 total of 460 to his desired goal of less than 300. Upon information and belief, to aid these efforts Coogan and the Co-conspirators made incomplete public disclosures and concealed or destroyed minutes and other documentary evidence of their wrongdoing.

121. In June 1997, the DiBello Family sued Firstmark, claiming that the Company, as well as Vigue and Gilbert, had engaged in fraud. DiBello alleged securities fraud after "June of 1996 [when Coogan and his Co-conspirators]…became controlling Stockholders and Directors." The alleged wrongdoing included the fraudulent sale of the 9% Convertible Notes in March 1997.

122. The DiBello lawsuit was settled in or about June 1998.

123. In December 1997, the State of Maine Securities Division commenced an investigation of Firstmark in conjunction with the SEC. While the SEC investigation focused on the wrongdoing of Vigue and Gilbert with respect to financial accounting for periods ending March 31, 1996, upon information and belief, Coogan concealed from the SEC and the Maine Securities Division Coogan's wrongdoing and manipulation of the Market after that period.

124. In the SEC disclosures and the Proxy Solicitations for the March 1999 sale, Coogan failed to disclose the allegations by the DiBellos, and upon information and belief by other Stockholders, of securities fraud and other wrongdoing after June of 1996 when Coogan and the Co-conspirators assumed control of Firstmark.

D. The March 1999 Sale Was an Undisclosed Business Combination Under Section 611-A of the Maine Business Corporation Statute.

125. The March 1999 sale to Old Guard was a "business combination" under 13-A M.R.S.A. § 611-A because, *inter alia:*

(a) It constituted a sale of substantially all Firstmark's assets, to wit one hundred percent of the stock of STIC, the subsidiary which operated the title insurance business.

(b) Cruikshanks was an associate of Old Guard and received an economic benefit disproportionate to his stock holdings.

(c) Coogan and Cruikshanks were interested stockholders.

126. The March 1999 sale to Old Guard was invalid under 13-A M.R.S.A. § 611A, because: (i) there was no valid quorum at the shareholder meeting at which the transaction was purportedly approved; (ii) the transaction was not validly authorized by a majority of the outstanding voting stock not beneficially owned by the Co-conspirators; (iii) and the minutes were intentionally falsified.

127. The Co-conspirators deceived the shareholders in the proxy statements and evaded proper shareholder approval under 13-A M.R.S.A. § 611A in order to ensure the approval of their self-dealing transaction and avoid potential demands for appraisal from dissenting shareholders.

E. <u>Fraud and Falsification of March 5, 1999 Minutes</u>

128. Section 611-A applied to the Old Guard sale. Under Section 611-A, the approval of stockholders required at "least a majority of the outstanding shares" of common stock without including the shares held by Coogan, Susan Coogan, Cruikshanks and any Firstmark Director.

129. Coogan, Susan Coogan and Cruickshanks, aided by Ball, fraudulently misrepresented the voting rights of the Shareholders in the Definitive Proxy. On March 5, 1999 Cruickshanks, aided by Ball, falsely certified the existence of a quorum and fraudulently included the votes of shares held in street name where there had been no instruction from the owners, fraudulently included the stock of Coogan, Susan Coogan, and Cruickshanks, and fraudulently included 10,000 shares for Director Settlage.

130. The Definitive Proxy Statement stated that "approval of the transaction requires the affirmative vote of the holders of at least a majority of the outstanding shares of common stock" but fraudulently omitted that the shares of Coogan, Susan Coogan, Cruikshanks and Director Settlage could not be included.

131. The Proxy Cards mailed to stockholders whose shares were held in street name unlawfully authorized the Clearinghouse Nominee to vote for the sale in the absence of instructions. Under the Stock Exchange rules, a broker may not exercise a vote on a transaction involving appraisal rights.

132. According to Ball's March 5, 1999 minutes, Cruikshanks declared the presence of a quorum based on the presence of 3,795,164 shares.

133. According to Ball's March 5, 1999 minutes, Cruikshanks reported that "a majority of the outstanding shares of the Corporations common stock entitled to vote for the sale had voted in favor of the sale."

134. As a matter of law, the declaration of a quorum for purposes of the sale to Old Guard was invalid because it included the 3,280,286 shares held by Coogan, Susan Coogan, and Cruikshanks and because it included 10,000 purportedly owned by Director Settlage.

135. According to Ball's March 5, 1999 minutes the holders of 3,609,887 shares approved the sale.

136. In fact, only 369,602 shares lawfully voted to approve the sale.

137. Ball fraudulently included 10,000 shares of Director Settlage and upon information and belief 10,000 shares of Director Morrison. The shares of a Director cannot be counted under Section 611-A.

IX. Coogan and Cruikshanks Part Ways.

138. After Coogan caused Firstmark to sell off its operating assets, Coogan and Cruikshanks, the controlling stockholders, knew that the Company needed to acquire an operating company, or face a probable liquidation in lieu of the substantial complications of being a holding company under the Investment Company Act of 1940 ("1940 Act"). After contracting with Old Guard in December, 1998, Coogan, who knew Gorman from prior business dealings, convinced Gorman that investing in Firstmark was an attractive opportunity. Specifically, Coogan initially suggested that Firstmark might acquire Gorman's securities firm. After announcement of the Old Guard sale in December, 1998, Gorman, in good faith and without notice of any of the allegations in this Complaint, purchased a handful of shares on the market.

139. During this time period, Coogan was working primarily as an investment banker, while Cruikshanks served as Firstmark's CEO and Chairman of the Board. Because Firstmark was only a holding company with no operating business, Firstmark paid Cruikshanks only $2,000 per month for his services in those capacities during this time period.

140. In early 2000, Coogan continued to woo Gorman. At the end of March, 2000,

Gorman purchased another 300,000 shares on the market as Firstmark requested a one-year or more further exemption from the 1940 Act

141. Facing a possible liquidation, Coogan and Cruikshanks disagreed about the next step for the Company. Accordingly, Coogan sought to get Cruikshanks out of the way.

142. In or about late 2000 or early 2001, Coogan convinced Gorman to help keep Firstmark alive as a public company and to help Coogan buy out Cruikshanks.

143. Gorman presented the opportunity to his friend, Arch Aplin III, and agreed to loan Aplin a substantial portion of the funds necessary to make the investment.

144. On or about February 9, 2001, Aplin, acting in good faith and without notice of the defects in the stock set forth in this Complaint, bought 1,000,000 shares of Firstmark's common stock from Cruikshanks and 60,000 shares from Settlage and Morison, for which he paid $.71 per share.

145. In connection with Aplin's investment in the Company, concurrent with the resignations of Morison and Settlage as directors, he and Robert Ellis, a mutual friend of Gorman's and Aplin's, joined Firstmark's Board of Directors.

146. Both Aplin and Ellis were experienced business people with strong qualifications to serve on Firstmark's Board.

147. Aplin and Ellis took charge of the 1940 Act issue with the SEC and were instrumental in securing an extension of time for Firstmark to acquire an operating company. In October 2001, the SEC granted Firstmark an additional year in which to acquire an operating company. If, however, Firstmark was unable to secure an operating company in that time, it would be forced to liquidate.

X. Coogan Deceives the Board in Connection with the Tecstar Acquisition.

A. Introduction

148. At or about this same time period in 2001, Coogan was terminated as an investment banker by the Rothschild Group. At loose ends in his career, Coogan turned his full attention to Firstmark.

149. Coogan arranged to be re-appointed to a new five person board, concealing from the new Directors the extent of his prior involvement with Firstmark from 1996 through the sale to Old Guard in March 1999. He induced them to hire him as CEO to act as an investment banker to locate, acquire and close an acquisition by October 2002.

150. In February 2002, Coogan located the Tecstar opportunity. He personally conducted extensive due diligence and pitched Tecstar to the Board as an opportunity to acquire a ten to twelve million dollar business for less than four million dollars. Coogan, however, concealed from the board that Tecstar's booked orders for the Fall would drop off sharply.

151. After securing the Board's approval to purchase Tecstar, Coogan launched a secret hostile takeover. He secured voting control in violation of Federal Securities laws and sued Gorman and the other Directors. Unaware of Coogan's extensive prior frauds and misdeeds, Gorman and the other so-called Texas Directors resigned in the belief that avoiding further internal litigation would be in the best interest of the Company.

152. In September 2002, by means of a fraudulent proxy solicitation, Coogan purported to elect a slate of seven directors. Within months, most of these directors resigned in the face of Coogan's self-dealing and concealment of the revenue drop-off.

153. Coogan, Susan Coogan, and Kaplan have put Firstmark on the brink of

insolvency as they have improperly caused Firstmark to pay Coogan's personal proxy and litigation expenses and an excessive salary to Coogan. To avoid the transparency required by SEC disclosures and to cover his tracks, without due authorization and in breach of his fiduciary duty, Coogan, aided by Kaplan, in late March 2003 deregistered Firstmark with the SEC.

B. The Tecstar Acquisition

154. After the Co-conspirators sold Firstmark's operating assets, it was left in existence as a mere shell corporation with only cash assets. Accordingly, in November 2001, the SEC imposed a one-year period within which Firstmark was obligated to acquire an operating subsidiary. If Firstmark was unable to acquire an operating company on or before October 31, 2002, the SEC would force Firstmark to liquidate.

155. Coogan used the SEC deadline as an opportunity to become Director and "CEO" of Firstmark, under the guise of acting as its investment banker. Beginning in November 2001, Firstmark paid Coogan an annual salary of $300,000 plus expenses to search for an operating company for Firstmark to acquire. The Board, including Coogan, however, agreed that $300,000 was excessive annual compensation for a CEO who was not running a business. The sum was justified only to the extent Coogan served as an acquisition broker and investment banker who would negotiate, document and consummate an acquisition before the October 31, 2002 deadline. As Coogan admitted at his 2002 deposition, he and the Board agreed that his salary would cease when "we either bought a business or we would have to liquidate." Accordingly, in or about November 2001, Firstmark hired him as CEO and Chairman, pursuant to a written contract for a one-year term at a compensation of $300,000 per year. Coogan's duties under the contract were to find and close an acquisition before October 31, 2002.

156. At a Board meeting in late February 2002, with time to find a suitable acquisition target and close an acquisition deal running short, Coogan proposed that the Company consider acquiring Tecstar Electro Systems, Inc. ("Tecstar") in Durham, North Carolina. In making his proposal Coogan had performed substantial due diligence and disseminated to the Board economic projections.

157. Now desperate to push through an acquisition within the time remaining, and having invested substantial Company funds and time in the proposed acquisition, Coogan made material misrepresentations to Firstmark's Board in order to induce it to approve the deal.

158. Specifically, Coogan withheld from the Board the material information that Tecstar's orders from its primary client, Honeywell, would drop sharply within months.

159. As Firstmark's CEO, specifically charged with finding an acquisition target for the Company, Coogan was primarily responsible for all due diligence regarding Tecstar. Beginning in February 2002, Coogan had no less than a dozen meetings with management of Tecstar. Tecstar's management disclosed to Coogan that it maintained a backlog of orders on a monthly basis and a prospective basis, including anticipated revenues through at least December 31, 2002.

160. Upon information and belief, during Coogan's due diligence, Tecstar's management disclosed to Coogan backlog information showing orders through December 31, 2002, which revealed a sharp downturn in business orders from Tecstar's largest customer, Honeywell Aerospace ("Honeywell"), in the third and fourth quarters of 2002. This belief is based upon information obtained in interviews of former senior Tecstar executive officers. Tecstar's management told Coogan not only that the continued relationship with Honeywell was

uncertain, but that the committed and booked business from Honeywell in the third and fourth quarters of 2002 was sharply down. This information was conveyed to Coogan not only orally but, according to interviews conducted prior to April 17, 2003 with Tecstar management, Coogan and his accountants received three and six-month backlogs and also a one-year backlog.

161. On or about March 20, 2002, Coogan presented the results of his due diligence to Firstmark's Board. Despite having actual knowledge that the business orders from Honeywell would decline sharply during the third quarter of 2002, Coogan failed to disclose this information to the Board. Instead, Coogan prepared and presented to the Board a deal profile for the Tecstar acquisition which projected future growth based solely on the three month backlog of orders. The projections Coogan presented to the Board reflected average monthly orders from Honeywell greater than 1.5 million dollars for the three-month period ending June 30, 2002. Coogan minimized the potential impact of any loss of Honeywell business, pitching the acquisition to the Board as attractive on a balance sheet basis regardless of the Company's fortunes in the marketplace as "we can acquire [a] $10-12 million business for at most $4mm." At the time of Coogan's March presentation, Honeywell orders accounted for approximately 50% of Tecstar's business.

162. Upon information and belief, based on interviews with Tecstar managers prior to April 17, 2003, Coogan attended a meeting in early to mid-April 2002 at the North Carolina premises of Tecstar, at which Brian Harbell, a Tecstar middle manager, apprised Coogan that the continued relationship with Honeywell was uncertain, and that the committed and booked business in the third and fourth quarters with Honeywell was sharply down. As a result, following that meeting, Coogan demanded that Tecstar allow him to meet personally with

Honeywell to discuss the relationship and the status of orders.

163. With the support of the Board, on April 23, 2002 Coogan transmitted a proposed letter of intent to Mr. John Clark, Chairman of the Board of Tecstar, copies of which were provided to the Board, and in which Coogan acknowledged:

> We are now far more familiar with the company, its management team, its major issues, its assets and its earnings capacity going forward with or without the Honeywell business (which as you know represents over fifty percent of the Company's revenues). We have probably completed eighty-five percent +/- of our due diligence.

164. On or about April 25, 2002, the Firstmark Board of directors decided to proceed with the acquisition. While the Firstmark directors were aware that the continuation of a supplier relationship with Honeywell was uncertain, Coogan did not inform them of the steep downturn in Honeywell business commencing in the third quarter of 2002.

165. According to Coogan, the Board relied entirely and solely on him for all due diligence, the conduct of negotiations and conducting and closing the Tecstar acquisition. Coogan's knowledge of the imminent, substantial decline in Honeywell's orders was, accordingly, material information that he was obligated to disclose to the Board.

166. By failing to disclose his knowledge of an imminent, substantial decline in Honeywell orders, Coogan omitted material information necessary to make his presentation to the Board not misleading.

167. Coogan controlled all information presented to Firstmark's Board. Ali Ezami was Tecstar's general manager of the Aerospace business, as well as Tecstar's liaison to Coogan. He provided information to Coogan and hoped to secure a job with Firstmark as president of the acquired business. During this time Coogan had instructed Ezami not to provide any information

to the Board except as Coogan instructed. Coogan also divided the due diligence tasks between the accountants whose work was limited to determining feasibility and cost of appropriate SEC audits and the lawyers whose work was limited to review of operative business agreements and the like. Coogan maintained separate control of each due diligence function and reviewed all memos from Firstmark's accountants and lawyers before presenting them to the Board.

168. In April and/or May 2002, Coogan visited Honeywell purportedly to discuss the status of its relationship with Tecstar and its intentions with regard to future orders. Ali Ezami, Tecstar's general manager, accompanied Coogan to the Honeywell meeting. At the meeting, Coogan failed to ask any material questions about Honeywell's relationship with Tecstar or its intentions with regard to pending or future orders. On information and belief, based upon the information recited in the foregoing paragraphs, Coogan intentionally and knowingly refrained from asking Honeywell material questions about Honeywell's relationship with Tecstar or its intentions with regard to pending or future orders. At minimum, a reasonably prudent person in Coogan's position would have used the Honeywell meeting as an opportunity to inform himself fully of Honeywell's intentions, which Coogan failed to do.

169. On or about May 24, 2002, in reliance upon the false and misleading information provided to it by Coogan, Firstmark's Board approved the Tecstar acquisition and entered into an asset purchase agreement with Tecstar. On May 28, 2002, Firstmark filed its 8k over Coogan's signature and disclosed the Asset Purchase Agreement. While not bound to do so, the Board contemplated hiring Ali Ezami as the president of the new subsidiary.

170. Coogan was motivated to deceive the Board of Directors and Firstmark stockholders in order to entrench himself and maintain his ability to funnel excessive self-

dealing compensation and other benefits to himself and Kaplan.

171. While the Board contemplated the closing of the Tecstar asset purchase to occur in late June, upon information and belief, Coogan, delayed the closing until July 8, 2002 in order to have sufficient time to orchestrate and implement his take-over of Firstmark. For example, in a June 11, 2002, memo to the Board, Coogan apologized for not disclosing one delay by explaining that he "just forgot to bring it up."

172. On July 8, 2002, Firstmark and Tecstar closed the asset purchase. On July 9, 2002, Ezami became a director.

VI. Coogan Seizes Control of the Company Through Deception.

A. Coogan Secretly Decides to Seize Control of the Company

173. Beginning no later than mid-June 2002, Coogan unlawfully seized control of Firstmark by secretly making a fraudulent tender offer for sufficient shares of Firstmark stock to increase his ownership to more than fifty percent.

174. By Coogan's own admission at his deposition on August 14, 2002, Coogan began investigating the purchase of additional shares of Firstmark stock in June 2002, before the Tecstar asset purchase agreement had even closed. Coogan's goal was to acquire enough shares to take control of Firstmark's Board of Directors. By the end of June 2002, Coogan had retained counsel (Kaplan) to assist him in obtaining the shares.

175. According to Coogan's own deposition testimony, by mid-June Coogan determined to buy more shares to gain control in material part because, according to Coogan's sworn testimony:

> [Ezami] had great concerns that the Board…wasn't dealing with him honestly…and that if…the Board was allowed to stay in place, that – they would

> ruin the business. And as a consequence, [Ezami] he had serious doubts that [Ezami] he would be willing to sign his contract, which was a pre-condition or one of our major pre-conditions of closing the transaction;

Coogan also testified that Ezami had asked Coogan to change the Board, as Ezami might not sign a contract unless the Board was changed. Coogan admitted that by the middle of June, he had determined that he would try to change the Board of Directors, purportedly in order to close the transaction and retain Ezami.

B. Coogan Lies to Shareholders to Induce them to Sell to Him

176. Coogan admitted under oath that between the middle of June and prior to the July 8, 2002 closing, he told a "number of our shareholders:"

> [L]ook, you know, if we're - - if this Board is going to be changed and this deal is going to get done, I guess I'm going to have to buy some shares and try to change the Board.

177. This statement to shareholders was false and misleading. Under the Acquisition Agreement Coogan had negotiated, Firstmark was not bound to hire Ezami. The Tecstar deal did not depend on hiring Ezami. Upon information and belief, Ali Ezami was hoping to be hired as he would be out of work unless the Tecstar business was sold as a going concern. Upon information and belief, Ezami never asked Coogan to change the Board of Directors and Ezami never informed Coogan that he was unwilling to sign an employment contract unless the Board of Directors was changed.

178. Upon information and belief, in May and/or June 2002, well prior to the July 8th closing, Coogan met with third parties including outside investors and investment bankers to seek financing or other means, such as a merger, by which to achieve his tender offer and takeover campaign.

179. Coogan at this time was uniquely in possession of inside information as he was the person primarily responsible for the Tecstar due diligence, and possessed information about Tecstar's backlog of orders that he had wrongfully withheld from Firstmark's Board.

180. Upon information and belief, based on contemporaneously made notes dated July 10, 2002 and signed by Mark W. Harry on July 10, 2002: (i) between May 29, 2002 and June 20, 2002, Mr. Harry had purchased on the open market 32,000 shares of Firstmark common stock; (ii) on July 9, 2002, Mr. Harry received a printed postcard from Firstmark announcing the acquisition with a handwritten note from Bill Coogan; and (iii) on July 10, 2002, Coogan called Mr. Harry and spoke to him for approximately forty-five minutes. During their conversation, Coogan, *inter alia*, represented that: (i) there was a need to increase the number of shareholders from the approximate 150 current to over 300 in order to maintain the stock exchange listing; (ii) that the current Board of Directors was a weakness; (iii) that one large shareholder who owned a securities firm in Texas was causing problems by buying up all available shares and reducing the number of shareholders, making it more difficult to maintain the minimum number of shareholders required for listing; and (iv) that he felt something should be done about this Texas investor. Coogan also purported to disclose inside financial information to Harry during the call, telling Harry that Firstmark was in better financial shape that its public filings revealed.

181. The representations by Coogan to Harry, and upon information and belief, made to numerous shareholders, were materially misleading and deceptive because, *inter alia*, Coogan and no one else was the large shareholder who, as of July 10, 2002, was in the process of purchasing shares and reducing the number of stockholders and it was Coogan who intended to take over the Company, entrench himself and deregister the stock.

182. Coogan admitted under oath at his 2002 deposition that his intention in buying additional shares of Firstmark common stock was to take control of the Company.

C. Coogan Misleads the Shareholders Again in his July 19, 2002 Form 13D.

183. At the time that Coogan began seeking to acquire a controlling interest in Firstmark, his Form 13D, most previously filed with the SEC on May 1997, expressly represented that his purpose in owning shares of Firstmark was "for investment purposes only," and disclaimed any intention to take control of the Company, to sell substantially all its assets, to cause the delisting of its stock or to take any action to reduce the number of shareholders below 300. As previously alleged, from 1997 through March 1999, Coogan failed to amend his Form 13D when he caused the sale of the title insurance business and when he subsequently caused the stock to be delisted.

184. Coogan did not amend his Form 13D until July 19, 2002, after he had secured controlling interest in the Company. That amendment did not reflect his then intention, upon information and belief, to go private in violation of his fiduciary duty to shareholders. That amendment, jointly filed with Susan Coogan, was knowingly false.

185. The July 19th Form 13D Amendment was knowingly false because Coogan failed to disclose his prior actions to sell the title insurance business and to delist the stock.

186. The July 19th Form 13D Amendment was materially misleading for failure to disclose that Coogan had launched a takeover campaign in June and had secured a more than 50% controlling interest before his July 19th filing.

187. On information and belief, in his July 19, 2002 amendment, however, Coogan again made a false and deceptive statement when he represented that he had "no present plans or

proposals that relate to or would result in any actions or events required to be described in Item 4 of Schedule 13D." This statement was false and deceptive because, upon information and belief, at the time that Coogan made this statement, he already intended to cause the Company to terminate its public filings with the SEC, which is an action or event required to be described in Item 4 of Schedule 13D.

188. The belief stated in the foregoing paragraph is based upon the following information:

(a) Coogan's prior course of conduct, as described in this Complaint, in seeking systematically to take control of the Company and eliminate any transparency into his activities in running the company, revealed *inter alia* by his causing or permitting the April 1999 delisting merely weeks after his false assurances to stockholders that the NASDAQ Small Cap Market listing would be maintained;

(b) His prior actual knowledge of the imminent, sharp downturn in Honeywell orders to Tecstar, as described in this Complaint; and

(c) His statements in letters to shareholders on February 13, 2003 and April 14, 2003, in which he represented the principal driving factors underlying the deregistration were (i) the wholly "unexpected loss due to a dramatic decline in business in the third quarter of 2002" because "when Firstmark agreed to …acquire the ..business we were led to believe that operating results for the near-term would be better than they have been" and (ii) the "extraordinary expenses related to the [July-October] proxy fight."

D. <u>The Termination of Coogan's Employment Contract</u>

189. On or about August 5, 2002, having become aware of some small part of

Coogan's self-dealing activities, the Board removed Coogan from his position as CEO and Chairman of the Company. Coogan responded by calling for a shareholders meeting to replace the Board and filing a lawsuit against the Board members.

190. In his August 20, 2002, proxy Coogan admitted that on or about August 6, 2002, his November 2001 employment contract had been terminated upon his receipt of a written notice of his termination.

E. Coogan and Kaplan Conspire to Have Firstmark Unlawfully Pay Kaplan's Legal Bills to Coogan.

191. Late in the day on August 23, 2002, after a brief but intense period of litigation, but unaware that Coogan's stock was void, unaware of Coogan's past looting, and unaware of Coogan's material omissions about the Company's short-term cash needs, Gorman, Aplin, Mayer and Ellis resigned as directors, believing that an amicable resolution of the dispute was in the best interest of the Company.

192. On August 26, 2002, Susan Coogan was appointed director and Coogan was reinstated as Chairman of the Board and "as …[Firstmark's] President and Chief Executive Officer."

193. According to the Firstmark's minute book, on September 19, 2002, a special meeting of the Board of Directors consisting of Coogan, Susan Coogan and Ali Ezami was held by telephone. At Coogan's request, Kaplan acted as secretary. The interim caretaker Board purported to direct Coogan to pay Kaplan and reimburse Coogan and Susan Coogan for the fees and expenses incurred by Coogan in the personal lawsuit brought by him and his wife and proxy solicitation, whether the expenses were on behalf of Coogan "or the Company." Upon information and belief, Ezami objected to such payment and did not vote to approve it.

Accordingly, Kaplan's minutes falsely represented the approval to have been unanimous.

194. As Coogan and Kaplan well knew, the September 19th authorization to pay Coogan's litigation and proxy expenses was unauthorized and violative of 13-A M.R.S.A. § 717 because the purported authorization required his and his wife's vote, because he never sought stockholder approval and because there was no effort to demonstrate the propriety or fairness of the payment, much less any record of a fairness determination.

195. Coogan knew that Maine law did not allow him and his wife to cause Firstmark to pay these expenses. On or about January 11, 2002, Thomas Grant, Esq., retained by Coogan on behalf of Firstmark, had informed Firstmark and Coogan by letter, that under section 717 of the Maine Business Corporation statute, any agreement in which a director has a personal interest, if authorized by director action, must be approved by a majority of disinterested directors, or failing that, by a vote of the stockholders and in all events, upon a record of demonstrable fairness.

196. As a matter of law, the September 19th authorization to pay Coogan's legal and proxy expenses, which upon information and belief totaled approximately $200,000, was void under 13-A M.R.S.A. § 717(1).

F. Coogan Commits Proxy Fraud in Connection with the October 2002 Election.

197. On August 8, 2002, as amended August 20, 2002, as amended August 23, 2002, Coogan filed a proxy concerning his call for a shareholders meeting September 6, 2002. Coogan's proxy statements were replete with fraudulent misstatements and omissions.

198. For example, Coogan made the following false and misleading statement:

> [B]efore I joined Firstmark as its Chairman, President and CEO, the price of the Company's common stock was well below its current levels.

> Before I became Chairman, President and CEO of Firstmark in November 2001, the Company's sales prices during the second and third quarter of 2001 for its common stock ranged from a low of $0.32 to a high of $0.59 per share. During the past 30 days [preceding August 20, 2002], Firstmark's common stock has traded at a low of $0.86 and a high of $1.35. On the date I issued a call of substitute annual meeting of shareholders, July 12, 2002, the closing price of Firstmark was $1.15. That's an increase of approximately 195 percent, from the high of $0.59 per share during the third quarter of 2001, the period immediately before I became President and CEO of Firstmark…I believe that my hard work in guiding the Company from November 2001 to August 2002 is reflected in the increase of our common stock of approximately 195 percent, from the high of $0.59 per share during the third quarter of 2001.

199. Coogan's assertion that his "hard work" was the cause of the Company's then-recent share price increase was false and materially misleading because, *inter alia,* Coogan's activities in the years 1996 through at least March 1999 had been designed to manipulate the share price and had caused it to reach the low level Coogan cited as being purportedly "before I joined Firstmark as its Chairman, President and CEO." Coogan, his wife Susan Coogan, and his former partner Cruickshanks, with the assistance of Firstmark's former legal counsel Ball, had previously dominated Firstmark's Board and successfully manipulated the shareprice in a range between $4.50 per share and $.75 per share.

200. In his August 8, 2002 proxy statement, Coogan also falsely represented that:

> Firstmark has not held a regular shareholders meeting since 1996, and I believe shareholders should have a board that promotes the highest levels of corporate governance procedures and gives shareholders a voice in electing directors. Firstmark is required to have an annual meeting each year to be in full compliance with applicable Maine law. While the company did have a special shareholders meeting in February 1999 on the sale of Southern Title to Old Guard, it has not held a regular annual shareholders meeting since the fall of 1996…I have repeatedly voiced my concern about the length of time that has past since a regular annual meeting has been held, and have met with resistance each time. I believe the proper election of Firstmark's directors at a properly conducted meeting should be a priority for the company…I am concerned that the rights of Firstmark's shareholders have been ignored by the Company's Board.

201. In his August 20, 2002 amended proxy, Coogan repeated the foregoing misrepresentation and added the false statement that:

> I have voiced my concern at Board meetings since becoming a Director of Firstmark about the length of time that has passed since a regular annual meeting has been held…I am dissatisfied that Firstmark's shareholders have not held an annual meeting for years.

202. Coogan's statements quoted in the foregoing two paragraphs were false and misleading because as more than a ten percent stockholder, Coogan had the legal ability to obtain a court order calling a meeting and, in all events, because as the largest single and controlling stockholder who, at least through early 2001, controlled the board, Coogan at any time could have caused a shareholder meeting to be noticed and convened.

203. These representations as to historic facts and statement of intent as to Coogan's purported dissatisfaction with shareholders governance rights are false and materially misleading because, to his knowledge no annual meeting of shareholders or any meeting of shareholders was held in the fall of 1996. In fact, in violation of law and the then Company By-Laws in May 1996, Coogan had caused Firstmark to unlawfully pack the Board. While the prior Board had authorized and directed a call of a meeting of stockholders for July 1996 to ratify the expansion of the Board, Coogan's Board never revoked that action but ignored it. No such meeting of stockholders was ever called in July or at any other time in 1996. When Coogan called the special meeting in February 1997, his agenda included only the two votes to increase capital six-fold and to opt out of the appraisal rights control statute.

204. In his August 8, 2002 amended proxy, Coogan also falsely stated his purported belief "that if my director-nominees were elected Firstmark common stock would further

increase in value…Our first acquisition has been well thought out and well executed." In his August 20, 2002 proxy, he stated his purported belief "that the Tecstar Electro Systems acquisition will provide shareholder benefit in the future" and "that my director-nominees…will take action to enhance shareholder value by leading Firstmark in seeking growth opportunities." These representations and statements of belief are materially misleading because, *inter alia,* Coogan then knew, but failed to disclose, that Firstmark's newly acquired business would shortly experience a sharp downturn in revenues.

205. In violation of his fiduciary duty to Firstmark and its shareholders, Coogan failed to disclose his prior scheme to take control in 1996, waste assets, entrench himself, delist the stock and eventually take the Company private. This allegation is made upon information and belief based on all allegations herein, including: (i) that after urging stockholders in February 1997 to increase capital six-fold as the title insurance business could not be developed and expanded without capital, within just months of the stockholders increasing Firstmark's capitalization to thirty million shares, Coogan set out to sell the very business he had merged into Firstmark; (ii) that to stay in control Coogan manipulated the market with materially misleading filings, then knowingly sold unregistered securities in violation of federal and state securities laws and did so by knowingly making false representations as to the convertibility of the securities; (iii) that after his manipulation did not sufficiently lower the market price of a Firstmark share, he and his Co-conspirators, aided and abetted by Ball, fraudulently issued about 630,000 shares of watered stock to themselves; and (iv) then, in selling the title insurance company, he and his Co-conspirators fraudulently concealed their prior wrongdoing and compounded their sins by falsifying minutes to approve the sale.

G. Coogan Unlawfully Pays Himself an Excessive Salary.

206. Having successfully entrenched himself, Coogan arranged for his $300,000 annual salary to continue, even though he had become merely the president of a holding company, and he had himself agreed previously that $300,000 per year was excessive for that position. While the admittedly terminated contract required the Board to set a new salary in October, Coogan continued to pay himself an admitted excessive salary without authorization and without even colorable claim.

207. While there is no director or shareholder resolution purporting to authorize the entry into an employment agreement, on November 19, 2002 Coogan falsely certified in Firstmark's 10QSB for September 2003 that the November 2001 employment agreement, which Coogan acknowledged had been terminated in accordance with its terms, was then extant between him and Firstmark.

208. Coogan's conduct in paying himself a $300,000.00 salary without any authorization and without submission to stockholders, followed by his misrepresentations in his November 2002 SEC filing constitute willing, knowing and intentional fraud, evidenced in material part by having been advised in writing by counsel for the Company of such illegality.

H. Coogan Fraudulently Obtains Proxies for the October 2002 Election.

209. Because the shareholder contest was so close, turning on less than one half of one percentage point, Coogan fraudulently obtained proxies from Phil A. Whitney and at least one other shareholder. On information and belief, he also improperly voted 24,953 shares standing in the name of Alliance Medical USA and made a secret agreement with John Wyand, one of Coogan's director nominees, to vote Wyand's shares.

210. While the contest was ongoing, under oath, Coogan testified that his proffered July 2002 offers to purchase coupled with a proxy were unconditional and that he would accept and close the agreements with all accepting shareholders. In fact, Coogan contracted with five shareholders in order to obtain their unconditional proxy and then refused to close on the contracts after securing his takeover.

211. In his August 20th proxy—three days before the resignations of the Texas directors—Coogan represented that he possessed Mr. Whitney's proxy under a contract dated or effective August 5, 2002. But Keith Jones Esq. as counsel to Coogan wrote to Whitney the day before on August 19th and apprised him that:

> Coogan has agreed to purchase your…shares pursuant to a contract that you and Mr. Coogan signed earlier…[That]agreement ….expired by its terms on July 31, 2002, but to secure…Mr. Coogan's right to vote the shares pursuant to the proxy in the agreement….the agreement term [must] be extended beyond July 31, 2002.

While Whitney signed and transmitted the agreement as requested to Coogan's attorney, and while prior to Coogan's August 19th extension request, Coogan had accepted Whitney's share certificate, assignment and agreement, more than seven months later Coogan refused to close.

212. Alliance Medical USA had been both a debtor and a shareholder of Firstmark for many years. Their management was well known to Coogan since at least March 1997.

213. In or about February 2002, Alliance and Firstmark reached an agreement, concluded by an exchange of letters in May 2002, whereby Alliance would sell its 24,953 shares back to Firstmark in exchange for a partial debt cancellation.

214. On July 8, 2002, the very day the Tecstar deal closed and by which time Coogan had already launched his secret, illegal takeover, Firstmark's local Montreal counsel learned that the stock certificate --necessarily in the name of Alliance-- had been located and had been

forwarded to Coogan. Three months later, according to the list of eligible shareholders for the October 4th meeting found in the minute book, the 24,953 Alliance shares were registered in street name.

215. Attorney Jones' October 4th certificate as to treasury shares (differing by 13 shares) indicated only an insignificant change in the number of treasury shares from the audited financial for 2001 and the quarterly filings by Coogan (159,387).

216. Based on Attorney Jones' October 4th certificate and Attorney Kaplan's June 11, 2003 shareholder list, plaintiffs allege, on information and belief, that Coogan improperly voted 24,953 shares at the October 4, 2002 election.

217. On August 14, 2002, Coogan testified under oath that John Wyand was one of the Firstmark major stockholders with whom Coogan had a face-to-face meeting that some of Coogan's purchase agreements had handwritten terms differing from the form attached to his filed amended 13D and that some of the different terms may have been other than extension of closing dates. In his series of July to September filings, Coogan changed the calculation and number of open and closed purchase securities agreements, but on August 14, 2002 Coogan testified that he owned the Wyand shares.

218. On information and belief, based on the foregoing allegations, the September 13, 2002 proxy and the June 11, 2003 Shareholder List specifying Wyand as owner of 30,549 shares Coogan had a secret undisclosed agreement with his director nominee John Wyand concerning the vote and/or purchase of Wyand's 30,549 shares.

I. Repeating the March 1999 Fraudulent Procurement of Proxies, Coogan Fraudulently Misrepresents the Voting Procedures in the Proxies for the October 2002 Election.

219. In the proxy materials for the October 2002 election, Coogan, aided and abetted by Kaplan, intentionally and fraudulently misrepresented how the voting for the special meeting of stockholders would be determined for purposes of a quorum and the election of directors.

220. In his initial proxies on August 8th, August 20th and August 23rd – before the Texas Directors had resigned – Coogan had declared that shares held in "street name" would not be voted without specific instructions from the beneficial owner. On September 5th and again on September 13th, Firstmark, now under Coogan's thumb, issued proxies for the special meeting which Coogan had caused to be adjourned until October 4, 2002. In each of the September 5th and the September 13th proxies, Coogan advised stockholders that the prior proxy cards—which had specified that the brokers would not vote shares held in "street name" without instructions—would not be accepted, and that the only proxy sheet that would be accepted would be the Blue Proxy Sheet accompanying this proxy statement.

221. In each of the September 5th and the September 13th proxy statements, when describing the required vote and the rules for a quorum, Coogan fraudulently represented that

> If a quorum is present, new directors will be elected by a plurality of the votes cast. This means that the director-nominees receiving the highest number of votes will be elected as directors. Accordingly, abstentions and broker non-votes do not have the effect of a vote against the election of any director-nominees. Brokers will not have discretion to vote shares held in street name without instructions from the beneficial owner of the shares with respect to the proposals under this proxy statement at the Annual Meeting.

222. According to the minute book on October 4, 2002, the Shareholders set the number of directors at seven and ratified the appointment of Ernst & Young.

223. According to the certificate of Keith C. Jones, Esquire as voting inspector on

October 4, 2002, proxies from the holders of 5,183,217 shares were present, constituted a quorum and, by vote of 5,182,692 of those proxies, the stockholders also purported to elect Coogan's slate of seven directors.

224. As a matter of law, there was no valid quorum for election of directors because the 2,180,286 shares presented by Coogan, Susan Coogan and Cruikshanks were void as a matter of law and because no less than 1,941,788 proxies had been fraudulently voted by Coogan.

225. The beneficial owners of 1,941,788 shares withheld their proxies and, in reliance on the proxy representations, gave no instruction to the nominee title holder clearing house for proposal number 2, the election of directors, and did not vote for Coogan's slate in the October 4, 2002 election. Accordingly, Coogan fraudulently presented no less than 1,941,788 false proxies to Attorney Jones.

226. There was an absence of a quorum at the October 4, 2002 meeting because the 2,180,286 shares held of record by Coogan, Susan Coogan and Cruikshanks were void as matter of law, leaving 3,161,757 shares validly outstanding and eligible to vote. Under Art. IV § 1 of the Company By-Laws, a quorum for election of directors required the presence in person or by proxy of 1,580,879 shares. Because Aplin, Ellis, Mayer, Gorman, Rechner, John Garber, and Mark Harry, collectively withheld their proxies for 1,941,788 shares, they cannot be counted for the director proposal. Therefore, there could only have been present and eligible to vote for directors a total of 1,219,969 proxies. As a matter of law, there was no quorum present on October 4, 2002 for purposes of electing seven directors and therefore, the purported vote to elect the seven directors at that meeting is null and void.

227. The 2,180,286 shares presented by Coogan, Susan Coogan and Cruikshanks were

void because: (i) the shares had been authorized in March 1997 and issued in October 1997 by an invalidly constituted Board of Directors and hence their issuance was a nullity; and (ii) the shares had been issued on conversion of void, unauthorized series B preferred stock, purportedly issued on June 7, 1996.

228. Coogan, Susan Coogan and Cruickshanks, in January 1999 and again in September 2002, committed proxy fraud to pursue their unlawful and disloyal goals. In January 1999, they falsely represented that "in certain circumstances a broker may not vote shares in street name," but fraudulently omitted that the sale for which they sought approval was one of those circumstances and then enclosed a proxy card which directed the clearing house to vote the shares on the Old Guard sale if the beneficial owner did not provide instructions. In September 2002, they falsely represented that street name shares would not be voted for election of directors and then sent out proxy cards by which the clearing house would exercise its discretion, voting with management, if the owner provided no instructions.

XI. Coogan's New Board Declines to Participate in or Ratify His Self Dealing.

229. At a meeting of the new seven person Board of Directors on October 11, 2002, upon information and belief based on an interview with Barry Morrow prior to April 17, 2003, an interview with Jeffrey Roncka and purported minutes of the October 11, 2002 meeting, Barry Morrow, the CFO for the new operating subsidiary and the former CFO for Tecstar, made two controversial reports to the Board. First, Morrow reported to the Board that the payment of Coogan's proxy and litigation expenses appeared to be personal in nature and should the Board approve same, the Company should treat the payment as a bonus to Coogan and issue an IRS form 1099 to Coogan for such additional compensation. According to Morrow, Kaplan

vociferously insisted that Morrow was incorrect. Kaplan's version of the October 11, 2002 minutes—initially withheld by Kaplan and purportedly by inadvertence -- acknowledged only the presence of Morrow and that at Coogan's suggestion Morrow left the meeting so that Board could discuss "a legal matter with" Kaplan.

230. Second, Morrow reported on the financial circumstances of the operating subsidiary. According to Morrow and consistent with Roncka's admission, Morrow first apprised the newly installed Board of the dramatic downturn of Honeywell orders and the dwindling backlog. Morrow then estimated for the Board the sales and revenues anticipated for the balance of the year. In December 2002, Coogan terminated Morrow's employment.

231. The October 11, 2002, minutes bearing the signature of Kaplan, which in June 2003 Kaplan had sought to conceal from plaintiffs during their minute book inspection, do not reference either of the subjects which Morrow insists he discussed and which Roncka admits were discussed. The December 13, 2002 minutes, the form of which was never approved by the attendees, recite that "the minutes of the meeting of the Board of Directors on October 11, 2002 were approved in the form circulated "WITH TWO CORRECTIONS." (Emphasis added). The December 13, 2002 minutes, consistent with Roncka's memory as to subjects discussed, recite that at Coogan's request the seven-member board reviewed the September 19, 2002 minutes regarding the payment of Coogan's legal and proxy expenses but refused to entertain the question either at the October 11, 2002 meeting or on December 13, 2002, when Coogan raised it again.

232. On October 11, 2002, according to Kaplan's minutes, the Directors purported to repeal the Company's By-Laws and adopt amended and restated bylaws dated October 11, 2002.

This purported replacement of the Company's By-Laws was invalid for several reasons. For example, to the extent that there was a valid quorum of stockholders on October 4, 2002 for any purpose, the shareholders fixed the number of directors at seven until the next annual meeting of stockholders. Under the October 11, 2002, amended and restated By-Laws, the directors are purportedly authorized to change the number of directors from time to time by, *inter alia*, the affirmative vote of at least two-thirds of the directors then in office.

233. The amendment to the indemnification provision of the By-Laws purports to limit mandatory indemnification to current and as to former directors solely for service on or after October 3, 2002. If valid, this purported amendment would have the effect of protecting only Coogan, Susan Coogan and their cronies.

234. Upon information and belief, based upon: (i) the fact that Coogan and his Co-conspirators had concealed all minutes from May 1996 to January 1999; (ii) the foregoing allegations, and (iii) a confidential informant who says the subject of the dwindling backlog was discussed at Fall 2002 board meetings, Coogan and Kaplan falsified minutes and attempted to conceal both Coogan's cover-up of his material omissions concerning the short term cash needs of the Company because of the dwindling backlog and Coogan's and Kaplan's blatant self dealing in looting the treasury to pay approximately, upon information and belief, around $200,000 of Coogan's expenses from his illegal takeover.

235. Within six months of the October 4, 2002 election, four of Coogan's seven directors had resigned from Firstmark's Board.

236. On or about December 23, 2002, Steven Sebastian resigned as a Firstmark director.

237. On or about January 24, 2003, Jeffrey Roncka resigned as a Firstmark director.

238. On or about February 19, 2003, Ali Ezami resigned as a Firstmark director.

239. On or about March 14, 2003, Timothy Byrne resigned as a Firstmark director.

240. In violation of the Exchange Act's reporting requirements, upon information and belief, to further his illegal scheme, Coogan failed to file 8Ks reporting the resignations of Directors Sebastian, Roncka and Byrne.

241. Upon information and belief, based in part on the foregoing allegations and an interview with Jeffrey Roncka on April 23, 2002, in which Mr. Roncka acknowledged that during October through December 2002, the Board discussed and considered: (i) the status of pending Honeywell orders; (ii) the legal fees for proxy expenses and Mr. Coogan's explanation thereof; (iii) Mr. Ezami and the question of moving the plant; and (iv)the possibility of shareholder suits being brought, Directors Roncka, Sebastian, Ezami and Byrne resigned in order not to be party to Coogan's continuing wrongdoing, self-dealing and fraud.

XII. Coogan Terminates Firstmark's Registration as a Public Company.

242. On or about March 21, 2003, the three remaining purported members of Firstmark's Board, consisting of defendants Coogan, John Wyand and John McCown, purported to approve Coogan's plan to cause Firstmark to file a Form 15, certifying the Company's intention to terminate its registration as a publicly reporting company with the SEC. As a matter of law, the March 21, 2003 vote is void as unauthorized.

243. Section 7.10(2) of 13-A M.R.S. mandates that:

> [I]f at any time there are fewer directors in office than one-half of the number of directors fixed by the bylaws…the directors then in office may transact no other business than the filling of vacancies on the board of directors…;

As of March 21, 2003, Firstmark had purported to set its Board as consisting of seven directors. Therefore, the March 21, 2003 action of three directors was unauthorized and void.

244. The March 21, 2003 vote of the three directors authorizing the deregistration is also null and void as the act of an improperly constituted Board of Directors whose election was procured by fraud and voting of void shares.

245. On or about March 26, 2003, Coogan caused the Form 15 to be filed with the SEC.

246. The March 26, 2003 Form 15 filing is void as unauthorized, and also voidable for breach of fiduciary duty. Upon information and belief, Coogan filed the Form 15 immediately before the due date for the 10K for the period ending December 31, 2002 to evade the reporting requirements of the Exchange Act in order to conceal his looting and self-dealing including, without limitation, his excessive salary, and improper payment of his personal expenses and Kaplan's legal fees.

247. Immediately upon filing the Form 15, Firstmark's obligation to file public disclosures with the SEC was suspended. On June 24, 2003, the termination of registration became "final," and Firstmark no longer files public disclosures with the SEC.

XIII. Coogan Has Caused and is Causing Irreparable Harm to Firstmark.

248. Since seizing control of the Company in October 2002, through his secret and unlawful tender offer, Coogan has caused the Company substantial irreparable harm, which harm is continuing and accelerating.

249. Upon information and belief, Coogan's self dealing, his material misstatements and omissions, and other wrong-doing, have caused irreparable harm to Firstmark and resulted

in the risk of insolvency. In an April 14, 2003 letter to the shareholders, Coogan reported "on the ongoing, difficult conditions we face at Firstmark. . .[which require us] to conserve our cash. . .to weather this awful aerospace market and to survive as a viable business." Coogan went on to explain that these "difficult conditions" were attributable to a "fourth quarter [of 2002] … loss" in excess of One Million Dollars, which he attributed specifically to the "unexpected" downturn of business in the third quarter of 2002 coupled with the substantial Summer 2002 proxy and litigation expenses.

250. Coogan, since seizing control of the Company, has:

(i) Purported to elect himself and his slate to the Board in a fraudulent, void election;

(ii) Suffered the loss of a majority of even his own slate of directors from the Board, when they resigned within months as a result of Coogan's fraud and self-dealing;

(iii) Caused the Company to pay his personal legal expenses in the amount of approximately $200,000;

(iv) Caused the Company to pay him an excessive salary;

(v) Fired the experienced management whom Firstmark had hired in connection with the Tecstar acquisition in order to entrench himself, eliminate opposition to his self-dealing policies, and conceal his fraud and wrongdoing in connection with the Tecstar acquisition;

(vi) Laid off 46 of the Company's 106 employees;

(vii) Caused the Company to file a baseless lawsuit against its former management as part of his strategy to entrench himself and conceal his fraud and wrongdoing in connection with the Tecstar acquisition;

(viii) Purported to amend the Company's By-Laws so as to make the mandatory indemnification provisions applicable only to himself and his cronies; and

(ix) Caused the Company to terminate its registration with the SEC in order to avoid making public filings and conceal his prior, further and on-going self dealing and wrong-doing; and

(x) Undermined the Company's ability "to survive as a viable business" through his mismanagement, looting and fraudulent omissions to the prior board.

251. Upon information and belief, Coogan's and Kaplan's self-dealing threatens Firstmark with further immediate and irreparable harm. Coogan continues to draw the unauthorized, excessive monthly salary of $25,000.00. Upon information and belief, based on an interview with Barry Morrow conducted prior to April 17, 2003, Kaplan had been billing Firstmark approximately $20,000.00 per month, which bills, upon information and belief based on all allegations herein are inflated and improper.

252. Upon information and belief based on all allegations herein and Coogan's representation in his April 13, 2003 letter to stockholders that Firstmark will no longer make the disclosures necessary to maintain a public market for the Company's stock, Coogan has breached his fiduciary duty and caused irreparable harm to the stockholders, by causing or impelling the number of stockholders to go below 300, delisting the Company's stock in April 1999, and deregistering the common stock with the Securities and Exchange Commission in March 2003 without valid authority.

253. As a matter of law, Firstmark has suffered irreparable harm and faces continuing, immediate and irreparable harm from the continuing management of the Company by Coogan

and/or necessary parties Wyand and McCown, whose election to the Board is void.

254. There is a substantial risk of prospective, immediate and irreparable harm warranting an injunction in the nature of a Common Law Writ of Mandamus.

255. As a result of Coogan's deregistration and failure to provide information necessary to maintain a market, Coogan's future self dealing and other wrongdoing will be immeasurably more difficult to detect. As a matter of law, the deregistration coupled with Coogan's refusal to provide information necessary to maintain a public market, achieved by unauthorized and/or voidable actions in furtherance of Coogan's scheme to take Firstmark private for his selfish individual interests, constitutes immediate and continuing irreparable harm to Firstmark and its stockholders.

XIV. Coogan and Kaplan Impede Stockholder Inspection Rights

256. In late April 2003, Gorman sought to exercise inspection rights to investigate potential wrongdoing by Coogan and engaged plaintiffs' lead counsel. Coogan and Kaplan wrongfully refused to permit inspection.

257. On June 11, 2003, Coogan and Kaplan finally permitted a stockholder inspection pursuant to the May 23, 2003 demand of plaintiffs Phil A. and Karin Whitney. The demand stated as a purpose, *inter alia*, to investigate breaches of fiduciary duty and violations of law, including questions concerning the validity of the 1996 preferred stock, disclosures to the SEC and stockholders including false representations concerning the legal status of certain securities, self-dealing and waste by management. Plaintiffs explained and specifically requested, among other things, the original record of shareholdings. While the By-Laws required retention of Firstmark's "original stock transfer books" to determine voting rights and the like, to impair

plaintiffs' stated investigation, at the direction of Kaplan, Coogan refused to produce the original stock ledger and produced only a current list of shareholders.

258. On June 11, 2003, the Plaintiffs conducted an inspection of the Minute Book at Coogan's offices in Richmond, Virginia. The Minute Book contained no documentation whatsoever for the period between May 1996 and January 1999. That examination revealed that missing from the Minute Book, *inter alia*, were the March 2002 profile which Coogan swore was the predicate for the Tecstar acquisition, February 21, 2002 minutes and October 11, 2002 minutes.

259. On June 12th, the plaintiffs demanded that Kaplan explain the irregularities and omissions. Kaplan had no explanation for the missing documents except that the October 11, 2002 minutes bearing his signature had been inadvertently omitted and would be delivered along with the bates-stamped documents. Upon information and belief, based on the foregoing and all allegations herein, Coogan and Kaplan have caused irreparable harm to Firstmark by concealing and/or destroying operative corporate records and documents.

260. Upon information and belief, based on missing 1997 minutes, records and minutes from May 1996 through early 1999, missing February 2002 minutes, missing Coogan's "profile" directed to be kept in the minute book, and Kaplan and Coogan's attempted concealment of the October 11, 2002 minutes, Coogan, Susan Coogan, Cruickshanks, Ball, and Kaplan have caused irreparable harm to Firstmark by destroying or concealing corporate records and minutes.

261. Upon information and belief based on the forgoing, there is a substantial risk that Coogan, Cruickshanks, Susan Coogan, Ball, and/or Kaplan will cause further irreparable harm

by concealing or destroying additional corporate records or relevant evidence.

I. DERIVATIVE CLAIMS

COUNT I: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER ON BEHALF OF FIRSTMARK AGAINST COOGAN FOR BREACH OF FIDUCIARY DUTY

262. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

263. At all times relevant to the allegations in this Complaint, Coogan owed Firstmark a fiduciary duty to exercise his powers and discharge his duties in good faith with a view to the interests of the corporation and of the shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.

264. By the conduct described herein, Coogan has repeatedly breached his fiduciary duty to the Company, engaged in self dealing, diversion of corporate opportunity, corporate looting and waste of assets.

265. As described more particularly herein, Coogan's breaches include, without limitation:

(a) Enforcing an unconscionable agreement to his personal advantage at the expense of Firstmark and its stockholders;

(b) Causing an improperly constituted Board of Directors to issue void Preferred Stock to himself, Susan Coogan, and Cruickshanks;

(c) Fraudulently converting the void Preferred Stock and issuing himself, Susan Coogan, and Cruikshanks more than 600,000 shares of watered stock;

(d) Causing or permitting Firstmark stock to be delisted;

(e) Fraudulently procuring the votes of proxies for shares held in street name in both

1999 and 2002;

(f) Withholding from the other officers, directors and shareholders relevant information on the value of Firstmark, his plans for the Company, his compensation and payments to his Co-conspirators and the Tecstar acquisition;

(g) Using his position as chairman and CEO of Firstmark to gain a privilege or advantage over the other officers, directors, and shareholders of the Company;

(h) Manipulating the share price of Firstmark's common stock in order to benefit himself and his Co-conspirators at the expense of and to the detriment of the Company and its other shareholders;

(i) Causing Firstmark to pay his personal expenses;

(j) Causing Firstmark to deregister with the SEC;

(k) Issuing false and misleading statements purportedly on behalf of the Company in order to conceal and further his own self dealing transactions;

(l) Causing Firstmark to pay him an excessive and unjustifiable salary while serving as the CEO of a holding company;

(m) Causing Firstmark to sell its operating assets in order to secure self dealing payments for himself and his Co-conspirators; and

(n) Firing both the President and CFO of Firstmark's operating subsidiary and filing a lawsuit against them in order to conceal Coogan's own wrongdoing.

(o) As a result of Coogan's conduct, the Company has suffered substantial damages as well as irreparable harm and is threatened with further and ongoing immediate irreparable harm.

COUNT II: PLAINTIFFS WHITNEYS AND GORMAN ON BEHALF OF FIRSTMARK AGAINST DEFENDANTS SUSAN COOGAN, CRUIKSHANKS AND BALL FOR

BREACH OF FIDUCIARY DUTY

266. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

267. At all times relevant to the allegations against them in this Complaint, Defendants Susan Coogan, Cruikshanks and Ball owed Firstmark a fiduciary duty.

268. By the conduct described herein, Defendants Susan Coogan, Cruikshanks and Ball have repeatedly breached their fiduciary duty to the Company, engaged in self dealing, diversion of corporate opportunity, corporate looting and waste of assets.

269. As a result of Defendants Susan Coogan's, Cruickshanks' and Ball's conduct, the Company has suffered substantial damages as well as irreparable harm.

COUNT III: PLAINTIFFS WHITNEYS AND GORMAN ON BEHALF OF FIRSTMARK AGAINST THE OTHER DEFENDANTS FOR AIDING AND ABETTING COOGAN'S BREACH OF FIDUCIARY DUTY

270. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

271. Defendants knowingly and intentionally aided and abetted Coogan in breaching his fiduciary duty to the Company.

272. As a result of Defendants' wrongdoing, Firstmark has suffered substantial damages as well as irreparable harm, and is threatened with further and on-going irreparable harm.

COUNT IV: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER ON BEHALF OF FIRSTMARK AGAINST COOGAN, SUSAN COOGAN AND CRUIKSHANKS FOR CONSTRUCTIVE TRUST

273. Plaintiffs repeat and reallege the allegations contained in the foregoing

paragraphs as if fully set forth herein.

274. In order to remedy the damage to Firstmark proximately caused by the breaches of trust by Coogan, Susan Coogan, and Cruickshanks, the Court should impose a constructive trust on all stock held by each of Coogan, Susan Coogan, and Cruikshanks and also on the proceeds received by any of Coogan, Susan Coogan, and Cruikshanks upon sale of Firstmark stock.

COUNT V: PLAINTIFFS WHITNEYS AND GORMAN ON BEHALF OF FIRSTMARK AGAINST BALL FOR DISGORGEMENT OF IMPROPERLY OBTAINED FUNDS IN BREACH OF HIS FIDUCIARY DUTY TO THE COMPANY

275. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

276. From and after approximately June 7, 1996 through at least April 1997, Ball served as both Director and legal counsel to Firstmark.

277. Upon information and belief, from and after June 7, 1996 through approximately March 2001, Ball and his firm served as legal counsel to Firstmark.

278. As a matter of law, Ball at all material times owed a fiduciary duty to both Firstmark and Firstmark's minority stockholders.

279. Upon information and belief, Ball and his firm provided legal advice, counsel and legal services in furtherance of Coogan's breaches of duty as herein alleged.

280. Having participated directly in breaches of fiduciary duty to Firstmark and/or aiding and abetting Coogan in his breaches of fiduciary duty as herein alleged, Ball and his firm should be ordered to disgorge the payment of all legal fees and expenses attributable to such wrongdoing and return the funds to Firstmark along with interest and consequential damages.

COUNT VI: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER ON BEHALF OF FIRSTMARK AGAINST KAPLAN FOR DISGORGEMENT OF IMPROPERLY OBTAINED FUNDS IN BREACH OF HIS FIDUCIARY DUTY TO THE COMPANY

281. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

282. On or about September 19, 2002, Defendant Kaplan served as both Secretary to the Company and its counsel for the purpose of a telephonic meeting of the Board of Directors.

283. During the meeting, the Board voted, based upon Kaplan's professional advice, to pay the legal bills submitted by Kaplan and his firm to the Company for payment.

284. The bills that Kaplan and his firm submitted to the Company for payment were not properly payable by the Company, and instead were properly Coogan's personal obligation.

285. Kaplan's invalid legal advice was motivated by self interest in obtaining payment of his own, and his firm's legal bills.

286. By issuing said advice, and accepting improper payment when Kaplan knew or should have known that the payment was improper, Kaplan breached his fiduciary duties to the Company.

287. Accordingly, Kaplan should be ordered to disgorge the payment and other improper payments and return the funds to the Company along with interest and consequential damages.

COUNT VII: PLAINTIFF WHITNEY ON BEHALF OF FIRSTMARK AGAINST COOGAN, SUSAN COOGAN AND CRUIKSHANKS FOR BREACH OF 13-A M.R.S.A. § 720 -- DECLARATION OF A DIVIDEND IN VIOLATION OF THE MAINE BUSINESS CORPORATION ACT

288. Plaintiffs repeat and reallege the allegations contained in the foregoing

paragraphs as if fully set forth herein.

289. While serving as directors of the Firstmark, defendants William Coogan, Susan Coogan and Donald Cruikshanks declared self-dealing dividends for the Preferred B Stock in violation of 13-A M.R.S.A. § 720.

290. As a result of their declaration of an unlawful dividend to themselves, defendants William Coogan, Susan Coogan and Donald Cruikshanks are liable to the corporation.

COUNT VIII: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER ON BEHALF OF FIRSTMARK AGAINST COOGAN FOR VIOLATION OF THE WILLIAMS ACT, 15 U.S.C. § 78m(d)

291. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

292. Pursuant to 15 U.S.C. § 78m(d) and the SEC Rules promulgated thereunder, defendant Coogan had an obligation to amend his Form 13D at such time as he determined that he would seek to buy shares sufficient to take control of the Company.

293. Coogan determined no later than mid June 2002 that he would buy sufficient shares to take control of the Company.

294. Coogan violated 15 U.S.C. § 78m(d) and the SEC Rules promulgated thereunder by failing to file an amendment to his Form 13D until after he had purchased sufficient shares to take control of the Company.

295. As set forth more particularly herein, Coogan's failure to amend his Form 13D prior to buying a controlling interest in the Company harmed the Company.

II. DIRECT CLAIMS

COUNT IX: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST ALL DEFENDANTS FOR DECLARATORY JUDGMENT

296. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

297. Pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201, this dispute presents an actual controversy within the Court's jurisdiction regarding the rights and legal relations of the plaintiffs and defendants.

298. Gorman and Whitney are both Firstmark shareholders whose rights and legal relations will be affected by the Court's decision.

299. Defendants William Coogan, Susan Coogan (individually and as Trustee), and Donald Cruikshanks purport to hold 2,180,286 shares of Firstmark common stock which, as set forth above, are void *ab initio* for violation of Maine's Business Corporation Act. The Court should declare all said stock void.

300. On or about October 4, 2002, Coogan purported to cause himself and a slate of six other directors to be elected to Firstmark's Board of directors through proxies based upon: (a) Cruickshanks', Coogan's, and Susan Coogan's void shares; (b) fraudulently presented proxies for shares beneficially owned by shareholders who had withheld their votes; and (c) fraudulent misstatements and omissions conveyed to shareholders in Coogan's proxy materials. The Court should accordingly declare the October 4, 2002 election void.

301. Coogan wrongfully obtained through fraud and commercial extortion a vote by Firstmark's shareholders in February 1997 purporting to exempt the Company from the shareholder appraisal rights otherwise provided in 13-A M.R.S.A. § 910. The Court should declare this shareholder vote void.

COUNT X: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST

COOGAN FOR VIOLATION OF SECTIONS 14(a) OF THE WILLIAMS ACT IN CONNECTION WITH THE ISSUANCE OF A PROXY STATEMENT

302. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

303. As set forth with particularity herein, Coogan made affirmative, material fraudulent, deceptive and manipulative representations and omissions in his proxy statements in violation of 15 U.S.C. § 78n(a) and SEC Rule 14a-9 thereunder.

304. As set forth more particularly herein, the plaintiffs were injured by Coogan's misrepresentations and omissions in that Coogan has been able through his deceptions to undermine the Company's shareholder democracy, deny shareholders their right to vote their shares knowledgeably, secure more than 50% of the outstanding shares of the Company, and unlawfully take control of it.

305. As more particularly set forth herein, Coogan, through misstatements and omissions in his proxy materials has been able to usurp and manipulate the Company's corporate machinery and engage in unlawful and self-dealing corporate transactions.

306. As set forth with particularity herein, Coogan acted with scienter in that he knew that the misrepresentations he made were untrue and that the omissions he made were material and necessary to render his statements not misleading.

COUNT XI: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST COOGAN FOR VIOLATION OF SECTION 14(d) OF THE WILLIAMS ACT IN CONNECTION WITH A TENDER OFFER

307. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

308. Beginning no later than mid June 2002, Coogan secretly approached numerous

Firstmark shareholders and solicited the purchase of their shares of Firstmark common stock.

309. Pursuant to these solicitations, the defendant purchased 477,702 shares, equaling nearly 10% of the outstanding shares of Firstmark. On the circumstances of the defendant's solicitations and purchase of shares, including but not limited to the secrecy of his offers, his deceptive high-pressure tactics, his failure to disclose to all shareholders his intention to seek control of the Company, the solicitation of substantial percentage of stock, and the firm and non-negotiable terms of the offer, this solicitation constituted an unlawful tender offer pursuant to Section 14 of the Williams Act, 15 U.S.C. § 78n.

310. Coogan failed to comply with the filing requirements of Section 14 of the Williams Act, 14 U.S.C. § 78n(d) in that he did not file notice or amend any existing filing with the Securities and Exchange Commission as required by the statute prior to making the tender offer.

311. Coogan failed to comply with the All Holders Rule in that he offered to purchase shares only from certain shareholders.

312. Through the tender offer, Coogan increased his stock ownership to in excess of 50% of the Company's outstanding shares.

313. On information and belief, based upon Coogan's twenty years of investment banking experience, Coogan knew that he was required to file notice of the tender offer prior to soliciting shares and knew that the information not disclosed was material to all Firstmark shareholders.

314. As set forth more particularly herein, Plaintiffs were injured as a result of Coogan's failure to file notice with the SEC.

COUNT XII: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST COOGAN FOR VIOLATION OF SECTIONS 14(e) OF THE WILLIAMS ACT IN CONNECTION WITH A TENDER OFFER

315. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

316. Coogan's failure to file notice pursuant to Section 14(d) constitutes an omission of a material fact in connection with the making of a tender offer in violation of Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e).

317. As set forth with particularity herein, Coogan also made affirmative, material fraudulent, deceptive and manipulative representations and omissions to recipients of the tender offer in violation of 15 U.S.C. § 78n(e).

318. As set forth more particularly herein, the plaintiffs were injured by Coogan's misrepresentations and omissions in that Coogan has been able through his deceptions to undermine the Company's shareholder democracy, deny shareholders their right to vote their shares knowledgeably, secure more than 50% of the outstanding shares of the Company, and unlawfully take control of it.

319. As more particularly set forth herein, Coogan, through misstatements and omissions in his tender offer, has been able to usurp and manipulate the Company's corporate machinery and engage in unlawful and self-dealing corporate transactions.

320. As set forth with particularity herein, Coogan acted with scienter in that he knew that the misrepresentations he made were untrue and that the omissions he made were material and necessary to render his statements not misleading.

COUNT XIII: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST COOGAN FOR VIOLATION OF THE WILLIAMS ACT, 15 U.S.C. § 78m(d)

321. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

322. Pursuant to 15 U.S.C. § 78m(d) and the SEC Rules promulgated thereunder, defendant Coogan had an obligation to amend his Form 13D at such time as he determined that he would seek to buy shares sufficient to take control of the Company.

323. Coogan determined no later than mid June 2002 that he would buy sufficient shares to take control of the Company.

324. Coogan violated 15 U.S.C. § 78m(d) and the SEC Rules promulgated thereunder by failing to file an amendment to his Form 13D until after he had purchased sufficient shares to take control of the Company.

325. As set forth more particularly herein, Coogan's failure to amend his Form 13D prior to buying a controlling interest in the Company harmed the Plaintiffs.

COUNT XIV: PLAINTIFF WHITNEYS' CLAIM FOR THEMSELVES AND ALL SHAREHOLDERS SIMILARLY SITUATED FOR FRAUDULENT DENIAL OF APPRAISAL RIGHTS UNDER 13-A M.R.S.A. § 611-A AGAINST COOGAN, SUSAN COOGAN, BALL AND CRUIKSHANKS

326. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

327. At all times relevant to this claim, from prior to June 7, 1996 to date, the Whitneys or their predecessors have owned shares of Firstmark common stock.

328. The Whitneys bring this claim on their own behalf and on behalf of all other shareholders similarly situated.

329. The Whitneys bring this claim as a class action pursuant to Federal Rules of Civil

Procedure 23(a) and (b)(3) on behalf of all persons who held Firstmark common stock on March 5, 1999 and who suffered damages from the improper denial of appraisal rights under 13A M.R.S.A. § 611-A in connection with the old Guard sale. Excluded from the class are Defendants, members of Defendants' families, James Vigue, Ivy Gilbert, any relative or affiliate of James Vigue and/or Ivy Gilbert, or any entity in which any one of the foregoing has a controlling interest, and the legal representatives, heirs, predecessors, successors and assigns of any one of the foresaid excluded class members.

330. 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 Whitneys at this time, and can only be ascertained through appropriate discovery, the Whitneys believe that the number of class members may exceed 300. As of March 31, 1999, the Company had 5,319,876 outstanding shares of common stock and was traded publicly on the NASDAQ Small Cap Market.

331. 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, including the question whether the defendants unlawfully structured the Old Guard sale so as to avoid shareholder appraisal rights under Section 611-A.

332. The Whitneys' claim is typical of the claims of the members of the Class and members of the Class sustained damages arising out of the defendants' wrongful conduct.

333. The Whitneys will fairly and adequately protect the interests of the members of the Class and have retained counsel experienced in class actions and corporate litigation. The Whitneys have no interests antagonistic to or in conflict with those of the Class.

334. A class action is superior to other available methods for the fair and efficient adjudication of the controversy since joinder of all members of the Class is impracticable. Furthermore, because the damages suffered by the individual class members may be relatively small, the expense and burden of individual litigation make it impossible for the Class members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

335. As set forth more particularly herein, Coogan, Susan Coogan, Ball and Cruikshanks failed to give the shareholders notice of the Section 611-A transaction, and instead conspired to falsely and deceptively deny the Whitneys, and all others similarly situated, the shareholder rights set forth in 13-A M.R.S.A. § 611-A.

336. As a result of Coogan's, Susan Coogan's, and Cruickshanks' wrongdoing, the Whitneys and all others similarly situated have suffered damages, and are entitled to relief including injunctive or other equitable relief, the value of their shares at the time of the control transaction, interests, costs, expert witness fees, attorneys' fees and other expenses of bringing this proceeding.

337. In addition, pursuant to 13-A M.R.S.A. § 611-A, the Whitneys ask that this Court enter injunctive relief including:

(a) an order requiring Coogan, Susan Coogan and Cruikshanks to pay into court or post security for the estimated amount of the judgment; and

(b) an order imposing a lien on the property of Coogan, Susan Coogan, Cruikshanks and Ball.

COUNT XV: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST COOGAN FOR COMMON LAW FRAUD

338. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

339. As set forth more particularly herein, Coogan knowingly made false representations of material fact to Plaintiffs in order to further his self interest to the detriment of the Plaintiffs, the Company and the other shareholders.

340. As set forth more particularly herein, Plaintiffs reasonably relied on Coogan's misrepresentations.

341. As set forth more particularly herein, as a result of Coogan's misrepresentations, Plaintiffs suffered damages.

COUNT XVI: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST COOGAN FOR NEGLIGENT MISREPRESENTATION

342. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

343. As set forth more particularly herein, in the course of his business dealings and in connection with matters in which he had a pecuniary interest, Coogan made representations to Plaintiffs Whitney and Gorman for guidance in their business dealings.

344. In making these representations to plaintiffs, Coogan supplied false information, with regard to which he failed to exercise reasonable care or competence in obtaining or communicating the information.

345. As set forth more particularly herein, Plaintiffs reasonably relied on the false information Coogan supplied.

346. As set forth more particularly herein, as a result of Coogan's misrepresentations,

Plaintiffs suffered damages.

COUNT XVII: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST COOGAN AND SUSAN COOGAN FOR BREACH OF FIDUCIARY DUTY

347. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

348. On and after July 19, 2002, Coogan and Susan Coogan, as purported majority shareholders, owed the plaintiffs a fiduciary duty as minority shareholders to exercise their powers in good faith with a view to the interests of the corporation and of the shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.

349. By the conduct described herein, Coogan and Susan Coogan have repeatedly breached their fiduciary duty to the minority shareholders, engaged in self dealing, diversion of corporate opportunity, corporate looting and waste of assets.

350. As a result of Coogan's and Susan Coogan's conduct, the plaintiffs have suffered substantial damages as well as irreparable harm and are threatened with further and ongoing immediate irreparable harm.

COUNT XVIII: PLAINTIFFS WHITNEYS, GORMAN AND RECHNER AGAINST ALL DEFENDANTS FOR BREACH OF FIDUCIARY DUTY

351. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

352. In their capacities as officers and/or directors of the Company, and in Ball's case as counsel, each of the defendants have owed the plaintiffs as shareholders a fiduciary duty to

exercise their powers in good faith with a view to the interests of the corporation and of the shareholders and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.

353. By the conduct described herein, the defendants have repeatedly breached their fiduciary duty to the plaintiffs, engaged in self dealing, diversion of corporate opportunity, corporate looting and waste of assets.

354. As a result of defendants' conduct, the plaintiffs have suffered substantial damages as well as irreparable harm and are threatened with further and ongoing immediate irreparable harm.

COUNT XIX: PLAINTIFFS' JOINT REQUEST FOR INJUNCTIVE RELIEF AGAINST DEFENDANTS COOGAN, SUSAN COOGAN, CRUIKSHANKS, MCCOWN AND WYAND

355. Plaintiffs repeat and reallege the allegations contained in the foregoing paragraphs as if fully set forth herein.

356. As set forth in detail above, Firstmark's Board is improperly constituted because its current purported members, Defendants Coogan, McCown and Wyand, purport to hold office based on a void election held on October 4, 2002.

357. Even if Coogan, McCown and Wyand had been lawfully elected, the Board would be currently unable to transact any lawful business because three members are less than half of the seven-member Board required by a shareholder vote at the same meeting at which they were purportedly elected.

358. In order to maintain the status quo, prevent immediate further irreparable harm to the Company and its shareholders and avoid any additional, improper efforts by Coogan to

entrench himself and loot the corporation, the Court should enter a temporary restraining order and preliminary injunction: (i) restraining the Board from manipulating the corporate machinery for entrenchment or self dealing; (ii) prohibiting the destruction or concealment of any corporate records; and (iii) prohibiting Coogan, Susan Coogan (individually and as Trustee), and Cruikshanks from selling any of their void shares of Firstmark stock to any third party.

359. After trial, the Court should enter judgment declaring the October 4, 2002 election void, permanently enjoining Coogan, McCown and Wyand from purporting to act as Board members based upon that election, and ordering a special meeting of the shareholders at the earliest opportunity lawfully to elect a new Board.

WHEREFORE, plaintiffs demand judgment as follows:

A. granting judgment against each defendant in favor of Firstmark for the amount of damages sustained by Firstmark as a result of the breaches of fiduciary duty and other wrongdoing by each defendant;

B. requiring that a full accounting be made including imposition of one or more constructive trusts in granting judgment against each defendant for the amount of the total financial losses to Firstmark as a result of the acts complained of;

C. granting judgment against each defendant in favor of the individual plaintiffs for all damages suffered by as a result of their wrongdoing;

D. granting judgment against Coogan, Susan Coogan, Cruikshanks and Ball in favor of Phil A. Whitney, Karin Whitney and all other Firstmark stockholders similarly situated in an amount sufficient to compensate them for their losses;

E. granting injunctive relief as set forth herein;

F. awarding to plaintiffs the costs and disbursements of this action, including reasonable attorneys', accountants' and experts' fees, and costs and expenses; and

G. granting such other and further relief as the Court may deem just and proper.

JOHN J. GORMAN, individually and
derivatively on behalf of FIRSTMARK

CORP., KURT RECHNER, individually and derivatively on behalf of FIRSTMARK CORPORATION and PHIL A. WHITNEY and KARIN WHITNEY, individually and derivatively on behalf of FIRSTMARK CORP. and as class representatives on behalf of ALL OTHER STOCKHOLDERS SIMILARLY SITUATED,

By their attorney,

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July 10, 2003

Of Counsel:

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VERIFICATION

I, John Gorman, state under the pains and penalties of perjury that the foregoing is true and correct to the best of my knowledge, except as to the matters alleged on information and belief, and that as to those matters I believe them to be true.

_____
John J. Gorman
Plaintiff–Shareholder

July ___, 2003.

I, Phil A. Whitney, state under the pains and penalties of perjury that the foregoing is true and correct to the best of my knowledge, except as to the matters alleged on information and belief, and that as to those matters I believe them to be true.

_____
Phil A. Whitney
Plaintiff–Shareholder

July ___, 2003.

I, Karin Whitney, state under the pains and penalties of perjury that the foregoing is true and correct to the best of my knowledge, except as to the matters alleged on information and belief, and that as to those matters I believe them to be true.

_____
Karin Whitney
Plaintiff–Shareholder

July ___, 2003

I, Kurt J. Rechner, state under the pains and penalties of perjury that the foregoing is true and correct to the best of my knowledge, except as to the matters alleged on information and belief, and that as to those matters I believe them to be true.

_____
Kurt J. Rechner
Plaintiff–Shareholder

July ___, 2003.