UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

WARD KLUGMANN, Individually and on behalf of all others similarly situated, *Plaintiff,* *v.* AMERICAN CAPITAL LTD., MALON WILKUS, JOHN R. ERICKSON, IRA WAGNER, SAMUEL A. FLAX, and RICHARD E. KONZMANN, *Defendants.*	**Civil Action No. 8:09-CV-00005-PJM** **CLASS ACTION** **JURY TRIAL DEMANDED**

LEAD PLAINTIFFS' CLASS ACTION COMPLAINT

INTRODUCTION

1. This is a securities class action on behalf of a class consisting of all persons and entities who purchased the publicly-traded common stock of Defendant American Capital Ltd.. formerly known as American Capital Strategies, Ltd. (hereinafter "ACAS" or the "Company") between October 31, 2007 and November 7, 2008, inclusive (the "Class Period"), for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the Securities and Exchange Commission ("SEC").

2. Lead Plaintiffs Charles E. Mendinhall, Ron Miller and Joseph J. Saville, and Plaintiffs Kent Nixon and Nina van Dyke (collectively, "Plaintiffs") allege the facts set forth herein for Lead Plaintiffs' Class Action Complaint ("Complaint"), which are based upon their personal knowledge as to the allegations about them and, as to all other matters alleged herein, based on the extensive investigation conducted by and through Plaintiffs' Co-Lead Counsel, which included: (i) analysis of

ACAS press releases, SEC filings, and other public statements; (ii) analysis of the transcripts of investor conference calls conducted by Defendants; (iii) analysis of videotaped interviews given by Defendants; (iv) analysis of the reports of securities analysts who followed ACAS; (v) analysis of the ratings given by credit rating agencies that rated ACAS; (vi) analysis of news coverage concerning ACAS; and (vii) analysis of accounting rules and standards applicable to ACAS.

3. The Defendants carried out a massive securities fraud. As more particularly alleged below, Defendants made material misrepresentations concerning the Company's ability to pay its dividends – indisputably the most important subject to potential purchasers of ACAS stock. Defendants affirmatively and expressly misrepresented that the ability of the Company to pay its 2008 dividends was *not* impacted by decreases in the value of the Company's investments (referred to as "net unrealized depreciation") in its portfolio of companies, and misrepresented that the Company's 2008 dividends would be paid as long as the Company's income that was sufficient to "cover" the amount of its dividends. These misrepresentations were clearly material to Plaintiffs and the Class, causing the price of ACAS stock to increase each time the misrepresentations were made. These misrepresentations also proved to be extremely lucrative to Defendants, enabling the Company to obtain over $474 million from stock sales at inflated prices, save the Company approximately $130 million in its acquisition of another company (European Capital) by using artificially inflated ACAS stock to price the deal, allowing the Company's CEO to avoid repayment of millions of dollars of Company "margin" loans during the Class Period, and allowing a senior executive to sell over $4 million shares of ACAS stock at artificially inflated prices. Unfortunately for Plaintiffs and the Class, Defendants' representations were completely untrue. As Defendants well knew, the amount of the Company's net unrealized depreciation *would* prevent ACAS from paying its 2008 dividends, *regardless* of the amount of income realized by the

Company, if the combination of the amount of net unrealized depreciation and the dividend payment would cause the Company to default on tangible net worth covenants under its revolving credit facilities. When Defendants finally disclosed in November 2008 that their prior representations concerning the Company's ability to pay its dividends were false, the market was shocked, and the Company's stock price dropped by over 42 percent to close at $7.87 per share – eliminating over $1 *billion* in market capitalization in one day alone.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to (i) § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa *et seq.* (the "Exchange Act"), and/or (ii) 28 U.S.C. §§ 1331 and 1337. The claims asserted in the Complaint arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b), 78t(a)) and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated by the SEC.

5. Venue is proper in this District pursuant to Section 27 of the Exchange Act and 28 U.S.C. § 1391(b). ACAS's principal place of business is located in Bethesda, Maryland; ACAS maintains an office in Chevy Chase, MD; false statements were made in this District, and acts giving rise to the violations complained of occurred in this District.

6. In connection with the wrongs alleged herein, Defendants used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities, and the facilities of the national securities markets.

THE PARTIES

7. Lead Plaintiff Charles E. Mendinhall ("Mendinhall") purchased shares of ACAS common stock during the Class Period, as set forth in his Certification previously filed with the Court, and adopted by reference herein, and was damaged as a result of Defendants' conduct described herein.

8. Lead Plaintiff Ron Miller ("Miller") purchased shares of ACAS common stock during the Class Period, as set forth in his Certification previously filed with the Court, and adopted by reference herein, and was damaged as a result of Defendants' conduct described herein.

9. Lead Plaintiff Joseph J. Saville ("Saville") purchased shares of ACAS common stock during the Class Period, as set forth in his Certification previously filed with the Court, and adopted by reference herein, and was damaged as a result of Defendants' conduct described herein.

10. Plaintiff Kent Nixon ("Nixon") purchased shares of ACAS common stock during the Class Period, as set forth in his Certification attached hereto as Exhibit A, and was damaged as a result of Defendants' conduct described herein.

11. Plaintiff Nina van Dyke ("van Dyke") purchased shares of ACAS common stock during the Class Period, as set forth in her Certification attached hereto as Exhibit B, and was damaged as a result of Defendants' conduct described herein.

12. At all times relevant to the allegations of this Complaint, Defendant American Capital, Ltd., was a company organized under the laws of Delaware with its principal place of business in this Judicial District.

13. At all times relevant to the allegations of this Complaint, Defendant Malon Wilkus ("Wilkus") was the Company's Chief Executive Officer and Chairman of the Company's Board of

Directors. During the Class Period, Defendant Wilkus made misrepresentations in Company press releases, during the Company's investor conference calls, in interviews, and in SEC filings.

14. At all times relevant to the allegations of this Complaint, Defendant John R. Erickson ("Erickson") was the Company's Chief Financial Officer ("CFO") and the President of its Structured Finance division. During the Class Period, Defendant Erickson made misrepresentations in Company press releases, during the Company's investor conference calls, and in SEC filings.

15. At all times relevant to the allegations of this Complaint, Defendant Ira Wagner ("Wagner") was the Company's Chief Operating Officer ("COO"). During the Class Period, Defendant Wagner made misrepresentations during the Company's investor conference calls and in SEC filings.

16. At all times relevant to the allegations of this Complaint, Defendant Samuel A. Flax ("Flax") was the Company's General Counsel ("GC"), its Chief Compliance Officer, and its Secretary. During the Class Period, Defendant Flax participated in the Company's investor conference calls, and made misrepresentations in SEC filings.

17. At all times relevant to the allegations of this Complaint, Defendant Richard E. Konzmann ("Konzmann") was the Company's Senior Vice President, Accounting and Reporting. During the Class Period, Defendant Konzmann participated in the Company's investor conference calls, and made misrepresentations in SEC filings.

18. Collectively, Defendants Wilkus, Erickson, Wagner, Flax, and Konzmann are referred to herein as the "Individual Defendants."

19. The Company's national and global operations are highly integrated and managed centrally from its Bethesda, MD headquarters, where its senior management - including all five Individual Defendants – makes the key strategic decisions for ACAS. The Company's definitive proxy,

filed with the SEC on Form 14A, and the Company's website list just eight individuals – including Defendants Wilkus, Erickson, Wagner, and Flax – as its executive officers. Each of the Individual Defendants directly participated in the management of ACAS and was directly involved at the highest level in the day-to-day operations of ACAS.

CLASS ACTION ALLEGATIONS

20. Plaintiffs bring this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of all persons and entities who purchased the publicly-traded common stock of ACAS between October 31, 2007 and November 7, 2008, inclusive (the "Class"). Excluded from the Class are Defendants, members of Defendants' immediate families, any entity in which any Defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded person.

21. The members of the Class are so numerous that joinder of all members is impracticable. Although the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe there are, at a minimum, thousands of Class members who purchased and/or acquired ACAS common stock during the Class Period. For example, the Company had 202,896,718 shares of common stock outstanding as of March 31, 2008. During the Class Period, the Company's stock traded on NASDAQ under the ticker symbol "ACAS."

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

a. whether the federal securities laws were violated by Defendants' acts as alleged herein;

b. whether Defendants issued false and misleading statements during the Class Period;

c. whether Defendants acted knowingly and/or recklessly in issuing false and misleading statements;

d. whether the market price of ACAS common stock during the Class Period was artificially inflated because of Defendants' conduct complained of herein; and

e. whether the members of the Class have sustained damages and, if so, what is the proper measure of those damages.

23. Plaintiffs' claims are typical of the claims of the members of the Class, as Plaintiffs and members of the Class each sustained damages arising out of Defendants' wrongful conduct in violation of federal law as complained of herein.

24. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class actions and securities litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

25. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Furthermore, because the damages suffered by the individual Class members may in many instances be relatively small, the expense and burden of individual litigation makes it impracticable 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.

26. Plaintiffs will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

a. Defendants made public misrepresentations or failed to disclose material facts during the Class Period;

b. the omissions and misrepresentations were material;

c. the stock of the Company was listed and traded on NASDAQ, a highly efficient market, traded at a high volume, was followed and reported on by securities analysts; the Company filed periodic reports with the SEC and was eligible to file SEC registration Form S-3, and there are empirical facts showing a cause and effect relationship between unexpected corporate events or financial news and an immediate response in the stock price;

d. the Company issued press releases and conducted interviews that were carried by national news wires, which were publicly available and entered the public marketplace;

e. the misrepresentations and omissions alleged would tend to mislead a reasonable investor concerning ACAS's business and/or financial condition; and

f. the market for ACAS stock promptly digested current information with respect to the Company from publicly available sources and reflected such information in the Company's stock price. Under such circumstances, Plaintiffs and members of the Class purchased their ACAS stock at prices that were artificially inflated due to Defendants' material misrepresentations and omissions.

FACTUAL BACKGROUND

ACAS's Business

27. At all times relevant to the allegations of this Complaint, ACAS conducted its business as a "Business Development Company" under the Investment Company Act of 1940 and derived its revenue from essentially two areas. The vast majority of the Company's revenue was derived from the segment of its business that made equity and debt investments in predominantly privately held companies (sometimes referred to herein as the Company's "portfolio companies"). In addition, ACAS derived revenue from its asset management segment, which provided advisory services to the Company's portfolio companies and its alternative asset funds. As described by the Company, "[w]e provide investors the opportunity to participate in the private equity and alternative asset management industry through an investment in our publicly traded stock."

28. At all times relevant to the allegations of the Complaint, the Company operated so as to qualify to be taxed as a regulated investment company (an "RIC") as defined in Subtitle A, Chapter 1, under Subchapter M of the Internal Revenue Code of 1986, as amended. As an RIC, if the Company distributed 90% or more of its taxable income on an annual basis, it would not be subject to federal income tax on its taxable income and capital gains that it distributed to shareholders. As more particularly alleged below, the Company's ability to pay quarterly dividends was a material investment consideration for potential ACAS investors, and a material factor in the valuation of ACAS shares.

The Adoption of SFAS 157

29. At all relevant times, the Company's financial statements were required to reflect its portfolio company investments at "fair value." Prior to January 1, 2008 there were different definitions of "fair value" and limited guidance for applying those definitions. For example, as reported in the

Company's 2007 Form 10-K, the Company valued its portfolio company investments using several different valuation methodologies, including methodologies based on discounting forecasted cash flows, estimated liquidation value of the assets, estimated liquidation of the collateral value of the assets, third party valuations, and potential strategic buyer analysis. In order to eliminate divergent financial reporting by U. S. companies, the Financial Accounting standards Board issued Statement of Financial Accounting Standards ("SFAS") No. 157, Fair Value Measurements ("SFAS No. 157"), which required, *inter alia*, that companies report "fair value" in terms of the current price that would be received upon the sale of the investment. If the fair value of the assets declined, the Company was required to report the amount as "net unrealized depreciations," and report lower net asset value.

30. Beginning on January 1, 2008, the Company was required to report the value of its investments in accordance with this new accounting rule. As a result, regardless of whether ACAS had any intention of selling its investments in a particular quarter, ACAS was required to report their value based on the current price that would be received if the Company *did* sell. In a declining economy, the result of this accounting rule change was to cause ACAS to report substantial "net unrealized depreciation" and quarterly decreases in the valuation of its investments.

Events Preceding The Class Period
<u>Put Pressure On ACAS's Stock Price</u>

31. The downturn in the economy put pressure on the net value of the Company's assets, and, by extension, on its stock price. Beginning in approximately the summer of 2007, the economy began to experience unprecedented turmoil. As the housing "bubble" burst, Bear Stearns announced in July of 2007 that two of its sub-prime hedge funds had lost nearly all of their value. American Home Mortgage collapsed on August 6, 2007, and the market for mortgage-backed securities effectively disappeared.

During the summer of 2007, numerous mortgage lenders filed for bankruptcy, and one of the largest mortgage lenders – Countrywide Financial – lost almost 75 percent of its market value. This turmoil in the credit markets caused securities analysists to express concern about ACAS; as noted by an analyst from Friedman Billings, quoted in Briefing.com, Inc. on October 15, 2007:

> [T]urbulent times in the capital [markets] in 3Q07 have adversely impacted the valuation of multiple asset classes, including those invested in by business development [companies]. In the near term, [earnings per share] and book value will be negatively impacted by unrealized depreciation as investments are marked to [market] to reflect wider credit spreads. The degree of impact depends on the content of the investment portfolio. Based on their analysis of a variety of factors relating to risk and return, [Friedman Billings] believes that . . . ACAS is the most exposed by disruptions in the capital [markets] given its unique portfolio mix and prodigious origination platform.

Similarly, UBS downgraded ACAS stock from "buy" to "neutral" on October 11, 2007, and Keefe, Bruyette & Woods downgraded ACAS stock from "outperform" to "market perform" on October 29, 2008. As a result, prior to the beginning of the Class Period, ACAS' stock price declined, dropping from $45.43 on October 11, 2007 to $42.00 on October 30, 2007.

CLASS PERIOD EVENTS AND DEFENDANTS' REPRESENTATIONS

False or Misleading Statements in October 2007

32. The Class Period begins on October 31, 2007. After the market had closed on October 30, 2007, the Company issued a press release (the "October 30, 2007 Press Release"). The October 30, 2007 Press Release listed Defendant Erickson as a Company contact person, and contained quotes from Defendants Erickson, Wilkus, and Wagner. The October 30, 2007 Press Release was filed with the SEC on October 31, 2007 as an exhibit to a Form 8-K signed by Defendant Konzmann.

33. After quoting Defendant Wilkus as stating that "the market is placing value on the size, growth and predictability of dividends," the October 30, 2007 Press Release reported the amount of

dividends that the Company would pay during the fiscal year ending December 31, 2008 ($4.19, consisting of $1.01 for the quarter ending March 31, 2008; $1.03 for the quarter ending June 30, 2008; $1.05 for the quarter ending September 30, 2008; and $1.10 for the quarter ending December 31, 2008). In the October 30, 2007 Press Release, the Company represented that these 2008 dividends would be paid out of the ordinary taxable income and net long-term capital gains earned by ACAS in the taxable years ending September 30, 2007 and September 30, 2008. The October 30, 2007 Press Release further reported that "American Capital anticipates that its 2008 ordinary taxable income and net long-term capital gains will exceed its dividends and it will retain the excess for future dividends."

34. On October 31, 2007, the Company conducted a conference call with analysts and investors (the "October 31, 2007 Conference Call") concerning the business and financial results reported in the October 30, 2007 Press Release. Defendants Wilkus, Erickson, Wagner and Konzmann participated in the October 31, 2007 Conference Call, and Defendants Wilkus, Erickson and Wagner answered questions. During the October 31, 2007 Conference Call, Defendants repeatedly represented that the $4.19 2008 dividend would be paid from 2007 income and capital gains which ACAS would "spill over" into 2008, coupled with 2008 income and capital gains, which would be so high that ACAS could "spill over" substantial amounts for the payment of 2009 dividends as well.

(a) For example, in his prepared remarks, Defendant Wilkus said:

> So we've had an excellent year of ordinary taxable income that we're forecasting the full year to be outstanding, that it will exceed the dividend and we will spill over some of that dividend for future or some of that taxable income for future dividends. . . . Our net long term capital gains earned during the tax year-ending in 2007 will be paid as part of the 2008 dividends . . . . So we are spilling over some of our long term – or actually all of our long term capital gains into 2008 for the payment of 2008 dividends and starting in 2008 a portion of American Capital's dividends will be from that long term capital gains and this change will likely require more cash dividends than under the previous policy and the market

– and the reason for doing this is that we believe the market values the size, the growth and the predictability of dividends measured in part by the amount of taxable earnings retained for future dividends and this policy will allow us to retain more taxable earnings for the future dividends and shareholders should benefit from this change. . . . we are really announcing an outstanding dividend increase for 2008.

American Capital forecasts that both its 2008 ordinary taxable income and its 2008 net long term capital gains will exceed its 2007 amount. So in both cases we think these are going to exceed our amounts that we experienced in 2007 and so we are forecasting $4.19 total dividends per share for '08. That's a 13% increase over the 2007 dividends that have been paid and declared and we're forecasting these dividends to be paid from ordinary taxable income and net long term capital gains from taxable years ending in 2007 or 2008. So we're spilling some of our 2007 over. We will take both the 2007, 2008 and use it in part to pay the dividends and we actually anticipate we'll spill over additional amounts from 2008 into 2009. . . . We think that should be considered really an outstanding development for shareholders at American Capital . . . .

You can see an outstanding history of dividends. This doesn't take you back the whole 10 years of since we went public, but if it did, you would see increases in dividends every single year since we went public and you can see the forecasted guidance of dividends in '08 and those should be viewed as quite substantial and interestingly – currently based on the 4th quarter $1 dividend that we declared and based on our stock price yesterday, we're trading at a 10% dividend yield. This 13% growth rate added to that yield should give us a 23% total return by the end of 2008 assuming that we continue to trade at a 10% dividend yield at the end of 2008 based on the 4th quarter dividend at that time. So a 23% dividend yield which is already structured into our – I'm sorry, 23% total return that's already structured in the dividend yield and based on our guidance with respect to our growth rate of the dividend and we would think that that would be viewed quite positively in the market.

. . . . [O]ver the last three years, our realized earnings was 126% of our $9.92 in dividends. So we have for quite some time been earning substantially more realized earnings than we pay out in dividends and our change in dividend policy will now allow us No. 1, to reserve more earnings that can be used to cover future dividends on a temporary basis. . . . [and] with that reserve we believe we can make it very steady, highly predictable and without much fluctuations and certainly we are confident enough to forecast the dividend guidance that we did for 2008.

* * * *

We're forecasting $4.19 in dividend, a 13% growth rate on top of our 10% yield today or our 23% total return if we're trading at the same 2% yield at the end of next year. ***We think that's a no brainer return***, an incredible return and keep in mind the other extraordinary thing, keep in mind half of that return is going to be in cash dividends that the market can't reprice and we can't restate.
(Emphasis added).

(b) Defendants repeated these representations in response to questions from analysts:

[Wilkus]: Well, you could see that our ordinary taxable income has been doing a superb job of covering our dividends and we don't see any reason why that won't continue. So – but on the other hand, since we are spilling over the capital gains and we can only do that for so long, we will have to use a chunk of the capital gains to pay the dividend. We will report that, but we will spill over then the net operating income over into 2009. So we expect to have outstanding coverage by our taxable income of our dividend in '08.

[Erickson]: Yes. I mean we didn't give detailed guidance on this, but you will be able to see that our '07 capital gains that are being spilled over are significant, so, you know, based on where we have set the dividend if we pay the level that we've set, you could really see with the numbers there's not a need to use any of the '08 capital gains to pay that level of dividend. I mean, you know, what has been happening is over the past three years, we've been distributing less than our realized earnings, you know, as I think Malon mentioned on the call, the realized earnings have been running 26% higher than our dividend. And so -- I think that if you look, we grew the dividend from '06 to '07 12% without using capital gains and you could, in fact, look at this increase of 13% as being modest now that we're flowing capital gains in there not really relying heavily on future capital gains, you know, because just increase in the growth rate of 1% to some extent would be modest. If you assume our earnings are going to change and grow next year as they have this year, so there's really not a reliance in looking out towards '08. We feel like with the spillover and we started spilling over I think it was probably two years ago. We already built up over two quarters cushion with this spilling over of the capital gains. So we've got plenty of cushion to cover the dividend forecast without having to really rely on '08 capital gains.

[Analyst]: Just a follow-up question on the dividend policy going for the payout on long term gains, does that inject more volatility into the dividend I mean if you're going –

[Wilkus]: No. Just the opposite. I mean that's the thing I find so interesting. All of a sudden we add in more capital to the potential that can fund the dividend. So historically for 10 years now we have only funded the dividend with ordinary taxable income. Now we've announced we're going [to] add another stream of cash flow of earnings that can fun[d] the dividend and now people are thinking this can become more volatile. Well, that would be the case if we took it to the max but we have never taken the dividend to the max. We always have earned dramatically more realized earnings than we've had – have paid out as dividends and we intend to continue to do that. We plan to actually have the dividends be more consistent to provide more confidence in the dividend by building up the reserve to the extent that the tax laws allow and that's quite meaningful. It's not – you can't do it forever, but it's at a very, very meaningful amount.

[Erickson]: Just in the excess realized earnings over the dividend for the last three years was like $0.45 in '05, $1.10 in '06 and $0.79 in '07 and so, you know, there has been substantial earnings. The other thing to keep in mind is our portfolio is extremely granular. It's not as though we have three or four companies where we're expecting all our capital gains to come from so you either sell them or you don't. We have a granular portfolio of equity investments where we have a number of companies that we're planning to put up for sale in the near term that have good unrealized depreciation and there will be more companies in '09 and more companies in 2010. You know, so it's going to be a regular harvest moon. Now certainly we can go through a recession or a tough environment, but that's why two years ago we started to bank the dividend paying excise tax and that's, you know, we've put ourselves in a position to absorb a downturn. So, you know, I would echo Malon's sentiment we've actually been very conservative and have plenty of excess capacity. So that we don't want to pay out 100% of everything so that you do start to see the dividend having to move up and down with the realized earnings. We are going to keep it at a conservative level to where we continue to spill over and bank, so then if ***you do have a negative environment, you've got the ability to keep that dividend going at the same rate and, you know, just eat into the spilled over earnings that you would have had for the following year.***

[Wilkus]: Yes. One thing I've always been surprised at is that relative to other BDCs we've had one of the best coverages of ordinary taxable income to our dividends and we have managed that to where it seems that at least in some cases BDCs have not concentrated on their ordinary income and used gains to make their dividends, but so even -- so there's two -- you can think of it kind of two kinds of companies, one more like finance companies in the BDC world where all they really have is ordinary taxable income to cover their dividends. We've really been highly competitive with them in terms of how we've covered the dividend plus we've done the banking of our gains, but we have not created a set of assets where we were looking for home runs from several of our portfolio companies so that we could cover the dividends.

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> [Analyst]: ... And then a little bit more clarification on the dividend policy. I just want to establish you talked about sort of building a reserve. Are you intending to pay the dividend, pay long term capital gains on a regular basis through the dividend or is it – you mention getting, I think Malon to a three or four quarter kind of a reserve or is that the intention and you don't plan on paying long term capital gains through the dividend, only in the event of having to dip into the reserve that you would build up?
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> [Wilkus]: We'll be compelled to pay first with long term capital gains and it will be the ordinary taxable income that we will spill over from year to year to year and so you will see our dividend composed more of long term capital gains but you need to pay attention to our total ordinary taxable – or I'm sorry, a total taxable income and you will see that frankly we could have paid it with – you will see, I believe, that we will – we could have paid the future dividends with ordinary taxable income or almost entirely with ordinary taxable income, but it will get reported as being paid from long term capital gains to some extent and then ordinary taxable income to another extent and we will try to keep you apprised of how much we are covering the dividend with realized earnings just as we have been. I don't -- people don't see it written very often, but we've been dramatically covering the dividend with realized earnings and we don't see that changing. By upping our growth rate, keep in mind we grew 12% last year and we only upped it to 13%. So we really haven't upped it very much from our prior growth rate, but we've – and you can just compare it to the return on equity. The realized return on equity is 16%. So by definition we're keeping 3%, if we have 16% return on equity through 2008, then by definition we've kept 3% return on equity as some form of retention either ordinary taxable income or long term capital gains.
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> (Emphasis added).

35. As a result of Defendants' representations in the October 30, 2007 Press Release and the October 31, 2007 Conference Call, the price of ACAS stock increased by $1.65 per share on October 31, 2007, to close at $43.41.

ACAS's November 2007 Stock Offering

36. On or about November 21, 2007, the Company sold 4 million shares of common stock at $39.43 per share, for total proceeds of approximately $157.7 million.

False or Misleading Statements in February 2008

37. Before the market opened on February 13, 2008, the Company issued a press release (the "February 13, 2008 Press Release"). The February 13, 2008 Press Release listed Defendant Erickson as a Company contact person, and contained quotes from Defendants Wilkus, Erickson and Wagner. The February 13. 2008 Press Release was filed with the SEC on February 13, 2008 as an exhibit to a Form 8-K that was signed by Defendant Konzmann.

38. In the February 13, 2008 Press Release, ACAS declared a $1.01 dividend for the first quarter ending March 31, 2008. In the February 13, 2008 Press Release, the Company represented that the remaining 2008 dividend ($3.18) would be paid from 2007 income and capital gains which ACAS would "roll over" into 2008, coupled with 2008 income and capital gains, which would be so high that ACAS could "roll over" substantial amounts for the payment of 2009 dividends as well:

> American Capital announces that $361 million of excess taxable income, comprised of $219 million ordinary income and $142 million of net long term capital gains, has been rolled from 2007 into 2008 to pay 2008 dividends. This represents almost two quarters of forecasted 2008 dividends. . . . American Capital reiterates its forecast that its 2008 ordinary taxable income will exceed its 2007 ordinary taxable income. American Capital forecasts that almost half of its 2008 ordinary taxable income will be rolled over into 2009 to pay 2009 dividends. American Capital reiterates its forecast that its 2008 taxable net long term capital gains will exceed its 2007 taxable net long term capital gains. American Capital forecasts that all of its 2008 taxable net long term capital gains will be rolled over into 2009 to pay 2009 dividends. American Capital is forecasting that it will roll over $500 million of ordinary taxable income and net long term capital gains from 2008 into 2009. . . . "Our performance in 2007 was outstanding, particularly in light of the credit crisis," said Malon Wilkus, Chairman, President and CEO. "We produced $4.65 of Realized Earnings per share which covered our dividend of

> $3.72 per share by 125%. The excess earnings, in part, allowed us to roll over $361 million of taxable income into 2008 to pay 2008 dividends.

39. On February 13, 2008, the Company conducted a conference call with analysts and investors (the "February 13, 2008 Conference Call") concerning the business and financial results reported in the February 13, 2008 Press Release. Defendants Wilkus, Erickson, Wagner, Flax and Konzmann participated in the February 13, 2008 Conference Call, and Defendants Wilkus and Erickson answered questions. During the February 13, 2008 Conference Call, the Defendants repeatedly represented that the 2008 dividends would be paid from 2007 income and capital gains which ACAS would "roll over" into 2008, coupled with 2008 income and capital gains, which would be so high that ACAS could "roll over" substantial amounts for the payment of 2009 dividends as well. For example, in his prepared remarks, Wilkus stated:

> We realized earnings per basic share covered our 2007 dividends by 125%. Just simply outstanding coverage of our dividends, we had $3.72 in total dividends paid in '07, a 12% increase in '06, and that was paid $111 million from our '06 ordinary taxable income that we rolled over into '07, and – to pay the dividend. And it was paid by $544 million in 2007 ordinary taxable income. As you can see later, that was not all of our ordinary taxable income in '07, we rolled over quite a bit in '08. And none of the dividend in '07 used up any of our net taxable long term gains, which we have rolled over into '08 to cover the '08 dividends and we'll talk about that in a minute.
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> . . . . We've already declared $1.01 dividend for the first quarter and that's a 13% growth over our Q1 '07 dividends. It's $0.01 increase over Q4 '07 and is expected to be paid from 2007 excess ordinary taxable income. So this is – just to make clear here, the first quarter of '08 dividend is going to be paid from last year's excess ordinary taxable income. We are forecasting $4.19 for the whole year in dividends, that would be a 13% increase over '07. And we're anticipating that the second quarter '08 dividends will include – will be paid in part by the '07 net taxable long term capital gains. So you won't see – so for people who are getting their forms, you will see – you won't see until the second quarter the use of the '07 long term capital gains to cover the dividends. Our 2008 quarterly dividend per share forecast is – as we have already declared $1.01 for the first quarter, $1.03 for the second, $1.05 to the third and $1.10 for the fourth quarter, those will be 13%, 13%, 14% and 10% increase over their prior quarters of '07.

* * * *

> [E]ven through a recession, we will be paying out $4.19 in dividends for the year, and almost half is forecast to be paid from 2007 taxable income. We're also trying to make it as clear as a bell that our – we forecast our realized earnings in '08 will exceed our dividend. And we're giving guidance that in the first quarter, we're – we expect that a $0.73 to $0.78 in net operating income on a diluted basis. And we're also trying to be as clear as a bell as well, that 2008 net taxable long term capital gains will exceed our 2007 net taxable long term capital gains. And that '08 net taxable long term capital gains, all of will be – is being forecast to be rolled over into 2009 to pay the 2009 dividends.

40. As alleged in paragraphs 29-30 above, ACAS was required to implement SFAS 157 beginning with the first quarter ended March 31, 2008. In response to a question, Defendants represented that any declines in the value of the ACAS's portfolio company investments required under accounting rules (such as SFAS 157) did not impact the Company's ability to pay its 2008 dividends, as its ability to pay its dividends was ***solely based*** on the income derived from the Company's portfolio company investments:

> [Wilkus]: In the world of private equity, in the world of illiquid assets, that's what we invest in. . . . .It takes months to sell most of the assets that is we invest in. And in that world, you will have depreciation and it's just – it's just, you hold it through to the right time to sell it. You make a very thoughtful decision about when to sell, and that doesn't disturb us at all.
>
> [Erickson]: Well now, and keep in mind, there's a big difference in realized losses and mark to market losses. So if we make an investment and realize a loss, that's not a good thing. If when we buy a triple B that's yielding 14% and we underwrite in every piece of collateral within that bond, and we feel like we're going to collect our 14% over our 10 year holding period, if the market later decides that it should be a 20% return rather than 14%, well, that 14% is going into our NOI and paying our dividend every single quarter and what I care about is the performance of the underlying collateral. If I absorb more losses and don't get all my money at the end of the day, yes, that's the situation I care about, and I don't want to be depreciating the bond because the collateral's not performing. If the collateral's performing and paying my – paying my interest and repaying my principal over that 10 year life, and I collect my 14% every quarter, then the fact that the market decided for some period of time should be trading at a 20% return rather than 14% doesn't really impact us and doesn't really – ***it doesn't impact our ability to***

> ***pay dividend***, doesn't impact our financial performance other than the unrealized appreciation which will come back over time as the asset performs. The shorter that bond becomes, the more you collect of the income, and the more the collateral performs, that depreciation will come back.

(Emphasis added).

41. As a result of Defendants' representations in the February 13, 2008 Press Release and the February 13, 2008 Conference Call, the price of ACAS stock closed at $34.90 on February 13, 2008, an increase of $0.67 from the closing price of $34.23 on February 12, 2008.

ACAS's March 2008 Stock Offering

42. On or about March 31, 2008 the Company sold 8.7 million shares of common stock at $36.41 per share, for total proceeds of approximately $316.7 million.

False or Misleading Statements in May 2008

43. As alleged above, the Company was required to implement SFAS 157 beginning in the first quarter ended March 31, 2008. On May 5, 2008, the *Wall Street Journal* ("WSJ") reported that the price of ACAS stock could "take a beating" when ACAS reported the value of the Company's investments in portfolio companies as part of its financial results for the first quarter ended March 31, 2008, since this would be the first time that the value of its portfolio company investments would have to be reported in accordance with SFAS 157. Securities analysts expressed similar concern about the impact of SFAS 157 upon the value of the Company's portfolio investments; for example, on May 5, 2008, Stifel Nicholaus analyst Troy Ward wrote that the implementation of SFAS 157 would have a greater impact on ACAS's asset valuations than other peer companies. At the same time, UBS reduced its rating on ACAS from "Neutral" to "Sell." As a result, on May 5, 2008, ACAS's stock price dropped by $2.24, or 6.9%, to close at $29.77 – the Company's biggest stock drop since August 2003.

44. As these commentators and analysts had feared, ACAS recorded an astonishing $997 million in net unrealized depreciation for the first quarter of 2008, causing ACAS to report a loss of $4.16 per diluted share for the first quarter of 2008. As alleged below, following this large stock price decrease on May 5, 2008, Defendants represented that the 2008 dividend would be paid because "realized earnings" (defined as earnings, less depreciation and appreciation) exceeded the dividend amount.

45. For example, before the market opened on May 6, 2008, the Company issued a press release (the "May 6, 2008 Press Release"), in which ACAS declared a $1.03 dividend for the second quarter of 2008 ending June 30, 2008, and the Company represented that the amount of its "realized earnings" for first quarter 2008 "covered" 93 percent of the first quarter dividend per share, and that second quarter 2008 "realized earnings" would be $1.10 per share – well in excess of the second quarter 2008 dividend of $1.03 per share. The May 6, 2008 Press Release also stated that ACAS would "roll over more than $500 million of ordinary taxable income and net long term capital gains from 2008 into 2009" to pay dividends. The May 6, 2008 Press Release also reported that the Company's net asset value was $28.16 per share as of March 31, 2008, which was $4.72 less than it was as of December 31, 2008. The May 6, 2008 Press Release listed Defendant Erickson as a Company contact person, and contained quotes from Defendants Wilkus, Erickson and Wagner. The May 6, 2008 Press Release was filed with the SEC on May 7, 2008 as an exhibit to a Form 8-K that was signed by Defendant Konzmann.

46. On May 6, 2008, as a result of the Company's representations in the May 6, 2008 Press Release, ACAS's stock price closed at $30.54, an increase of $0.77 per share from the closing price on May 5, 2008.

47. On May 7, 2008, the Company conducted a conference call with analysts and investors (the "May 7, 2008 Conference Call"), concerning the business and financial results reported in the May 6, 2008 Press Release. Defendants Wilkus, Erickson and Wagner participated in the May 7, 2008 Conference Call and answered questions. During the May 7, 2008 Conference Call, Defendants represented that 2008 dividends would be paid out of 2007 taxable income and capital gains which ACAS had "rolled over" into 2008, coupled with 2008 taxable income and capital gains, which would be so high that ACAS could "roll over" $500 million for the payment of 2009 dividends as well; Defendants also represented that the amount of its realized earnings would exceed the amount of the 2008 dividend:

> [Wilkus]: Just want to review our dividends. Again, we reiterated our 419 – $4.19 in dividends for 2008, 13% increase over '07, almost half of that dividend we're forecasting to be paid from income that we earned in 2007 that we rolled over into 2008. That means the income we're earning in 2008 we will be able to over a very large amount of that into '09. We also want to make clear, we are forecasting that our 2008 realized earnings will exceed our 2008 dividends. So we expect to perform this year for our shareholders.
>
> The second quarter forecast is for $0.68 to $0.75 in NOI per diluted share. We also expect our realized earnings will exceed $1.10 per diluted share. And that would not only then cover our second quarter dividend, but the slight amount that we didn't cover in the first quarter with realized earnings. And then we wanted to reiterate our forecast that over $500 million of 2008 taxable income will be rolled over into 2009 to cover the 2009 dividends. And that's versus the $360 million that we rolled over from last year to this year. So again, we expect to be performing in an outstanding way this year. Moving to slide seven, we paid $1.01 in the first quarter, a 13% growth. Our realized earnings per share was 93% of that Q1 dividend, so virtually covered by our realized earnings. And the forecast is that our -- to our first quarter dividend will be paid from ordinary income for tax purposes and rolled over, taxed income that was rolled over from '07.
>
> Now, for the second quarter dividend, which we declare now at $1.03, $0.70 of that will be paid from net long-term capital gains, rolled over from 2007. . . . And then you can see our forecast for the rest of the year adding up to the $4.19 in dividends and on slide eight you can see a wonderful growth rate in our dividend. You can see how well we performed growing our dividends in the last recession,

> and we see no reason why we won't continue to perform well in this recession, if indeed we're in one, and if we move into one, we expect to perform.
>
> * * * *
>
> [Erickson]: We . . . believe that we will size ourselves properly, and so we intend to perform in terms of our realized earnings covering our dividend, and we expect to do that one way or the other.
>
> * * * *
>
> [Wagner]: . . . . But the bottom line is that we will be earning our dividend, we are only paying a dividend that indeed we've earned, and actually we're earning more than our dividend we're and going to roll over more into next year than we did from last year to this year. I got to say I just think this is, I am so proud of what we are doing here, and we don't seem to get much credit for it, I have to say.

48. In response to a question from an analyst during the May 7, 2008 Conference Call, the Defendants repeated their representations alleged above and represented that there were no circumstances that could impact the Company's ability to pay the 2008 dividends:

> [Analyst]: I was just wondering if you could talk about, just looking over the next several years, are there any circumstances now that you could envision that would impair your ability to pay and/or grow the dividend?
>
> [Erickson]: No, I think, we've certainly, given the spillover in the way we positioned ourselves, ***we certainly don't envision a scenario where we can't pay the dividend.*** What I would say is when you go through a downturn, a recessionary environment, what that does do is, it changes your ability to grow the dividend, so we've had a great recent track record of growing the dividend at double-digit rates. But if you go through the last recession I think we were at down at low single-digit rates, and so the growth rate for '09 in 2010, may change somewhat based on the environment we are in today. Once we can get back in to more of a normalized environment in terms of taking our leverage up, raising accretive capital and doing more investing activities the growth rate will come back, but certainly this environment will change the outlook of the growth rate in '09 and 2010.
>
> [Wilkus]: . . . . .we try to have given the market a tremendous amount of information about this year, and actually some about next year, that should give tremendous comfort to people about our ability to pay the dividend, and pay the dividends that we are forecasting that has been a 13% growth rate in the dividends for '08, and then we're making it clear we expect to roll over $500 million of

> ordinary taxable income and taxable gains into '09. I don't know how we can give people more comfort about the dividend than what we are doing.
>
> (Emphasis added).

49. As a result of Defendants' representations in the May 7, 2008 Conference Call, the price of ACAS stock increased to $31.29 on May 7, 2009, recovering much of the stock drop that occurred on May 5, 2008, as alleged in paragraph 43, above.

50. On May 12, 2008, ACAS filed its Form 10-Q for the quarter ending March 31, 2008, with the SEC (the "Q1 2008 10-Q"). Among other things, the Company again represented in the Q1 2008 10-Q that the dividend payments for 2008 would total $4.19, including a third quarter dividend of $1.05 and a fourth quarter dividend of $1.10. As Defendants had previously represented, the Q1 2008 10-Q represented that the amount of unrealized net depreciation did not impact the Company's ability to pay the 2008 dividend:

> As ***unrealized net (depreciation) appreciation does not impact our ability to pay a dividend on our common stock***, we believe that Realized Earnings per common share, rather than Net (Loss) Earnings per common share, is a more relevant financial measure. We calculate Realized Earnings as our Net (loss) earnings less net unrealized (depreciation) appreciation.
>
> (Emphasis added).

The Q1 2008 10-Q was signed by Defendant Wilkus. In addition, the Q1 2008 10-Q contained certifications signed by Defendants Wilkus and Erickson, which stated, among other things, "Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."

51. As a result of the representations in the Q1 2008 10-Q, ACAS's stock price closed at $32.42 on May 12, 2008, an increase from the closing price of $31.49 per share on the previous trading

day (May 9, 2008), which recovered all of the stock price drop that occurred on May 5, 2008, as alleged above.

52. Despite Defendants' initial success at artificially increasing the price of ACAS stock, ACAS's stock price began to decline in June and July 2008, hitting a low price of $17.80 on July 15, 2008. This decline of ACAS's stock price, as well as the over $997 million in net unrealized depreciation reported for the first quarter of 2008, exacerbated a serious financial problem for Defendant Wilkus. In 2001, Wilkus had borrowed over $6.8 million from the Company to purchase hundreds of thousands of shares of ACAS stock. Under the terms of these loans, if ninety-five percent (95%) of the outstanding loan balance exceeded the aggregate "value" of the ACAS stock pledged as collateral, the loans would be automatically accelerated. Under these loan agreements, the "value" of the originally pledged stock was to be calculated as the greater of the Company's net asset value per share or the average of the closing price of ACAS stock for the previous twenty (20) trading days. Against the backdrop of these ACAS stock price declines, and almost $1 billion in net asset value decreases, Wilkus paid off $1,868,518 of these loans in June 2008. However, even after Wilkus's $1,868,518 repayment, he still owed the Company more than $5 million, secured by 208,200 shares originally pledged as collateral. Following Wilkus' $1,868,518 payment, under these loan agreements, the "value" of the collateral had to remain above approximately $22.91 per share (ninety-five percent of the loan balance, or $4,770,053.55, divided by the 208,200 shares that Defendant Wilkus had pledged as collateral), or Wilkus would be forced to repay the approximately $5 million in remaining loans.

53. The price of ACAS stock continued to decline following Wilkus's June 2008 repayment, dropping below $22.91 for the first time on July 3, 2009. By the close of the market on July 21, 2008, the 20-trading-day average closing price for ACAS was less than $22.91.

54. Thus, by late July 2008 – the time period immediately preceding the Company's scheduled August 2008 issuance of its financial results for the quarter ended June 30, 2008 – Defendant Wilkus faced an imminent threat that he would have to repay the outstanding $5,000,000 in loans to the Company unless he succeeded in boosting the Company's sagging stock price and/or minimizing any unrealized net depreciation of the Company's portfolio company investments required by accounting rules, including SFAS 157.

False and Misleading Statements in August 2008

55. After the market closed on August 5, 2008, the Company issued a press release (the "August 5, 2008 Press Release"). The August 5, 2008 Press Release declared a dividend of $1.05 per share for the third quarter ending September 30, 2008 and represented that the Company's "realized earnings" for the third quarter of 2008 would exceed $1.05 per diluted shares (*i.e.*, the amount of the third quarter 2008 dividend that was declared) and that the remaining 2008 dividend of $1.10 for the quarter ending December 31, 2008 would be paid out of the taxable income and capital gains earned by the Company. The August 5, 2008 Press Release also reported that the Company's 2008 taxable income and capital gains would not only be sufficient to pay the fourth quarter 2008 dividend of $1.10 per share, but was large enough to enable ACAS to "roll over more than $500 million of ordinary taxable income and net long term capital gains from 2008 into 2009" to pay dividends. The August 5, 2008 Press Release quoted Defendant Wilkus as saying, "[t]hough it looks like we are in a recession, we continue to have good realized earnings . . . [and] we expect to realize earnings that cover our dividend," and further quoted Defendant Erickson as saying, "[d]espite the economy, we are well positioned to maintain our dividend level in our steady state operating mode." The August 5, 2008 Press Release also reported that, pursuant to accounting rules, ACAS had experienced $264 million of net unrealized depreciation

within the second quarter of 2008 and that its net asset value per share as of June 30, 2008 was $27.01 per share ($1.15 less than it was on March 31, 2008). The August 5, 2008 Press Release listed Defendant Erickson as a Company contact person and contained quotes from Defendants Wilkus and Erickson. The August 5, 2008 Press Release was filed with the SEC on August 6, 2008 as an exhibit to a Form 8-K that was signed by Defendant Konzmann.

56. On August 6, 2008, the Company conducted a conference call with analysts and investors (the "August 6, 2008 Conference Call") concerning the business and financial results reported in the August 5, 2008 Press Release. Defendants Wilkus, Erickson, Wagner Flax and Konzmann participated in the August 6, 2008 Conference Call and answered questions. During the August 6, 2008 Conference Call, Defendants repeated their previous representations alleged above concerning the Company's ability to pay its 2008 dividends and represented that the 2008 dividends were "well covered." For example, in his prepared remarks, Defendant Wilkus stated:

> We successfully are operating in our steady-state mode. While the recession -- we believe we most likely are in a recession today. And in that steady-state mode, we were able to pay a 2008 dividend that's well covered, and we are forecasting the whole '08 dividend to be well covered. And in fact, we are planning to roll over over [sic] $500 million of taxable income from '08 into '09 to pay 2009 dividends.
>
> * * * *
>
> We're continuing to reiterate the $4.19 in 2008 dividend. We believe it's well covered, as we will discuss. The $4.19 is a 13% increase over our '07 dividend, and almost half of the 2008 dividend we are forecasting to be paid from 2007 taxable income because, as you recall, we rolled over $361 million of taxable income from '07 into '08 to cover the '08 dividend.
>
> Our third-quarter forecast is for our net operating income to be between $0.68 and $0.75 per diluted share, and that our realized earnings is forecast to exceed $1.05 per diluted share, which, by the way, is the dividend that we are announcing for the third quarter, $1.05 in dividends.
>
> So we are reiterating our forecast. I think we've reiterated this now about four times, of having $500 million of taxable income rolling over from '08 into '09 to

cover '09 dividends. And that's a substantial increase over the $361 million that we rolled over from '07 into '08.

Moving to slide eight, as you can see now, we've paid out $29.25 per share in paid or declared dividends since our IPO at $15 a share. And, we paid out $1.03 in our second quarter, which, to remind you, then would be a 13% growth over the second quarter of '07. And our realized earnings per basic share was 92% of that Q2 $1.03 dividend. So we are doing a decent job of covering the dividend for the second quarter, in particular, and that was paid from long-term capital gains and ordinary income for tax purposes that had been rolled over from 2007.

* * * *

But in reality, that dividend really came and is being covered by the income we produce in '07. So we are really able to retain this income in the second quarter and, together with the fourth-quarter income, and roll over that income into '09.

Now, as of this earnings call, we -- or release yesterday, we declared the $1.05 and the third quarter dividend, and we then gave a – reiterated our forecast of $1.10 for the fourth quarter of this year, dividend. And you can turn to slide nine and see this long track record of dividend payments, and you can see that we have been able to do that whether interest rates are high or low, and we've been able to grow our dividends through the course of the last recession.

* * * *

Now, this is, I think, an extremely good track record of covering the dividend. I think it's one of the best track records of covering the dividend. But some people have had some concerns about using realized earnings. And so, if you go into slide 12, we've just taken a different approach and hopefully addressed some of the concerns about covering the dividend. . . . And over to the right of it, the blue section represents our cash flow from operations. You can pull this right off our cash flow statement, and it's what I think people would very conventionally think is the cash flows that you have from your operations and available to pay things such as distributions and dividends.

* * * *

So if you look to the left of that chart you can see what we've done since 2005. The reason we use 2005 is that's when we initiated the policy of rolling over taxable income that exceeded the amount of our dividend. And we could use it, then, to pay the subsequent year's dividend requirement. We've been building up that amount year after year, the amount of the rollover. And we've just discussed what that $500 million – this is the $500 million we are talking about rolling over from '08 into '09.

And you can see that we have actually exceeded, since 2005, coverage of the dividend by 20%, so 120% of the dividend is covered with our cash flow, and that

> cash flow being cash flow from operations, collection of PIK and OID and net realized gains. We think that's a terrific track record. It allows us, then, to have substantial rollover of essentially – or retention of realized earnings that can be used in the subsequent year to cover the dividend. And it is these numbers which continue to show our track record.

57. During the August 6, 2008 Conference Call, the Defendants repeated these representations in response to a question from a securities analyst:

> [Analyst]: The dividend growth that you've had over the past few years -- I can see through the slides and going through the numbers that realized earnings has covered it. But if we assume that we stay in -- the current environment that we have today lasts for a while and we generally see slower deal activity, when you think about dividend growth for 2009, do you think that you can justify to having similar growth rates on a year-over-year basis, similar to what you've had?
>
> [Wilkus]: No. The answer is no. If you look at the last recession, we went into that recession with a high dividend growth rate and we really came out of it at a significant lower dividend growth rate. That's to be expected. It never declined, as you well know. And we don't anticipate it's going to decline in the course of this recession. But we also don't anticipate growing it at the rates that we have grown it in the past.

58. As a result of Defendants' statements in the August 5, 2008 Press Release and August 6, 2008 Conference Call, ACAS's stock price closed at $22.54 on August 6, 2008, a $2.01 increase from the closing price of $20.53 on August 5, 2008.

59. On August 11, 2008, the Company filed its Form 10-Q for the quarter ended June 30, 2008 with the SEC (the "Q2 2008 10-Q"). Among other things, the Q2 2008 10-Q represented that the dividend for the fourth quarter ending December 31, 2008 would be $1.10 per share, and that $500 million of ordinary income and net long term capital gains from 2008 would be used to pay 2009 dividends. The Q2 2008 10-Q reiterated the representations alleged above that the amount of the Company's unrealized net depreciation did not impact its ability to pay the 2008 dividends:

> As ***unrealized net (depreciation) appreciation does not impact our ability to pay a dividend on our common stock***, we believe that realized earnings per common share, rather than net (loss) earnings per common share, is a more relevant financial measure. We calculate realized earnings as our net (loss) earnings less net unrealized (depreciation) appreciation.
>
> (Emphasis added).

The Q2 2008 10-Q was signed by Defendant Konzmann, ACAS's Senior VP, Accounting and Reporting. In addition, the Q2 2008 10-Q contained certifications signed by Defendants Wilkus and Erickson, which stated, among other things, "Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."

60. On August 11, 2008, as a result of the representations in the Q2 2008 10-Q, ACAS's stock price closed at $22.43, an increase from the closing price of $21.66 on August 8, 2008 (the prior trading day).

61. On August 12, 2008, Wilkus, gave an interview with Bloomberg News reporter Pimm Fox (the "August 12, 2008 Interview"), during which, *inter alia*, he stated that the Company's ability to continue paying its dividends was "absolutely" sustainable.

62. After the market closed on September 29, 2008, the Company issued a press release (the "September 29, 2008 Press Release"), which reported that ACAS had amended its unsecured credit facility. In the September 29, 2008 Press Release, the Company represented that it would pay its 2008 fourth quarter dividend of $1.10 per share out of 2008 taxable income, that the Company's 2008 taxable income and capital gains would not only be sufficient to pay the fourth quarter 2008 dividend of $1.10 per share, but was large enough to enable ACAS to roll over more than $500 million of ordinary taxable

income and net long term capital gains from 2008 into 2009 to pay dividends, and that its amendment of the unsecured credit facility (along with a prior amendment of its secured credit facility that had been announced on September 8, 2008) further confirmed that these dividends would be paid:

> "As we announced earlier this quarter, American Capital has sought to amend covenants in certain of our debt facilities to improve or maintain availability. While this amendment will increase our borrowing cost, we continue to project that we will rollover more than $500 million of ordinary taxable income and net long term capital gains, and we expect to meet our total dividend forecast for 2008 of $4.19 per share," said Tom McHale, Senior Vice President, Finance. "We also expect to continue to invest in higher yielding subordinated debt, which has very attractive spreads over the cost of this capital."
>
> "We believe that this amendment will enhance American Capital's ability to maintain consistent liquidity," said John Hooker, Vice President, Debt Capital Markets. "The continued support of our lenders in the midst of the turmoil in the financial sector highlights our quality investment portfolio and low leverage."

The September 29, 2008 Press Release was filed with the SEC on October 3, 2008 as an exhibit to a Form 8-K that was signed by Defendant Flax.

63. Analysts following ACAS reacted favorably to the September 29, 2008 Press Release. For example, in a September 30, 2008 report entitled, "ACAS Renews Credit Facilities; Reaffirms Dividend," RBC Capital Markets gave ACAS management "credit" for renewing its credit facilities, and noted that the Company had simultaneously reaffirmed its 2008 dividend and that it would "roll over more than $500 million of 2008 taxable income and net long term capital gains to pay 2009 dividends." Similarly, by a report dated September 30, 2008, AvondalePartners, LLC initiated coverage of ACAS with a "market outperform" rating, on the basis of, *inter alia*, the Company's representations about its ability to pays its dividends:

> American Capital has already declared a quarterly dividend of $1.05 per share, and has give guidance for a dividend of $1.10 per share in 4Q08. Moreover, the company has stated that it expects at least single-digit dividend growth in 2009.

> The confidence in 2009 stems from the fact that management expects $500 mil (approximately $2.40 per share) of excess income to carry over from 2008.
>
> .

64. As a result of the statements in the September 29, 2008 Press Release, the price of ACAS's stock increased by $3.05 per share to close at $25.51 on September 30, 2008, or almost 14%, from $22.46 at the close of the market on September 29, 2008.

DEFENDANTS' CORRECTIVE DISCLOSURES

65. On November 10, 2008, Defendants shocked the market by disclosing that, contrary to their prior representations, the Company would not pay its 2008 dividends, and that ACAS was unable to pay these 2008 dividends because payment of the 2008 dividend would render ACAS in violation of the minimum tangible net worth covenants under its loan agreements due to the amount of net unrealized depreciation recorded by the Company.

66. On November 10, 2008, the Company issued a press release (the "November 10, 2008 Press Release"). Among other things, the November 10, 2008 Press Release made the following disclosures:

> Through the third quarter of 2008, American Capital has had to depreciate its assets by about $731 million beyond what we believe will be the realizable value of our assets on settlement or maturity of our investments, after taking into account credit quality. This gives us great concern, since American Capital is subject to minimum tangible net worth requirements under our loan agreements. Therefore, American Capital is implementing a number of measures to build our capital base and delever our balance sheet. Our decisions to . . . . reduce our dividend . . . will build our capital base and generally reduce our debt. It is a great time to be levered less than 1:1 debt to equity, however it has become evident that in this environment, there is a need to be levered even less.

* * * *

> DIVIDEND POLICY REVISION
>
> American Capital is revising its dividend policy to more proactively manage its capital base in the current volatile markets. . . . American Capital will pay no further dividends for the remainder of 2008.

The November 10, 2008 Press Release contained quotes from Defendants Wilkus and Erickson and was filed with the SEC as an exhibit to a Form 8-K that was signed by Defendant Konzmann.

67. On November 10, 2008, the Company also filed its report for third quarter ended September 30, 2008 with the SEC (the "3Q 2008 10-Q"), which was signed by Defendant Konzmann and which contained certifications by Defendants Wilkus and Erickson. In the Q3 2008 10-Q, the Company stated that it was recognizing $698 million in net unrealized depreciation in the third quarter of 2008 and ceased representing (as they had in the Q1 2008 10-Q and the Q2 2008 10-Q) that "unrealized net (depreciation) appreciation does not impact our ability to pay a dividend on our common stock." The 3Q 10-Q also provided additional information concerning the Company's newly disclosed inability to pay its 2008 dividends:

> *Dividends*
>
> We have revised our dividend policy to manage our capital base proactively in the current volatile markets. We have retained our 2008 net long-term capital gains and will retain future net long-term capital gains and treat them as "deemed distributions". We do not expect to pay further dividends for the remainder of 2008. Our Board of Directors will evaluate the declaration of our quarterly dividend after our financial results are determined each quarter, so that we may more precisely assess our taxable income, cash flow and changes in fair value to better manage our tangible net worth in the current volatile markets.
>
> As of September 30, 2008, which is our tax year end, we had undistributed ordinary income of $518 million. We paid a dividend of $218 million on October 14, 2008 reducing our undistributed ordinary income to $300 million. We expect to pay this undistributed ordinary income as a dividend to our shareholders by September 30, 2009 in order to avoid paying income taxes on our taxable income.

68. On November 10, 2008, the Company conducted a conference call with analysts and investors (the "November 10, 2008 Conference Call") concerning the disclosures made in the November 10, 2008 Press Release and the 3Q 10-Q. Defendants Wilkus, Erickson, Flax and Konzmann participated in the November 10, 2008 Conference Call, and Defendants Wilkus, Erickson, and Flax answered questions. During the November 10, 2008 Conference Call, Defendant Wilkus made the following statements:

> [Analyst]: Mr. Wilkus, you stated that after each quarter you were going to consider, the Board was going to consider, the results of the quarter as to determining a dividend, possible dividend, for that quarter. But are you stating later than even in January of this year, if you have a good quarter this fourth quarter, you're not going to consider a dividend?
>
> [Wilkus]: No. I haven't said that. I know this is probably a little confusing. What we have said is that we're not going to pay a dividend in – for the rest of this year. We have paid out quite a large amount of dividends up to now as you know. But we don't plan to pay a dividend between now and December 31. We actually close our books generally in early February and it will be immediately after that that our Board will evaluate whether we should pay a dividend. That dividend may be associated with the fourth quarter, but it would then get paid some time in the first quarter. And that's the plan that our Board is implementing really for here on after. What they might do, I can't say, they will take into account cash flow, they will take into account the liquidity, and also pay attention to our tangible net worth because when we do pay a dividend, it does – doesn't allow us to build our tangible net worth. And, of course, at the end of the following quarter, that may very well get tested under our tangible net worth covenants of our loan agreements. And that's why we're being extremely careful in how we manage our capital base.

69. Analysts at, *inter alia*, Argus Capital, BB&T Capital Markets, AvondalePartners, LLC, William Blair & Company, J.P. Morgan, and RBC Capital Markets immediately downgraded their ratings on ACAS stock due to the November 10, 2008 disclosures. Comments included the following:

a. Analysts at Argus Capital, in downgrading its rating on ACAS from "buy" to "hold," stated that the disclosure that ACAS could not pay its dividend "is analogous to John Deere ceasing to make tractors."

b. Analysts at AvondalePartners, LLC stated:

> Overshadowing American Capital's portfolio performance was the announced suspended dividend. . . .
>
> The main reason the company is going into capital preservation mode is that its write downs are expected to increase even from the high levels of 3Q08 (net unrealized loss of $700mil), which could lower its NAV [net asset value] to a level that would put its credit facility covenants at risk.

c. Analysts at William Blair & Company stated:

> Our rating downgrade on ACAS shares to Market Perform is primarily based on uncertainty on two fronts: a tangible net worth (TNW) covenant that we believe ACAS could trip as early as this fourth quarter, and the supply overhang presented by the realignment of ACAS's shareholder base now that retail investors – who hold approximately 50% of ACAS shares largely for the heretofore consistent dividend – now dump their shares in response to ACAS's new dividend policy.
>
> The report subsequently noted that the dividend cut "rewrites [the Company's] contract with investors."

70. Defendants' misrepresentations alleged above caused massive losses to Plaintiffs and the Class. In response to Defendants' disclosures on November 10, 2008 described in the preceding paragraphs, the price of ACAS's stock dropped from $13.77 at the close of the prior trading day (November 7, 2008) to $7.87 on November 10, 2008 – a decline of almost 43 percent – on volume of 18.7 million shares.

DEFENDANTS' MATERIALLY FALSE AND MISLEADING STATEMENTS

Defendants' Statements Concerning The Company's Ability to Pay 2008 Dividends

71. As more particularly alleged above, Defendants made a series of representations concerning the Company's ability to pay 2008 dividends:

(a) As set forth in paragraphs 32, 33, 34, 37, 38, 39, 45, 47, 48, 50, 55, 56, 57, 59, 61 and 62 above, Defendants represented that the Company's 2008 dividends would be paid because they were covered by the Company's 2007 and 2008 taxable income, long term capital gains, and/or realized earnings; and/or

(b) As set forth in paragraphs 40, 48, 50, 59 above, Defendants represented that the Company's ability to pay its 2008 dividends was not impacted by the amount of the Company's net unrealized depreciation.

72. Defendants' representations alleged in paragraph 71 above were false and/or misleading when made because, as Defendants disclosed on November 10, 2008 (as alleged in paragraphs 65-68 above), the amount of the Company's net unrealized depreciation could – and did – prevent the Company from paying its 2008 dividends, *regardless* of the amount of the Company's 2007 and 2008 taxable income, long term capital grains, and/or realized earnings, if the combination of the amount of the dividend and the amount of net unrealized depreciation placed the Company in default of its minimum tangible net worth covenants under its secured and unsecured revolving credit facilities (the "Credit Facilities"). The Company had borrowed over $1 billion dollars under the Credit Facilities. In order to avoid an event of default, ACAS was required, *inter alia,* to comply with minimum tangible net worth covenants that required ACAS to have prescribed amounts of assets relative to the amount ACAS was permitted to borrow under the Credit Facilities. If the net value of ACAS's assets dropped below

these covenant levels, the lenders under the Credit Facilities had the ability to declare a default and, upon doing so, the option to accelerate payment of its well over $1 billion in outstanding debt – an event which would have forced ACAS to forfeit all of its cash on hand and to sell its portfolio investments in order to pay off the accelerated debt. Such an outcome would threaten the Company's ability to continue as a going concern. Indeed, when further deterioration of ACAS's net asset value was reported for the fourth quarter ending December 31, 2008, on March 2, 2009, Defendants reported that ACAS *had* defaulted on its loan covenants, and its auditors required the Company to include a warning that its ability to continue as a "going concern" was in danger.

False or Misleading Statements in the September 29, 2008 Press Release

73. As alleged in paragraph 62, above, the September 29, 2008 Press Release also represented that the Company had amended the Company's revolving credit facilities in order to "enhance American Capital's ability to maintain consistent liquidity" and permit the Company to "invest in higher yielding subordinated debt" with "very attractive spreads over the cost of this capital."

74. Not only was the September 29, 2008 Press Release materially misleading for the reasons set forth in paragraph 72 above, but the representations in the September 29, 2008 Press Release concerning the reasons that the Company had amended the revolving credit facilities were materially false or misleading because the September 29, 2008 Press Release failed to disclose the material, adverse fact that that the real reason for the amendments was that, as a result of material increases in the amount of net unrealized depreciation during the quarter ending September 30, 2008, ACAS was in violation of the tangible net worth covenants under the revolving credit facilities, and that ACAS was able to avoid a default only by agreeing to materially decrease the total amount of the unsecured credit facility from $1.565 billion to $1.409 billion and the total lending amount of the secured facility from

$1.3 billion to $500 million. Indeed, as Defendants later disclosed, the Company's tangible net worth was only $5.06 billion as of September 30, 2008, which would have rendered ACAS in violation of the minimum net worth covenants under the revolving credit facilities if the total lending amounts had not been reduced.

Defendant Wagner's and Flax's Statements Concerning Material Adverse Information

75. Defendants Wagner and Flax made materially false and misleading statements in conjunction with their sales of ACAS stock during the Class Period. Specifically, each time they sold Company stock, Defendants Wagner and Flax filed a document with the SEC entitled, "Notice of Proposed Sale of Securities Pursuant to Rule 144" (the "144 Notice"). In each 144 Notice, Defendants Wagner and Flax made the following express representation:

> The person for whose account the securities to which this notice relates are to be sold hereby represents by signing this notice that he does not know any material adverse information in regards to the current and prospective operations of the issuer of the securities to be sold which has not been publicly disclosed.

These statements were materially false and misleading because each time Defendants Wagner and Flax filed a 144 Notice during the Class Period, they were aware of material adverse information regarding ACAS's current and prospective operations – specifically, that the Company's and the Individual Defendants' misrepresentations alleged in paragraph 71 above were false and misleading for the reasons alleged in paragraph 72 above. Defendant Wagner made these false and misleading representations on the following dates on which he filed a 144 Notice: twice on November 18, 2007; November 28, 2007; December 17, 2007; March 10, 2008; May 18, 2008; August 6, 2008; August 12, 2008; September 8, 2008; and November 3, 2008. Defendant Flax made these false and misleading representations on August 12, 2008 and September 8, 2008, when he filed a 144 Notice.

SCIENTER ALLEGATIONS

76. Defendants' material misrepresentations alleged above were made with *scienter; i.e.*, knowingly and/or recklessly. The following facts, individually and/or collectively, give rise to a strong inference that the misrepresentations alleged in paragraphs 71-72 above were made knowingly and/or recklessly.

<u>Wilkus' Motive To Avoid Repayment Of His Company Loans</u>

77. Throughout the Class Period, as alleged in paragraphs 52-54 above, Defendant Wilkus had a specific motive to make the misrepresentations alleged above. Specifically, as alleged above, Wilkus was liable to repay several million dollars in full recourse loans in the event that the Company's stock price and net asset value dropped below prescribed levels, and thus, as the Company's net asset value declined dramatically, Wilkus knew that he would be liable to repay these loans unless he was able to prop up the Company's stock price.

78. Wilkus's efforts ultimately failed. Despite his materially false and misleading statements during the Class Period, as alleged above, and despite the fact that in February 2009 he pledged an additional 852,456 ACAS shares (to be valued at the same-day closing price) as collateral, on March 2, 2009, the Company announced is 2008 year-end financial results, which included additional net unrealized depreciation exceeding $1.5 billion in the fourth quarter of 2008 ended December 31, 2008, which drove the Company's net asset value per share down to $15.41. On March 5, 2009 the Company issued a press release announcing that Wilkus's loan debt had been accelerated and his nearly 1.1 million total collateralized ACAS shares (the 208,200 originally pledged shares and the 852,456 shares pledged in February 2009) were foreclosed upon by the Company.

Wagner's Concrete Benefits Derived From ACAS's Inflated Stock Price

79. During the Class Period, Defendant Wagner had the motive and opportunity to commit securities fraud, and obtained concrete benefits from his misrepresentations because he was able to sell approximately 122,713 shares of ACAS stock at artificially inflated prices, for total gross proceeds in excess of $4 million. The shares Defendant Wagner sold during the Class Period are set forth more fully in the following chart:

Date of Stock Trade	**Number of Shares Sold**	**Gross Proceeds**
11/02/07	18,667	$780,280.62
11/05/07	2,000	$81,780.00
11/13/07	49,800	$1,967,100.00
11/27/07-12/15/07	1,931	$73,000.00
03/04/08	795	$28,169.48
05/12/08	20,110	$638,166.17
07/23/08	10,368	$235,957.95
07/29/08	2,317	$46,056.47
08/07/08	205	$4,361.47
08/27/08	14,231	$294,387.19
10/27/08	2,289	$24,200.00
Totals	**122,713**	**$4,173,459.35**

The Concrete Benefits Obtained from the Sale of 12.7 Million Shares Of ACAS Stock

80. During the Class Period, the Company had the motive and opportunity to commit securities fraud, and obtained concrete benefits from its misrepresentations, because it was able to sell approximately 12.7 million shares of ACAS stock at artificially inflated prices. As alleged in paragraphs 36 and 42 above, on or about November 21, 2007 and March 31, 2008, ACAS conducted stock offerings of 4 million and 8.7 million shares of common stock at $39.43 and $36.41 per share, respectively, for total proceeds of approximately $474 million. The proceeds derived from these stock

sales would have been substantially less if the Defendants had not made the material misrepresentations alleged above.

The Concrete Benefits Obtained From The European Capital Acquisition

81. Prior to the Class Period, ACAS owned approximately 67.7% of the publicly stock of European Capital, Ltd. ("European Capital"). European Capital's stock was publicly traded on the London Stock Exchange under the symbol "ECAS."

82. On November 7, 2008 – just one business day before the disclosure on November 10, 2008 of the adverse facts concerning the Company's ability to pay its dividend – European Capital entered into an agreement to be acquired by ACAS in an all-stock acquisition, under which European Capital shareholders would received 0.333 shares of ACAS for each of their 34,500,539 shares (the remaining 32.3% shares of European Capital that were publicly-traded), constituting a total of 11.5 million ACAS shares. Using the $13.77 per share closing stock price of ACAS on November 7, 2008, the market value of those 11.5 million ACAS shares was $158 million. However, once the disclosures were made on November 10, 2008, as discussed below, ACAS's stock price plummeted from $13.77 to $7.87 (its closing price on November 10, 2008), and, by the time the 11.5 million shares of ACAS stock were issued on March 26, 2009, those 11.5 million shares had a market value of only $25 million (or $2.17 per share). Thus, by inflating the stock price of ACAS through the material misrepresentations alleged above, ACAS obtained a concrete benefit from their representations, because ACAS was able to acquire the European Capital shares for just $25 million of ACAS stock, and not the $158 million.

Defendants Knew The Circumstances That Could Impact The Ability To Pay Dividends

83. There is a strong inference that Defendants acted with scienter in connections with the misrepresentations alleged in paragraphs 71-72 and 75 above because they knew, or were deliberately

reckless in not knowing, that the amount of the Company's net unrealized depreciation could prevent the Company from paying its 2008 dividends, *regardless* of the amount of the Company's 2007 and 2008 taxable income, long term capital gains, and/or realized earnings, if the combination of the amount of the dividend and the amount of net unrealized depreciation placed the Company in default of its minimum tangible net worth covenants under the Credit Facilities. As alleged above, each of the Individual Defendants were senior officers and/or directors of the Company. Given the critical importance of the Company's ability to pay dividends, and the necessity that the Company be in compliance with its tangible net worth covenants in order to avoid default under the credit facilities, there is a strong inference that these concealed, adverse facts concerning the Company's ability to pay its dividends were factual matters that were known by each of the Defendants and/or that the failure to know these adverse facts was reckless.

84. Defendants Wilkus, Erickson and Flax were senior officers of the Company who participated directly in the Company's efforts to obtain the September 2008 amendments to the Company's revolving credit facilities, and therefore possessed knowledge of the adverse, concealed facts alleged in paragraphs 73-74, above. Moreover, default on the tangible net worth covenants created the possibility that the Company would lose access to credit, be required by its lenders to immediately repay over $1 billion, and be unable to continue as a going concern; given these Defendants' positions as senior officers with the Company, and the critical importance of avoiding defaults under the revolving credit facilities to the Company's survival, there is a strong inference that the concealed, adverse facts alleged in paragraphs 73-74 above were factual matters that were known by each of Wilkus and Erickson and/or that the failure to know these adverse facts was reckless.

85. In addition, as Chief Operating Officer, Defendant Wagner knew, no later than October 27, 2008 (the date of his stock stale alleged in paragraph 79, above), that the Company was not going to pay the remaining fourth quarter 2008 dividends; accordingly, there is a strong inference that his certification on form 144, filed on November 3, 2008 as alleged in paragraph 75 above, was knowingly or recklessly false or misleading when made.

NO SAFE HARBOR

86. Defendants' misrepresentations alleged herein in ¶¶ 71-75 above are not "forward looking statements" under the PSLRA, 15 U.S.C. §78u-5(c)(1), because they were statements of present or past fact.

87. Even assuming, *arguendo*, that these statements were "forward-looking," they are not entitled to PSLRA "safe harbor" protection under 15 U.S.C. §78u-5(c)(1), because (i) they were made by Defendants, who at the time the statements were made, had actual knowledge that the statements were false and/or misleading, and (ii) Defendants' statements were not accompanied by meaningful cautionary statements.

THE LOSSES CAUSED BY DEFENDANTS' MISREPRESENTATIONS

88. As alleged above, Defendants' material misrepresentations caused the price of ACAS common stock to be artificially inflated throughout the Class Period. But for Defendants' material misrepresentations, ACAS stock would not have traded at the inflated levels that it traded at during the Class Period.

89. Plaintiffs and other Class Members who purchased ACAS stock suffered losses caused by Defendants' material misrepresentations, which were a direct and proximate result of Defendants' wrongful conduct. As alleged above, Plaintiffs and other Class Members suffered losses when the price

of ACAS stock dropped in response to disclosures on November 10, 2008 which removed the artificial inflation from the Company's stock price.

CLAIMS FOR RELIEF

Count I

Against All Defendants For Violations of Section 10(b) And Rule 10b-5(b) Promulgated Thereunder

90. Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

91. This Count is asserted against all Defendants and is based upon Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5(b) promulgated thereunder by the SEC.

92. During the Class Period, Defendants engaged in a plan, scheme, conspiracy, and course of conduct, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices and courses of business which operated as a fraud and deceit upon Plaintiffs and the other members of the Class; made various untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and employed devices, schemes and artifices to defraud in connection with the purchase and sale of securities.

93. Pursuant to the above plan, scheme, conspiracy and course of conduct, each of Defendants participated directly or indirectly in the preparation and/or issuance of the quarterly reports, SEC filings, press releases and other statements and documents described above, all of which were designed to and did influence the market for ACAS common stock. Such reports, filings, releases, and statements were materially false and misleading in that they failed to disclose material adverse

information and misrepresented the truth about ACAS's ability to continue paying a regular quarterly cash dividend.

94. Defendant ACAS, a publicly held company whose common stock was, and is, registered with the SEC, traded on NASDAQ during the Class Period, and governed by the provisions of the federal securities laws, and Defendants Wilkus, Erickson, Wagner, Flax, and Konzmann, as ACAS's officers, directors, and controlling persons, each had a duty to disseminate accurate and truthful information promptly with respect to, and to correct any previously issued statements that had become materially misleading or untrue, so that the market price of ACAS's stock would be based upon truthful and accurate information. Defendants' misrepresentations and omissions during the Class Period violated these specific requirements and obligations.

95. As more particularly alleged above, Defendants acted with scienter in that they knew or recklessly ignored that the public statements alleged above were materially false and misleading when made, knew that such statements or documents would be issued or disseminated to the investing public, and knowingly participated in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws.

96. As a result of the dissemination of the aforementioned false and misleading reports, releases and public statements, the market price of ACAS common stock was artificially inflated throughout the Class Period. In ignorance of the adverse facts concerning ACAS, Plaintiffs and the other members of the Class purchased ACAS common stock at artificially inflated prices and relied upon the price of the stock, the integrity of the market for the stock and/or upon statements disseminated by Defendants and were damaged thereby.

97. As more particularly alleged above, the misrepresentations and misconduct by Defendants directly and proximately caused losses, injury and damages to Plaintiffs and the Class. Had Plaintiffs and the other members of the Class known the truth, they would not have purchased said shares or would not have purchased them at the inflated prices that were paid. As alleged above, the price of ACAS stock dropped precipitously in response to Defendants' disclosures on November 10, 2008, causing losses and damages to Plaintiffs and the Class.

98. By reason of the conduct alleged herein, Defendants knowingly or recklessly, directly or indirectly, have violated Section 10(b) of the Exchange Act and Rule 10b-5(b) promulgated thereunder and caused losses, injury and damages to Lead Plaintiffs and the other members of the Class.

Count II

Against The Individual Defendants For Violations of Section 20(a) of the Exchange Act

99. Plaintiffs repeat and re-allege each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

100. This count is asserted against the Individual Defendants and is based on Section 20 of the Exchange Act.

101. Because of their position of control and authority as senior officers and directors of ACAS, the Individual Defendants were able to, and did, control the contents of the various reports, press releases, interviews, public statements and public filings that ACAS disseminated in the marketplace during the Class Period. Throughout the Class Period, the Individual Defendants exercised their power and authority to cause ACAS to engage in the wrongful acts complained herein. Therefore, the Individual Defendants were "controlling persons" of ACAS within the meaning of Section 20(a) of the

Exchange Act. In this capacity, they participated in the unlawful conduct alleged that artificially inflated the market price of ACAS common stock.

102. As controlling persons of ACAS, the Individual Defendants are liable pursuant to Section 20 of the Exchange Act.

Count III

Against Defendant Wagner For Violations of Section 20A of the Exchange Act

103. Plaintiffs reincorporate every paragraph above as if fully set forth herein.

104. This claim is asserted by Plaintiffs Kent Nixon and Nina van Dyke, who purchased ACAS stock contemporaneously with the sale of ACAS stock by Defendant Wagner (the "20A Plaintiffs") on behalf of themselves and other Class members pursuant to Section 20A of the Exchange Act, for purchases of ACAS stock made on November 19, 2007 and May 12, 2008, which were contemporaneous with the sale of ACAS stock by Defendant Wagner while he was in possession of material, non-public adverse information concerning ACAS.

105. During the Class Period, Defendant Wagner (*i.e.*, the Insider Trading Defendant), sold ACAS stock while in possession of material, non-public adverse information, in violation of Sections 10(b) and 20(a) of the Exchange Act, as more fully alleged herein.

106. The 20A Plaintiffs and other members of the Class purchased ACAS common stock contemporaneously with sales of ACAS common stock by defendant Wagner while Defendant Wagner was in possession of material, non-public adverse information, as alleged more fully above, and has been damaged by reason of the violations of Section 20A alleged herein. Defendant Wagner, while in possession of material, non-public adverse information from defendant ACAS, in violation of Section

20A(c) of the Exchange Act, 15 U.S.C. § 78t-1(a), engaged in the transactions outlined more fully above within the Class Period.

107. Defendant ACAS, acting through its officers and agents, is liable under Section 20A(c) of the Exchange Act for communicating material, non-public adverse information to Defendant Wagner, thereby enabling him to trade on such information and damage the 20A Plaintiffs and the other members of the Class who purchased while Defendant Wagner was contemporaneously selling ACAS shares.

108. Defendant Wagner, by reason of his status as a controlling person pursuant to Section 20(a) of the Exchange Act, is liable pursuant to Section 20A(b)(3) of the Exchange Act for ACAS' violations of the Exchange Act as more fully alleged herein.

109. By reason of the violations of Section 20A of the Exchange Act alleged herein, Defendant Wagner is liable to the 20A Plaintiffs and the members of the Class who purchased shares of ACAS common stock or securities tied to those common shares contemporaneously with the sales of Defendant Wagner's ACAS common stock during the Class Period, for the transactions based on material, non-public adverse information regarding ACAS.

110. By virtue of the foregoing, Defendant Wagner violated Section 20A of the Exchange Act.

111. As a direct and proximate result of the Defendant Wagner's wrongful conduct, the 20A Plaintiffs and the other members of the Class seek disgorgement of his profits from his transactions in ACAS stock during the Class Period.

Count IV

Against Defendants for Violations of Section 11 of the Securities Act

112. Plaintiff van Dyke repeats and realleges each and every allegation in paragraphs 1 through 89 as if set forth herein, but only to the extent that such allegations do not sound in fraud, allege *scienter* or otherwise allege the intent of any Defendant named in this Count to defraud Plaintiff van Dyke and/or any other members of the Dividend Reinvestment Plan ("DRIP") Class, consisting of all those who participated in the DRIP Plan during the Class Period and received dividend reinvestments pursuant to the DRIP Plan during the Class Period, and who were damaged thereby. Excluded from the DRIP Class are Defendants; members of their immediate families, their legal representatives, heirs, successors, or assigns; and any entity in which any of the Defendants, have or had a controlling interest.

113. On December 16, 1998, ACAS filed its Form S-3 Dividend Reinvestment Plan Registration Statement. On March 30, 2007, ACAS filed a Post-Effective Amendment No. 1 to Form S-3 Registration Statement with the Prospectus entitled, Third Amended and Restated Dividend Reinvestment Plan ("DRIP Registration Statement").

114. This Count is predicated exclusively upon the strict liability of Defendants for making materially untrue and/or materially misleading statements and omissions in the DRIP Registration Statement filed with the SEC and/or the documents incorporated therein and/or thereafter by reference.

115. This Count is asserted by Plaintiff van Dyke on behalf of herself and all other members of the DRIP Class who acquired ACAS shares by virtue of participating in the DRIP Plan during the Class Period authorized pursuant to the DRIP Registration Statement against Defendants.

116. The DRIP Registration Statement established the DRIP Plan to allow investors to buy additional shares of ACAS through dividend reinvestment. The purpose of the DRIP Plan was to

provide investors with "a simple and convenient method of investing cash dividends and distributions in additional shares of our common stock at a modest discount from our common stock's current market price." The DRIP Registration also stated: "Participants in the Plan may have cash dividends and distributions automatically reinvested without charges for recordkeeping, and may take advantage of the custodial and reporting services provided by Computershare Trust Company, N.A. (the "plan administrator" or "Computershare"), at no additional cost." Investors were enrolled in the plan, as follows:

> The Plan is an "opt-in" plan. You may join the Plan by signing an enrollment form and returning it to the plan administrator or you may enroll by accessing your plan account at the plan administrator's website, w*ww.computershare.com*. The enrollment form must be received by the plan administrator prior to the dividend record date in order to take effect as of the related dividend payment. Enrollment forms may be obtained at any time by telephonic, Internet or written request to the plan administrator. A dividend record date is, with respect to any dividend or distribution declared by our board of directors, the date set by our board of directors for determining stockholders of record entitled to receive the dividend or distribution.

117. The DRIP Registration Statement stated, in relevant part, the following:

> We have filed with the SEC a registration statement on Form S-3 under the Securities Act of 1933, as amended (the "Securities Act"), with respect to the securities offered by this prospectus. This prospectus, which forms a part of the registration statement, does not contain all of the information set forth in the registration statement and its exhibits and schedules, certain parts of which are omitted in accordance with the SEC's rules and regulations. For further information about us and the securities, we refer you to the registration statement and to such exhibits and schedules. Statements contained in this prospectus concerning the provisions of any document filed as an exhibit to the registration statement or otherwise filed with the SEC are not necessarily complete, and in each instance reference is made to the copy of such document so filed. Each such statement is qualified in its entirety by such reference.

118. The DRIP Registration Statement also stated:

> The undersigned registrant hereby undertakes:
>
> 1. To file, during any period in which offers or sales are being made, a post-effective amendment to this Registration Statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the Registration Statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the Registration Statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20 percent change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement;

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the Registration Statement or any material change to such information in the Registration Statement;

Provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the Registration Statement is on Form S-3, Form S-8 or Form F-3, and the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to Section 13 or Section 15(d) of the Securities Exchange Act, that are incorporated by reference in the Registration Statement;

2. That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof;

3. To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering;

4. That, for purposes of determining any liability under the Securities Act, each filing of the registrant's annual report pursuant to Section 13(a) or 15(d) of the Securities Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to Section 15(d) of the Securities Exchange Act) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial *bona fide* offering thereof.

119. The DRIP Registration Statements also provided information on how shares are allocated:

When our board of directors declares a dividend or distribution, all non-participants will receive such dividend or distribution by check mailed directly to the record holder by or

> under the direction of the plan administrator. As a participant, you will have credited to your plan account the number of whole and fractional shares (computed to three decimal places) that could be obtained, at the price determined in accordance with the answers to Questions 10 and 12, with the cash, net of any applicable withholding taxes, that would have been paid to you if you were not a participant. Depending on the circumstances described in the answer to Question 10, such shares will be acquired by the plan administrator for participants either (i) through receipt of newly issued or treasury shares of common stock from us or (ii) by purchase of outstanding shares of common stock on the open market.

120. As for incorporating documents, the DRIP Registration Statement stated:

> Each document or report subsequently filed by us pursuant to Section 13 or 15(d) of the Securities Exchange Act after the date of this prospectus and prior to the termination of the offering of the securities shall be deemed to be incorporated by reference into this prospectus and to be a part of this prospectus from the date of filing of such document. Any statement contained in this prospectus, or in a document all or a portion of which is incorporated or deemed to be incorporated by reference in this prospectus, shall be deemed to be modified or superseded for purposes of the registration statement and this prospectus to the extent that a statement contained herein or in any other subsequently filed document (that also is or is deemed to be incorporated by reference in this prospectus) modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of the registration statement or this prospectus.

121. Therefore, all documents issued prior to each of the dividend distributions were incorporated by reference into the DRIP Registration Statement. Because the documents were false and misleading, for the reasons described above, the DRIP Registration Statement, incorporating these documents, was also false and misleading as of the date of the documents.

122. During the Class Period, ACAS declared the following dividends on the respective payable dates with the record date of shareholder in parentheses according to the ACAS' website:

2007 dividends: $1.00 on January 16, 2008 (December 7, 2007)

2008 dividends: $1.01 on April 1, 2008 (March 7, 2008); $1.03 on July 1, 2008 (June 13, 2008); $1.05 on October 14, 2008 (October 6, 2008)

123. Plaintiff van Dyke participated in the DRIP Plan during the Class Period and received shares as dividend reinvestments pursuant to the DRIP Plan during the Class Period. Plaintiff van Dyke and the other members of the DRIP Class who participated in the DRIP Plan purchased ACAS shares through the DRIP Plan pursuant and/or traceable to the DRIP Registration Statement (and all documents incorporated therein and thereafter, including all of ACAS' SEC filings issued during the Class Period that were on record prior to each of the dividend distributions). Plaintiff van Dyke and the other members of the DRIP Class who participated in the DRIP Plan reinvested their dividends based on information in the DRIP Registration Statement, the documents incorporated therein and the subsequent reports from ACAS. Therefore, Plaintiff van Dyke and members of the DRIP Class who purchased ACAS shares through the DRIP Plan were damaged as a result of Defendants' wrongful conduct. As issuers of their respective shares issued via the materially untrue and misleading DRIP Registration Statement, Defendants are strictly liable for each false and misleading statements contained therein and in those documents incorporated therein and thereafter by reference.

124. Defendants are each signatories of the DRIP Registration Statement or documents incorporated therein or thereafter by reference, officers of ACAS and/or controlling persons of the issuer, who owed to holders of the ACAS shares obtained through the DRIP Plan the duty to make a reasonable investigation of the statements contained and/or incorporated by reference in the DRIP Registration Statement to ensure that such statements were true and that there were no omissions of any material facts required to be stated in order to make the statements contained therein not misleading. As such, Defendants are liable to Plaintiff van Dyke and all other members of the DRIP Class who participated in the DRIP Plan during the Class Period.

125. None of the Defendants named herein made a reasonable investigation or possessed reasonable grounds for the belief that the statements contained in the DRIP Registration Statement or in the documents incorporated therein or thereafter by reference were true or that there were no omissions of material facts necessary to make the statements made therein not misleading.

126. All Defendants named in this Count issued and disseminated, caused to be issued and disseminated, and participated in the issuance and dissemination of, material misstatements to the investing public which were contained in the DRIP Registration Statement, which misrepresented or failed to disclose, among other things, the facts set forth above. By reason of the conduct herein alleged, Defendants violated Section 11 of the Securities Act.

127. This action is brought within one year after discovery of the untrue statements and omissions which should have been made through the exercise of reasonable diligence, and within three years of issuance of ACAS shares to Plaintiff van Dyke pursuant to the DRIP Registration Statement.

128. Because of the foregoing, Plaintiff van Dyke and other members of the Class who participated in the DRIP Plan during the Class Period are entitled to damages under Section 11 as measured by the provisions of Section 11(e), from Defendants, each of them, jointly and severally, named in this Count.

Count V

Against Defendant ACAS for Violations of Section 12(a)(2) of the Securities Act

129. Plaintiff van Dyke repeats and realleges each and every allegation in paragraphs 1 through 89 and paragraphs 112 through 128, above, as if set forth herein, but only to the extent that such allegations do not sound in fraud, allege *scienter* or otherwise allege the intent of Defendants ACAS to

defraud Plaintiff van Dyke and members of the DRIP Class that purchased ACAS shares pursuant and/or traceable to the DRIP Registration Statement.

130. This Count is predicated exclusively upon the strict liability of Defendant ACAS for making materially untrue and/or materially misleading statements and omissions in the DRIP Registration Statement and the documents incorporated therein or thereafter by reference.

131. This Count is asserted by Plaintiff van Dyke on her own behalf as a DRIP Plan participant during the Class Period and on behalf of all members of the DRIP Class who acquired shares pursuant and/or traceable to the DRIP Registration Statement against Defendant ACAS.

132. Defendant ACAS was the seller, offeror, and/or solicitor of purchasers of the shares offered pursuant to the DRIP Registration Statement.

133. The DRIP Registration Statement and the documents incorporated therein and thereafter by reference contained untrue statements of material facts, omitted to state other facts necessary to make the statements made not misleading, and concealed and failed to disclose material facts. Defendant ACAS engaged in solicitation including participating in the preparation of the false and misleading DRIP Registration Statement and the documents incorporated therein and thereafter by reference.

134. Defendant ACAS owed to the purchasers of ACAS shares pursuant to the DRIP Plan the duty to make a reasonable and diligent investigation of the statements contained in the DRIP Registration Statement and the documents incorporated therein and thereafter by reference, to ensure that such statements were true and that there was no omission to state a material fact required to be stated in order to make the statements contained therein not misleading.

135. Plaintiff van Dyke and the other members of the DRIP Class who participated in the DRIP Plan and acquired ACAS shares pursuant and/or traceable to the defective DRIP Registration

Statement did not know, or in the exercise of reasonable diligence could not have known, of the untruths and omissions of material facts contained in the DRIP Registration Statement and/or the documents incorporated therein and thereafter by reference.

136. By reason of the conduct alleged herein, Defendant ACAS violated Section 12(a)(2) and/or controlled a person who violated Section 12(a)(2) of the Securities Act. Accordingly, Plaintiff van Dyke and members of the DRIP Class who hold ACAS shares acquired pursuant to the DRIP Plan have the right to rescind and recover the consideration paid for those ACAS shares and, hereby elect to rescind and tender their respective shares to Defendant ACAS. To the extent Plaintiff van Dyke and any other members of the DRIP Class have sold any of their ACAS shares purchased pursuant to the DRIP Plan, they are entitled to rescissory damages.

137. Plaintiff van Dyke, individually and representatively, hereby offers to tender to Defendant ACAS those shares which she and all other members of the DRIP Class continue to own that were acquired pursuant to the DRIP Registration Statement during the Class Period, in return for the consideration paid for those shares, together with interest thereon. To the extent Plaintiff van Dyke and members of the DRIP Class have sold any such shares, they are entitled to rescissory damages from Defendant ACAS.

138. Less than three years elapsed from the time that the securities upon which this Count is brought were sold to participants in the DRIP Plan to the time of the filing of this action. Less than one year elapsed from the time when Plaintiff van Dyke and other members of the DRIP Class discovered or reasonably could have discovered the facts upon which this Count is based to the time of the filing of this action.

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

A. Determining that the instant action may be maintained as a class action under Rule 23, Federal Rules of Civil Procedure, and certifying the Plaintiffs as Class Representatives;

B. Requiring Defendants to pay damages sustained by Plaintiffs and the Class by reason of the acts and transactions alleged herein;

C. Awarding Plaintiffs and the other members of the Class prejudgment and post-judgment interest, as well as their reasonable attorneys' fees, expert fees and other costs; and

D. Awarding such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

Dated: November 6, 2009

Respectfully submitted,

BROWER PIVEN
A Professional Corporation

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Co-Lead Counsel for Lead Plaintiffs Charles E. Mendinhall, Ron Miller, Joseph J. Saville; and Co-Lead Counsel for the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that this Lead Plaintiffs' Class Action Complaint, with Exhibits A and B, was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and electronically sent to those indicated as non-registered participants on November 6, 2009.

/s/ Charles J. Piven
Charles J. Piven