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SELF-DEALING AND BREACH OF DUTY AT ULLICO, INC.

REPORT

PREPARED BY THE

MAJORITY STAFF

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

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FINDINGS

Although ULLICO was a corporation directed by leaders of organized labor, company management structured stock transactions largely for the benefit of insiders rather than the union members whose unions and pension funds were the company's primary shareholders.

- ULLICO invested $7.6 million in Global Crossing and realized an after-tax gain of about $305 million. These gains temporarily masked operating losses in ULLICO's core businesses and created the false impression that management was running the company successfully. Senior executives used this illusion of success to justify unwarranted increases in their compensation and benefits.
- ULLICO insiders exploited the temporary windfall from the Global Crossing investment to enrich themselves by orchestrating manipulative transactions in ULLICO stock. ULLICO insiders received from company funds a net profit of $10.6 million in stock transactions, which deprived other shareholders of those gains. Additionally, the resulting scandal spawned numerous state and federal investigations. ULLICO spent nearly $14 million on lawyers, lobbyists, and consultants in response to those investigations.

Despite the company's faltering performance, ULLICO senior management received increased bonuses and benefits. Management concealed the true levels of executive compensation from the Board and the shareholders, attempting to maintain secrecy and avoid criticism that their pay was disproportionate to company performance.

- In addition to his base salary of $650,000 per year, Chairman and CEO Robert Georgine claimed approximately $20 million in stock profits, bonuses, and benefits between 1998 and 2001. Four other senior ULLICO executives received more than $9 million in stock profits, bonuses, and benefits over the same time period.
- ULLICO's Chief Legal Officer Joseph Carabillo said that Robert Georgine instructed him never to disclose information about executive compensation unless legally required to do so. Documents confirm that ULLICO's management paid outside lawyers to advise them on how to avoid disclosing compensation information to the Board of Directors.
- Former directors expressed shock when informed that ULLICO executives were so highly compensated. So closely held was information about Georgine's compensation, that Executive Vice President James Luce said he was unaware that Georgine had received a $2.2 million stock purchase credit agreement until he read a vaguely worded disclosure in ULLICO's 2002 Annual Report, two-and-a-half years later.

ULLICO's Board allowed the company's Chairman and CEO, Robert Georgine, to abuse his authority and use the power of his position improperly.

- ULLICO's Board of Directors was large. It consisted of 28 current and former labor leaders and was authorized to be as large as 32 members. Its meetings were infrequent, and attendance was poor. The Board tended to defer to Chairman Georgine's judgment or delegate authority to small committees over which he exerted heavy influence. This allowed Georgine to spend company funds irresponsibly or for the benefit of himself and his relatives.
- Georgine employed at least four of his relatives at ULLICO: his daughter, two sons-in-law, and a nephew. Georgine arranged for his nephew, Patrick J. Mertz, to receive $380,000 in unsecured loans from ULLICO, none of which was ever repaid. Georgine did not inform the Board or seek its approval of these transactions. The loans were ostensibly working capital for a business selling ULLICO insurance products. However, documents indicate that some of the money was used to open a brokerage account and engage in short-term trading of stocks. Questions remain about how much of the money was actually used for legitimate business expenses.
- While ULLICO's core businesses were struggling under Georgine's leadership, ULLICO self-financed the construction of a new luxury headquarters building for $160 million and leased a corporate jet for $3.7 million per year. Flight logs list Georgine as the primary passenger on the jet approximately twice a week for two-and-a-half years, to destinations including Italy, Switzerland, and Fiji.

ULLICO insiders arranged for themselves exclusive opportunities to purchase company stock at artificially low prices.

- ULLICO's annually-fixed stock price combined with the extraordinary growth of its investment in Global Crossing to create a situation where merely observing Global Crossing's market price in December provided a reliable indication of what ULLICO's price would be the following May. Thus, ULLICO insiders were able to virtually guarantee profits from transactions in ULLICO stock by manipulating the timing of their own opportunities to buy and sell.
- On three occasions in 1998 and 1999, Chairman and CEO Robert Georgine allowed officers and directors to purchase ULLICO stock at prices that were obviously below its true market value, given the growth of Global Crossing. Georgine did not provide the vast majority of ULLICO's shareholders, primarily labor unions and pension plans, a similar opportunity to purchase undervalued ULLICO stock.
- ULLICO insiders were so confident that they would profit from their purchases that some of them borrowed large amounts of money to buy ULLICO stock. Three senior executives borrowed about $215,000 each from Mellon Bank in December 1999 in order to purchase ULLICO stock. Two of them had never borrowed money to buy stock before.

ULLICO insiders arranged for themselves special opportunities to sell their stock back to the company at artificially high prices.

- Most shareholders could only sell their shares by participating in ULLICO's annual formal repurchase program, under which ULLICO insiders received favorable treatment.
- Georgine also allowed officers and directors to sell their ULLICO stock back to the company under his "discretionary authority." Robert Georgine and Chief Legal Officer Joseph Carabillo arranged for discretionary repurchases for themselves and other insiders without regard to the limits previously placed on this authority. The repurchases were not disclosed to nor approved by the full Board of Directors. Nor did management disclose the repurchases to other shareholders or inform them that they too could request repurchases merely for the purpose of realizing profits.
- Joseph Carabillo appears to have encouraged some of the discretionary repurchases. Carabillo is alleged to have circulated a form to certain ULLICO insiders allowing them to submit shares for discretionary repurchases. In fact, ULLICO Executive Vice President James Luce referred to this exclusive opportunity as the "Director and Officer Repurchase Program." This further suggests that insiders understood the discretionary repurchases were only being offered to officers and directors.
- In addition to profits realized through discretionary repurchases, ULLICO insiders made substantial profits through the formal repurchases of ULLICO stock. In 2000, when ULLICO stock was at its highest price, insiders received a disproportionate share of the limited funds made available for repurchase. Most of the officers and directors held fewer than 10,000 shares, and each year, ULLICO adopted a rule ensuring that those with fewer than 10,000 shares could sell all of their stock back to the company while other shareholders, such as labor unions and pension plans, could sell only a small portion of their shares back to the company. The 10,000 share threshold operated to protect the liquidity of officers and directors when ULLICO's stock became overvalued.

ULLICO did not adequately deal with its problems until after public pressure and scrutiny by investigators led to the ouster of Robert Georgine and the election of a slate of reform-oriented directors.

- Only after public reports of a grand jury investigation surfaced did ULLICO's management seek the appointment of an outside special counsel. The Board hired former Illinois Governor James Thompson, Chairman of the Winston & Strawn law firm. Thompson and his firm conducted a thorough inquiry and produced a valuable final report. The Thompson Report recommended ULLICO ask that those who participated in the suspect transactions return their profits, but the company rejected that recommendation and set out to defend the actions of its officers and directors.

- ULLICO spent almost $14 million on legal, consulting, and lobbying fees to deal with the multiple investigations spawned by the stock transactions. The company spent more than $2 million on the Thompson investigation. Then they spent twice as much, more than $4 million, on representation of individuals investigated by Thompson and to hire another firm, Sidley Austin Brown & Wood, to represent the company and to review and critique the Thompson Report. One lobbyist friend of Robert Georgine's billed ULLICO for nearly 650 hours of work at $500 per hour, yet the company could not locate a single letter, memo, or note, other than billing records, reflecting the work performed. ULLICO's new management has committed to investigate the services provided by Sidley and a number of other firms to see whether these professionals faithfully served the company's interests, as opposed to its former management's interests.
- ULLICO's Board appointed a Special Committee of directors to consider the Thompson Report. The Special Committee rejected the primary recommendation of the Thompson Report, that ULLICO seek a return of the ill-gotten gains from the stock transactions. Early drafts and notes from the Special Committee report suggest that some Special Committee members took a hostile view of the Thompson investigation.
- In May 2003, shareholders elected a new board of directors who installed Terence O'Sullivan as the new Chairman and CEO. O'Sullivan had been a dissenting member of the Special Committee. Under O'Sullivan's leadership, ULLICO's new Board quickly adopted all of the Thompson Report's recommendations, sent demand letters seeking repayment of the illicit profits, and suspended all representational activities of Sidley Austin Brown & Wood. Under O'Sullivan, ULLICO also fired Joseph Carabillo for cause, froze all retirement and deferred compensation accounts, and appointed former Federal Judge Abner Mikva to head a new special committee of directors to examine matters of impropriety even beyond those detailed in the Thompson Report. ULLICO has sued a number of former officers and directors over disputed claims to compensation, benefits, and profits from the improper stock transactions.
- Although the new Board adopted all the recommendations of the Thompson Report, the vote was far from unanimous. While the resolution passed with the approval of 14 directors, eight directors opposed it. Among them were several who had participated in the stock transactions and who had recently been the intended beneficiaries of an attempted gift from Robert Georgine.

As he departed from ULLICO, Robert Georgine attempted to give money to six sitting directors. Committee staff attempted to speak to all six board members. However, four of them invoked their Fifth Amendment right against self-incrimination rather than answer questions about the attempted gift or any other ULLICO-related subject.

- In Robert Georgine's resignation letter, he claimed he was entitled to $2 million in severance pay. He offered to forego the payment and asked that the money be used to repay stock profits for six sitting ULLICO directors. With this attempted

gift, Georgine may have been trying to influence these six directors to vote in Georgine's interest on matters coming before the Board. ULLICO's new management disputed that he was entitled to the severance.

- Five of the six directors named in Georgine's letter voted against returning any stock profits. Committee staff sought the testimony of all six directors named in Georgine's resignation letter, but only two agreed to cooperate: James LaSala and James McNulty. The other four (William G. Bernard, Marvin J. Boede, Billy J. Casstevens and Joseph F. Maloney) refused requests for voluntary interviews and asserted their Fifth Amendment rights against self-incrimination rather than participate in sworn depositions.
- Each director who pled the Fifth Amendment also refused ULLICO's request to return his profits. Three of them resigned from the Board around the same time Committee staff sought their testimony, and the fourth, Casstevens, was removed from the Board by a vote of the shareholders.

* * *

INVESTIGATIVE ACTIVITIES

In the course of this investigation, Senate Governmental Affairs Committee staff reviewed *The Report of the Special Counsel: ULLICO Stock Purchase Offer and Repurchase Programs and Global Crossing Investment* (November 26, 2002) and its three volumes of appended documents prepared by former Illinois Governor James R. Thompson, Chairman of the Winston & Strawn law firm (hereinafter "Thompson Report"). Committee staff also reviewed a response to the report prepared by the law firm of Sidley Austin Brown & Wood and its appended documents.[1] Additionally, Committee staff obtained and reviewed more than 50 boxes of documents constituting all records ULLICO provided to other outside investigators and summaries of 48 witness interviews conducted by the Governor Thompon's investigators. The Committee staff also conducted its own independent interviews of a number of ULLICO directors and senior executives: Chief Legal Officer Joseph Carabillo, Chief Financial Officer John Grelle, Executive Vice President James Luce, Director Daniel Mintz, Director John Joyce, Director James La Sala, and Director James F. McNulty. Committee staff sought to depose four other ULLICO directors who asserted their right against self-incrimination rather than answer questions under oath. Committee staff interviewed Patrick J. Mertz and Robert Juliano. Committee staff also had a number of meetings with ULLICO's new management, including the new Chairman, Terence O'Sullivan.

On June 19, 2003, the Committee held a public hearing on the ULLICO matter.[2] Governor Thompson provided a detailed summary of his findings to the Committee and ULLICO's new Chairman, Terence O'Sullivan, outlined the reforms he was instituting to rectify the problems created by the scandal. The Committee also invited Robert Georgine and Joseph Carabillo[3] to respond to questions about their roles in the stock transactions. However, both men declined to appear. Georgine provided a letter stating that if subpoenaed to testify, he would invoke his Fifth Amendment right against self-incrimination rather than answer any questions.[4]

EXECUTIVE SUMMARY

ULLICO, Inc. is the parent company of Union Labor Life Insurance Company, a business that has been providing life insurance to union members since 1925. ULLICO

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[1] Sidley was retained by ULLICO's former management to essentially defend the company and its insiders against the Board-authorized independent investigation led by Governor Thompson.

[2] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 6 (June 19, 2003).

[3] Joseph Carabillo agreed to a voluntary staff interview. However, he imposed an artificial limit on the length of the interview, which prevented a completed examination on all the relevant issues. Therefore, he was invited to testify at the hearing, but he declined to appear.

[4] Letter from Randall J. Turk, Baker Botts LLP, to Senator Susan M. Collins, Chairman, Senate Governmental Affairs Committee, and Senator Joseph I. Lieberman, Ranking Member (June 17, 2003) (Exhibit 1).

is a Maryland holding company formed in 1987 for Union Labor Life Insurance Company and related subsidiaries providing financial services to unions, their members, and their pension funds. ULLICO is a private, closely held corporation owned primarily by unions and union pension funds.[5] Its Board of Directors is composed of current and former labor union leaders.[6] Between December 1990 and May 2003, ULLICO's Chairman, President, and Chief Executive Officer was Robert Georgine, the President Emeritus of the AFL-CIO's Building and Construction Trades Department.

In March and April 2002, it was publicly reported that a federal grand jury in Washington, D.C. was investigating certain ULLICO stock transactions. The grand jury investigation reportedly grew out of the criminal probe of Jacob West, former head of the Ironworkers Union and a ULLICO director. He was under investigation for allegedly embezzling funds from the Ironworkers Union.[7] The U.S. Attorney for the District of Columbia apparently discovered the ULLICO transactions while trying to determine the source of money in West's bank accounts.[8] The grand jury's investigation reportedly focused on whether certain ULLICO repurchases of its stock in 2000 and 2001 illegally conferred benefits on some directors at the expense of their unions, which were also shareholders.[9] There were reports that in addition to the federal grand jury, the Department of Labor, the Maryland Insurance Administration, and the Securities and Exchange Commission were also investigating ULLICO stock transactions.

After these press reports surfaced, ULLICO retained former Illinois Governor James R. Thompson, Chairman of the law firm Winston & Strawn, to investigate and advise the company on matters related to the company's issuance and repurchase of stock since 1997. Following an extensive investigation, Governor Thompson and a team of lawyers from Winston & Strawn produced a written report for ULLICO's Board of Directors. The Thompson Report was submitted to ULLICO's Board of Directors on November 26, 2002. It strongly recommended the return of profits from those officers and directors who purchased ULLICO stock in 1998 or 1999 and who sold that stock back to ULLICO in 2000 and 2001. Governor Thompson recommended that 18 directors and officers return approximately $5.6 million in pre-tax profits. The Thompson Report

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[5] ULLICO has fewer than 500 shareholders and is, therefore, exempt from certain SEC reporting requirements under 15 USCS § 78l(g). However, unlike most closely held corporations, ULLICO's shareholders are primarily pass-through shareholders—entities that represent large numbers of individuals such as union members and pension plan beneficiaries. Thus, many of the reasons that publicly traded companies are required to provide extensive disclosures apply to ULLICO as well. However, ULLICO is not technically subject to such requirements.

[6] Article IV, Section 2 of the ULLICO by-laws require that three-fourths of all directors must be members of trade unions affiliated with the AFL-CIO. By-Laws, ULLICO Inc., Article IV, § 2 (Exhibit 2).

[7] West ultimately pleaded guilty in October 2002 to charges of embezzlement and falsifying a financial report and was sentenced to three years in prison and a $125,000 fine. Allan Lengel, "Ex-Boss Of Ironworkers Union Sentenced," *The Washington Post*, October 9, 2003.

[8] Tom Hamburger and John Harwood, "Inside Deal: How Union Bosses Enriched Themselves On An Insurer's Board," *The Wall Street Journal*, April 5, 2002; Aaron Bernstein, "Global Crossing: Labor's Questionable Windfall, *Business Week Online*, March 18, 2002; Tom Hamburger and John Harwood, "Grand Jury Reviews Stock Transactions By Insurance Firm," *The Wall Street Journal*, March 15, 2002.

[9] Tom Hamburger and John Harwood, "Inside Deal: How Union Bosses Enriched Themselves On An Insurer's Board," *The Wall Street Journal*, April 5, 2002.

also suggested that the Board study how to deal with certain other stock transactions, raised questions about the propriety of the executive compensation provided to senior executives, and proposed comprehensive corporate governance reforms to protect the company and its shareholders from similar events occurring again in the future.

After Governor Thompson submitted his report, the ULLICO Board established a Special Committee of eight directors who did not participate in the stock transactions to review the Thompson Report and decide what to do. In March 2003, the Special Committee voted to adopt the Thompson Report's corporate governance reforms, but rejected Governor Thompson's remedial recommendations—that profits from the transactions be returned.[10] Three members of the Special Committee dissented from its decision, advocating that the profits be returned as advised by the Thompson Report.

On April 1, 2003, the Senate Committee on Governmental Affairs requested that ULLICO produce documents related to the stock transactions, including a copy of the Thompson Report.[11] By May 8, 2003, ULLICO's Chairman and CEO Robert Georgine was forced to resign and the shareholders elected a reform slate of directors led by a new Chairman, Terence O'Sullivan. O'Sullivan had been one of the three dissenting directors on ULLICO's Special Committee. On May 13, 2003, ULLICO's new Board of Directors reversed the decision of the Special Committee and voted to adopt Governor Thompson's recommendations. On June 16, 2003, ULLICO sent letters to the 16 officers and directors who participated in the suspect transactions, asking them to return their profits within 30 days. Five directors returned or agreed to return their profits.[12] Ten officers and directors failed to return their profits.[13] Jacob West, whose $837,760 in profits first drew the attention of the grand jury, did not respond at all to ULLICO's demand for repayment.[14] ULLICO's disputes with its former officers and directors have become the subject of extensive litigation, which will likely continue for some time unless the parties reach mutually agreeable settlements.

A. ULLICO's Investment in Global Crossing

The controversial stock transactions at issue in the Thompson Report are inexorably tied to ULLICO's investment in Global Crossing, one of the high-flying tech stocks of the late 1990s. In 1991, ULLICO hired Michael Steed as a financial advisor to devise a strategy to increase ULLICO's assets and investment returns. Steed knew labor

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[10] Report of the Special Committee to the Board of Directors at 7 (March 25, 2003) (Exhibit 3).

[11] Letter from Chairman Susan Collins, Committee on Governmental Affairs, to Robert Georgine, President, Chairman, and CEO, ULLICO, Inc. (April 1, 2003) (Exhibit 4).

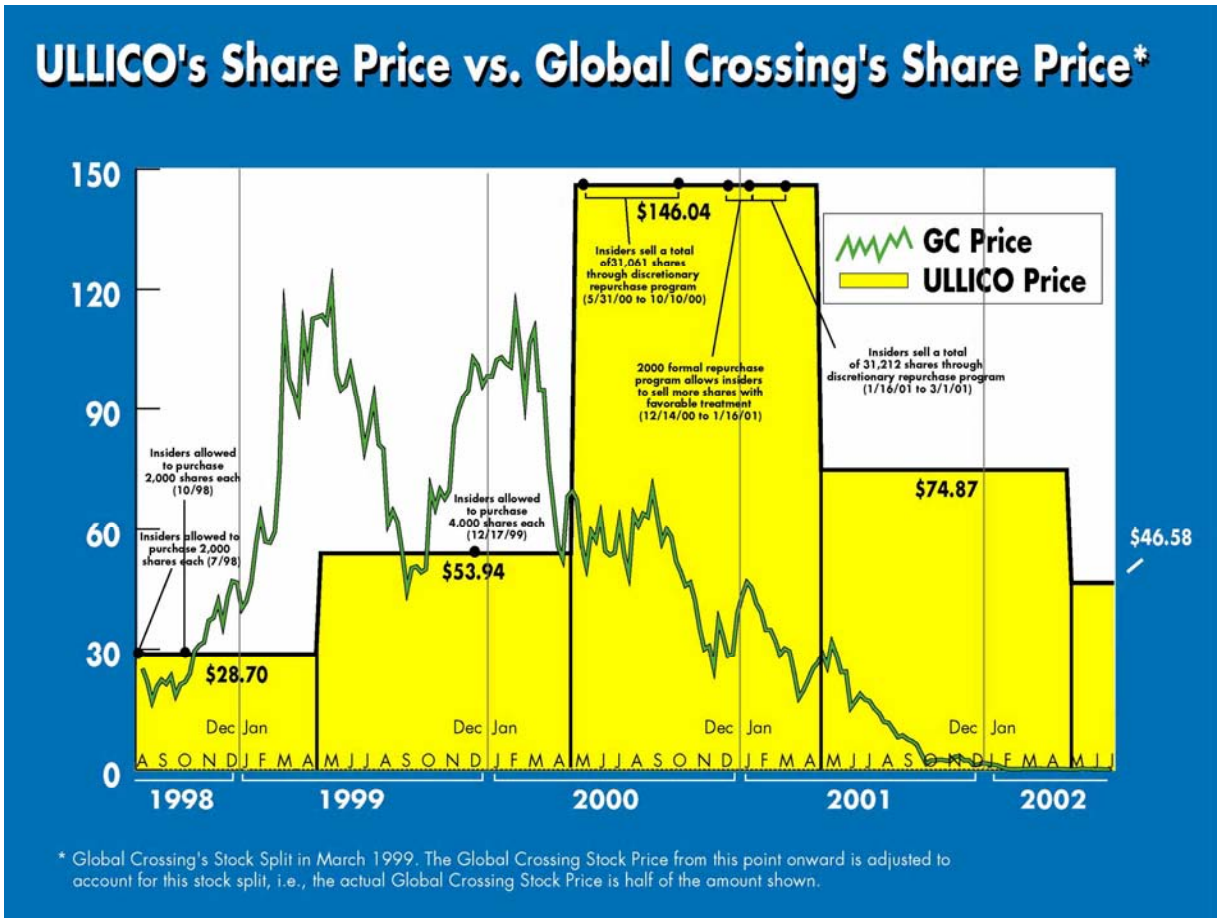
[12] The five directors who have repaid agreed to repay their profits are Morton Bahr, Kenneth J. Brown, Martin J. Maddaloni, Douglas J. McCarron, and James La Sala. Of these five, only McCarron repaid any of his profits before being asked. McCarron repaid some of his profits in October 2002, even before the Thompson Report was submitted to the Board.

[13] The ten directors and officers who have failed to repay their profits are John J. Barry, William G. Bernard, Marvin J. Boede, Joseph A. Carabillo, Billy J. Casstevens, John F. Gentleman, Robert A. Georgine, Joseph F. Maloney, James F.M. McNulty, and Roy O. Wyse.

[14] The remaining two directors named in Thompson's recommendation (John E. Cullerton and William H. Wynn) are since deceased.

leaders associated with ULLICO through his work as the Executive Director of the Democratic National Committee, and he had connections with Gary Winnick, who would become the founder of Global Crossing. In February 1997, ULLICO invested $7.6 million in Nautilus, LLC. Nautilus, LLC was later renamed Atlantic Crossing and then Global Crossing. In August 1998, Global Crossing went public. The stock quickly peaked at $61.375 per share in May 1999. By the Spring of 2002, however, it was trading for less than ten cents per share.

Chart 1



As a result of Global Crossing's rapid increase in value, ULLICO's $7.6 million investment suddenly became worth hundreds of millions of dollars. The rapid increase in Global Crossing's value had a significant, but temporary, impact on ULLICO's share value. In 1997, ULLICO had switched from a fixed price share valuation of $25 with substantial dividends to an annually-established share price based on book value with very low or no dividends. Under the new stock valuation regime, the book value per share of ULLICO stock was determined by taking the total stockholders equity ("TSE") from the annual financial statement, and dividing it by the total number of outstanding shares. By 1999, when Global Crossing reached it peak value, ULLICO's price became tied almost directly to Global Crossing's because the unrealized gain on the Global Crossing investment had grown to represent the dominant component of the TSE

calculation. By the end of 1999, the unrealized and after-tax realized gains on the Global Crossing investment represented about 85% of the TSE, or more than $1 billion. Chart 1 tracks the ULLICO and Global Crossing share prices.

As the chart illustrates, however, while ULLICO's share price was tied to Global Crossing's share price, the effect was delayed such that changes in Global Crossing's price would not result in a change to ULLICO's price until the following May. That is because ULLICO's stock was not publicly traded. Rather the market for ULLICO shares was primarily the company's own repurchase program, the price for which was set once per year, in May. ULLICO's May price was based on the previous year's audited financial statements, and therefore, it reflected the value of Global Crossing in the previous December rather than its current value. Generally, during the periods when the Global Crossing line on Chart 1 is outside the shaded area, ULLICO's price was undervalued, and when it is inside the shaded area, ULLICO's price was overvalued.

ULLICO was able to realize substantial gains from its Global Crossing investment before it collapsed.[15] In June 1999, ULLICO sold 9% of its Global Crossing stock for nearly $193 million. Over the next year or so, ULLICO liquidated additional Global Crossing shares on several occasions. At the end of October 2000, ULLICO still held 19 million shares of Global Crossing stock but did not sell any more until Spring of 2002, when it sold about 11.2 million shares for seven-and-a-half cents per share, generating about $850,000. ULLICO's total after tax gains from its sales of Global Crossing was approximately $305 million—again, on a $7.6 million investment. However, during the time ULLICO was realizing gains on its Global Crossing investment, it was "incurring substantial losses on its non-investment business operations."[16]

B. The Stock Offers to Officers and Directors

Twice in 1998 and once in 1999, ULLICO officers and directors were given an exclusive opportunity to purchase the company's stock. Chairman and CEO Robert Georgine made the stock available to insiders at the annually-set book value, a price that did not yet reflect the stock's true worth because it was based on the previous calendar years' audited financial statements. On the three occasions when officers and directors were allowed to purchase shares, ULLICO's true value had increased substantially due to the growth of its Global Crossing holdings since the previous December. Shareholders other than directors and senior officers were not given a similar opportunity to purchase shares at this artificially low price. While it was consistent with ULLICO's historical practice for officers and directors to be given the opportunity to purchase stock, these

[15] It should be noted that ULLICO's ability to sell its shares of Global Crossing was somewhat limited by a shareholders agreement and a registration rights agreement that restricted sales of stock by initial investors in Global Crossing. The agreements had certain exceptions, allowing, for example, the sale of Global Crossing stock in tender offers. Report of the Special Counsel: ULLICO Stock Purchase Offer and Repurchase Programs and Global Crossing Investment at 17 (November 26, 2002) (*hereinafter* "Thompson Report") (Appendix 1).
[16] *Id.* at 18.

offers were unusual in at least two ways. First, the offers allowed officers and directors to purchase far more shares than they had ever been able to purchase before, 4,000 shares in 1998 and 4,000 shares in 1999.[17] Second, Georgine timed the offers to minimize the downside risk for the purchasers, especially in 1999 when he waited until the final two weeks of the year to make the stock available.

When combined with the ability of officers and directors to sell ULLICO stock back to the company, these transactions afforded an opportunity for large returns with practically no risk. When officers and directors purchased stock in late December 1999, it was apparent that Global Crossing's growth over the previous year would mean a much higher share price for ULLICO in May 2000. Since the data used to set ULLICO's stock price would be based on numbers as of December 1999, a buyer of ULLICO stock at that time could be sure that ULLICO's true value was higher than the price he was paying. Moreover, he could be sure that any decline in Global Crossing stock between January and December 2000 would not be mirrored in ULLICO's official stock price until May 2001, allowing ample opportunity to sell shares back to ULLICO before the price fell. Therefore, the officers and directors only bore the risk that Global Crossing might decline in the few trading days between the date of their purchase and the end of the calendar year in 1999. In 1998, they were exposed to slightly more risk as the purchases occurred in August and October rather than in December. In interviews with Committee staff, senior ULLICO officers denied that they knew the purchases incurred virtually no risk, citing the fact that they had to buy the stock with their own personal funds rather than being granted the stock as an outright bonus from the company.

Contrary to their denials, there is persuasive evidence that those most involved in authorizing, timing, and conducting the sales understood clearly how little risk was involved for inside purchasers such as themselves. Three of them—Chief Executive Officer Robert Georgine, Chief Legal Officer Joseph Carabillo, and Chief Financial Officer John Grelle—with the assistance of company, each borrowed approximately $215,000 in order to finance their purchases of ULLICO stock in December 1999. Georgine borrowed an additional $2.2 million from ULLICO in order to purchase additional stock in an arrangement that provided loan forgiveness if Georgine remained with ULLICO for five years. Had it been possible for a precipitous decline in Global Crossing stock to affect their investment in ULLICO, it seems highly unlikely that these executives would have borrowed so much money in order to buy ULLICO stock. Indeed, in 2000 and 2001, Global Crossing's price did fall rapidly, but ULLICO repurchased much of its stock from officers and directors before that decline was reflected in ULLICO's own stock price.[18]

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[17] Interview with James Luce, former Executive Vice President, ULLICO, Inc., June 3, 2003 ("Luce Interview"), interview with James McNulty, former Director, ULLICO, Inc., July 31, 2003 ("McNulty Interview").
[18] *See* Chart 1.

C. The Repurchases from Officers and Directors

ULLICO had traditionally paid high dividends (10 percent or more) and had a fixed stock price of $25 per share. In 1997, ULLICO moved to a fluctuating stock price, set annually based on book value and lowered its dividends substantially. It also established a stock repurchase program whereby the company would offer to repurchase a certain dollar amount in ULLICO stock on a prorated basis from shareholders who tendered their shares. In the first year, ULLICO repurchased $30 million of its stock, and it was contemplated that it would purchase another $15 million annually over the next 10 years. Because of proration, ULLICO would repurchase a varying percentage of the shares tendered in any given year, depending on how many shareholders tendered their shares. In 1997, for example, when ULLICO's price was $27.06, it redeemed approximately one million of the more than three million shares tendered. Therefore, in that year each shareholder who tendered shares only had about 35 percent of his shares repurchased.[19]

In 1998 and 1999, ULLICO's share price increased dramatically due to the growth of its investment in Global Crossing. By May 2000, ULLICO set its share price at $146.04. However, in November 2000, when ULLICO offered to repurchase its shares at that price, Global Crossing's stock price had already declined sharply—by approximately 70% since January 2000. It was apparent that unless Global Crossing rallied dramatically in December 2000, ULLICO's 2001 price would be substantially lower than $146. Consequently, shareholders tendered nearly seven and a half million shares in 2000. Due to the increased price and the increased number of shares tendered, however, ULLICO only redeemed a little more than 150,000 of those shares, resulting in a severe 2.2 percent proration.[20] While most shareholders received an excellent, and arguably unrealistic, price for their shares, they were only able to sell about two percent of the shares they tendered. Similarly in 2001 as Global Crossing continued to decline and ULLICO's price was set at a still artificially high $74.87, shareholders were again severely prorated, having only 2.7 percent of their shares repurchased.

However, not all shareholders suffered this severe proration. Many officers and directors were able to redeem all of their ULLICO shares at the $146 and $75 share prices. Insiders received this preferential treatment in two different ways. First, many were able to sell their shares outside the formal repurchase program by making a request directly to Chairman Robert Georgine, thereby avoiding the formal program's severe proration. This was later referred to as the "discretionary repurchase program," although little about the practice was programmatic. Second, unlike the unions and pension plans that were ULLICO's primary shareholders, officers and directors generally held less than 10,000 shares. ULLICO's management designed the repurchase program with a proration threshold of 10,000 shares, so that those holding more than 10,000 shares were subject to proration, but those holding fewer than 10,000 shares (such as officers and directors) were not. Therefore, those insiders with less than 10,000 shares who participated in the formal repurchase programs of 2000 and 2001 were able to redeem

[19] Thompson Report, Exhibit 6 (Appendix 1).
[20] *Id*.

100 percent of their shares at favorable prices while unions and pension plans were able to redeem only about 2 percent of their shares at the same levels.

D. Deferred Compensation and Other Benefits for Executives

In addition to the transactions in ULLICO stock available to officers and directors, ULLICO executives were also provided large bonuses intended to reward them for the success of the Global Crossing investment. Moreover, these executives, including Chairman Robert Georgine, were able to defer their bonuses for tax purposes and use them to make "deemed investments" in ULLICO stock—which were merely ULLICO's promise to pay additional compensation as if the deferred compensation had been invested in ULLICO stock. Just as with the actual transactions in ULLICO stock, ULLICO executives were able to obtain the benefit of an artificially low ULLICO stock price before it accounted for the growth of Global Crossing. Likewise, they were able to lock in their gains when ULLICO's price was artificially high and before it reflected Global Crossing's subsequent fall.

In addition to the bonuses, deferred compensation, and deemed investments in ULLICO stock provided to ULLICO's five senior officers, Georgine also received a $2.2 million loan from ULLICO to allow him to purchase ULLICO stock in late December 1999 as well as a special provision as part of his employment contract allowing him to require ULLICO to repurchase all of his shares at the current book value.

The compensation and benefits provided to ULLICO executives appears to be excessive given the poor performance of ULLICO's core businesses. Moreover, there are questions about whether they were properly authorized by the company. The Thompson Report recommended that in addition to seeking repayment of profits from insiders who purchased stock in 1998 and 1999, ULLICO should study whether these other compensation and benefit schemes for management were properly authorized. Following the change in leadership at ULLICO, newly elected Chairman Terence O'Sullivan froze all payments out of those deferred compensation accounts. The amount of deferred compensation owed to former ULLICO executives is now in dispute as part of ongoing litigation between them and ULLICO.

A new issue raised in that litigation is an amendment to ULLICO's auxiliary retirement benefits plan. Although not discussed in the Thompson Report, the timing and effect of the amendment add to the evidence suggesting ULLICO's senior officers were intentionally taking advantage of the circumstances they had orchestrated to unduly enrich themselves. Specifically, ULLICO has alleged that in late October 1999, the Benefits Committee (consisting of senior officers) amended the definition of compensation used to calculate benefits under the auxiliary retirement plan to include "regularly established annual incentive compensation with no maximum, effective January 1, 2000."[21] The effect of the amendment was to greatly increase retirement

[21] James W. Luce v. Union Labor Life Auxiliary Retirement Benefits Plan, No. 03CV1014, Defendants' Answer and Counterclaim to the First Amended Complaint (E.D.VA.), p. 16 (Exhibit 5).

benefits for the company's five senior officers by including their Global Incentive bonuses in the benefits calculation. For example, ULLICO has alleged that the amendment would increase Executive Vice President James Luce's retirement benefits by more than $9,000 per month above what he would have received without the amendment.[22] Moreover, this amendment occurred around the same time (late 1999) that the same senior officers were borrowing money to purchase ULLICO stock made available only to insiders.

In light of the all these circumstances, it appears that many of ULLICO's senior officers were not merely the recipients of legitimate compensation. Rather, they were engaging in little more than a transfer of corporate assets to themselves. The sheer number and variety of ways that they sought to translate ULLICO's Global Crossing windfall into their own personal bonanza suggests knowing misconduct. The annual pricing system for ULLICO stock and the success of the Global Crossing investment combined to create a situation rife with the potential for mischief. Many of ULLICO's senior officers clearly knew how to exploit the situation for their own benefit and did so in almost every imaginable way.

E. The Investigation and Report by Governor James Thompson

In response to negative press reports, Chairman Georgine announced at an April 2002 Board meeting that he believed an outside independent counsel should investigate the facts and circumstances surrounding the press reports. The resolution adopted at that meeting retained former Illinois Governor Thompson, Chairman of the Winston & Strawn law firm. However, the evidence suggests that Georgine and ULLICO's senior management did not genuinely welcome a thorough, independent review. Instead, they took an adversarial approach to the Thompson investigation. Rather than appointing a select committee of disinterested directors to oversee the internal investigation, Georgine continued to supervise the investigation from his position as Chairman of the Board. Given that Georgine was at the heart of the circumstances being investigated, it was inappropriate for him to remain in a position to exert influence over the inquiry.

Through the efforts of Georgine and his allies, the Thompson investigation was limited in several ways. Despite being provided a broad mandate to by the Board to investigate the stock transactions and related matters he might deem appropriate, when Governor Thompson began inquiring into possible violations of the Employee Retirement Income Security Act ("ERISA"), he was asked to steer clear of those matters. Even after Thompson completed his investigation, the Board resisted authorizing a written report. However, Thompson insisted that a written report was essential and won approval to prepare one. Once it was complete, Georgine attempted to limit the dissemination of the report, preventing even fellow directors from retaining copies or taking notes while reading it. These limitations prompted the resignations of directors who believed they could not fulfill their duties to ULLICO shareholders under such limitations. Georgine and ULLICO's management had also hired separate counsel—at company expense and

[22] *Id.*

without Board approval—to defend their actions by preparing a "rebuttal" to the Thompson Report. The firm preparing the rebuttal charged ULLICO over $1.5 million to do so. This behavior appeared to be hostile to the notion of a complete, independent review of the circumstances. One director cited the "seemingly adversarial approach taken towards Governor Thompson's investigation" in his resignation letter.[23]

Following a series of director resignations, shareholder lawsuits, and increased public pressure, ULLICO finally released the Thompson Report in April 2003. The Thompson Report concluded that (1) there was a compelling argument that certain directors and officers had violated their fiduciary duties under Maryland corporate law; (2) it would be difficult to make a case that federal securities laws had been violated; and (3) there was "no evidence" of criminal violations. After an independent review of the evidence, it appears the Thompson Report was correct in its conclusions about Maryland law, but exceptionally cautious in its conclusions about federal securities law and criminal law. Because of its conclusion that fiduciary duties under Maryland law were violated, the Thompson Report recommended that 18 officers and directors return more than $5.5 million in profits.

F. ULLICO's Response to the Thompson Investigation

ULLICO failed to follow the sound advice that it hired Governor Thompson to provide. Rather, that advice was rejected and insiders used the company's resources to protect their profits. Their efforts were largely successful until the shareholders elected a reform-minded slate of directors who replaced the old management and adopted the Thompson Report's recommendations. If the previous management had simply adopted those recommendations, the company may have been spared months of scandal. Even though the Board had approved the hiring of Winston & Strawn to conduct an independent investigation, ULLICO's management turned to Sidley Austin Brown & Wood to defend the company and to prepare a rebuttal to the Thompson Report. Sidley was hired before the Thompson investigation was even complete, and unlike the decision to hire Winston & Strawn, Sidley's hiring was not approved by the Board. ULLICO management caused the company to pay nearly $1.5 million to Sidley to defend their actions, almost as much as the $2 million it paid to Winston & Strawn for the much more comprehensive, Board-authorized Thompson investigation.

ULLICO formed a Special Committee composed of eight directors who had not participated in the suspect stock transactions, to evaluate the Thompson Report and decide on implementing its recommendations. The Special Committee rejected the key recommendation of the Thompson Report, that key ULLICO insiders return the profits from their stock deals. Three of the eight members of the Special Committee dissented from its findings and called for the insiders to return their profits. One of the three dissenters, Terence O'Sullivan, later became ULLICO's new Chairman of the Board and moved quickly to adopt all of the Thompson Report's recommendations. In its initial

[23] Letter from Frank Hanley, International Union of Operating Engineers, to Robert Georgine, ULLICO (December 1, 2002) (Exhibit 6).

rejection of the Thompson Report's call for a return of the profits, however, the Special Committee relied heavily on the advice of Sidley. It cited Sidley's rebuttal report and materials prepared by consultants hired by Sidley. There is evidence that some Special Committee members had a hostile view of the Thompson investigation, and may not have taken the Thompson Report's findings as seriously as they should have.

Even after the shareholders elected a reform slate of directors and Georgine had left the company, the new Board did not unanimously adopt a resolution calling for insiders to return their profits. Eight directors, primarily those who had served on the old Board and who had participated in the stock transactions, voted against requiring insiders such as themselves to return any profits. For those who had profited from the stock transactions, their participation in the vote represented an obvious conflict of interest. Yet, only one of them abstained, James La Sala. Moreover, Georgine had attempted to financially benefit six of the remaining directors in his resignation letter by relinquishing claim to a severance payment he believed the company owed him. Georgine asked that, in return, ULLICO consider their profits to be repaid. By doing so, Georgine may have been attempting to influence how these directors might vote on the disposition of other funds in dispute between ULLICO and Georgine. All of the six directors named in Georgine's resignation letter subsequently resigned or were removed from the Board for refusing to return profits from the suspect stock transactions.

* * *

I. ULLICO'S CORPORATE CULTURE UNDER THE MANAGEMENT OF ROBERT GEORGINE

Following the singular success of ULLICO's investment in Global Crossing, some at ULLICO seem to have operated as if that one event had transformed the company into a major financial services firm that could afford massive bonuses and perks, untested new lines of business, and risky investments. Chairman and CEO Robert Georgine apparently subscribed to this view and encouraged it. In addition to the bonuses and stock deals, ULLICO began constructing what Governor Thompson called a new "luxury" headquarters building.[24] It also started leasing an expensive corporate jet. Georgine not only obtained a loan from ULLICO for himself, but he also provided large unsecured loans from the company to a relative. The Board of Directors took no steps to reign in Georgine. In some cases, this was because management kept the Board in the dark. In others it was because the Board either failed to recognize what was happening or was unwilling to stop it. The Global Crossing investment changed ULLICO, but ultimately not for the better. In reality, ULLICO was merely the recipient of a temporary windfall profit from a single investment. Once that investment went south, ULLICO could no longer afford its new big-company lifestyle. The improper stock transactions became public, and ULLICO management spent increasing amounts of time and money dealing with the scandal—all of which further hampered its core businesses.

A. Excessive Reliance on the Windfall Profits from Global Crossing

The stated reason for the extraordinary bonuses, benefits, and stock deals provided to ULLICO insiders was the success of the Global Crossing investment. Although that investment was enormously successful, the success was short-lived. Ultimately, it merely served to hide poor performance in ULLICO's business operations. Before ULLICO's investment in Global Crossing, its compensation consultant had been Frank Manley of Simbson & Company.[25] Manley was responsible for setting officer compensation until April 1998.[26] Later, in mid-1998, ULLICO developed and implemented the Global Incentive and deferred compensation programs with the assistance of another company, Mercer and Associates.[27] When asked about the bonus and incentive programs implemented after his tenure, Manley said that the programs were very unusual for any company and reflected a dramatic change from ULLICO's own prior practice.[28] Manley explained that companies almost always design compensation programs based on overall performance rather than the performance of a single

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[24] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 6 (June 19, 2003).
[25] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding May 30, 2002, Interview with Frank Manley, Simbson & Company (June 12, 2002) (Exhibit 7).
[26] *Id.*
[27] *Id.*
[28] *Id.*

investment.[29] By contrast, the Global Incentive Program set aside a percentage of the gain from ULLICO's investment in Global Crossing to be distributed to a small number of executives. Therefore, the Global Incentive bonus program rewarded executives despite the fact that ULLICO companies were losing money. Manley recalled that in his last meeting with ULLICO executives in 1998, Georgine had admitted that the Global Crossing investment was masking operating losses, saying that without Global Crossing, ULLICO would be in trouble.[30]

Georgine's observation was accurate in 1998 and became dramatically more so in the following years. Every year from 1998 through 2001, ULLICO's net income was negative when excluding gains on investments such as Global Crossing.[31] The company lost approximately $2.5 million in 1998. In 1999, the losses increased to nearly $91 million and the red ink continued for the next two years. The company lost $77 million and $42 million in 2000 and 2001 respectively.[32] Without the gains from Global Crossing, ULLICO would have indeed been in serious trouble, as Georgine had said. Fortunately for Georgine and other ULLICO stockholders, when factoring investment gains, primarily from Global Crossing, ULLICO's total net income grew from $8 million in 1998, peaked at $112 million in 2000, and then declined to $12 million in 2001.[33]

The gains from Global Crossing were not merely masking ULLICO's paper losses. Cash from the parent company was actually transferred to its subsidiary insurance companies to shore up their financial soundness ratings. CFO John Grelle indicated to investigators that if a subsidiary ULLICO insurance company had a bad year and was threatened with a lower rating, then ULLICO would transfer money into that subsidiary.[34] Auditors with A.M. Best ("AMB") indicated that they were aware that the parent company had been able to offset losses in previous years with capital contributions to its subsidiaries.[35] However, with the demise of Global Crossing, ULLICO was no longer able to replenish their capital. AMB auditors were apparently aware that ULLICO could not bail out its subsidiaries anymore. AMB indicated that when evaluating the financial strength the ULLICO subsidiaries, they considered conditions throughout the entire organization, including the parent company and related entities.[36] The decline of the value of Global Crossing ended ULLICO's ability to offset operating losses, and therefore, contributed to AMB lowering its financial soundness ratings in 2003 for subsidiaries operating ULLICO's property, casualty, life and health insurance businesses.[37]

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[29] *Id.*
[30] *Id.*
[31] Thompson Report, Exhibit 4 (Appendix 1).
[32] *Id.*
[33] *Id.*
[34] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding May 13, 2002, Interview with John Grelle, ULLICO (May 16, 2002) (Exhibit 8).
[35] Interview with Joe Zazzera, Carl Austin, and Rochelle Streigal, A.M. Best (June 18, 2003).
[36] *Id.*
[37] *Id.*

Another reason AMB lowered its financial soundness ratings of ULLICO companies was the concentrated investment risk in ULLICO's new, luxury headquarters building. At the same time that Global Crossing stock was plummeting and insiders were selling their ULLICO shares before it likewise plummeted, ULLICO began constructing a new headquarters building. The project began in October 2000 and continued through June 2003.[38] The building was entirely self-financed with ULLICO funds and, at its completion, represented nearly five percent of ULLICO's total assets. ULLICO eventually responded to A.M. Best's concerns about the building and negotiated a contract for its sale at $160 million, but not before AMB had already downgraded several of its subsidiary companies.[39] In a March 2003 press release AMB said of ULLICO subsidiary Union Labor Life:

> Despite the recent sale of its home office building, a capital contribution by its parent and ongoing actions to restructure its investment portfolio, Union Labor's capitalization is not consistent with a secure rating. The erosion in Union Labor's surplus was due primarily to the recapture of a block of direct marketed business, as well as substantial operating deficits in each of the past two years in several of its continuing and discontinued business lines. While actions taken in 2002 have improved its level of capitalization, underlying insurance and investment risks remain high. The investment in its new home office property and certain investments tied to limited partnerships reduced its overall liquidity.[40]

The true performance of ULLICO's businesses under Georgine's management became clear once the distorting effect of the Global Crossing investment had been removed. It was a record that did not merit the extraordinary compensation, bonuses, benefits, and stock profits that senior management had arranged for themselves to receive.

B. The Lack of Board Oversight

ULLICO's Board of Directors failed to vigorously oversee the way management ran the company. The Board was large, met infrequently, and consisted of labor leaders who did not necessarily have significant business experience. Likewise, the Board had a tendency to delegate important matters to small committees that were influenced heavily by management. For example, the company's former compensation consultant, Frank Manley, said that, during his tenure, the Compensation Committee did little more than rubber-stamp his reports.[41] It was also the Compensation Committee that adopted the Global Incentive bonus plan, the deferred compensation program, and purportedly

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[38] Letter from Teresa E. Valentine, Vice President and Associate General Counsel, ULLICO, Inc., to Susan M. Collins, Chairman, Committee on Governmental Affairs, United States Senate (September 23, 2003) (Exhibit 9).
[39] *Id*.
[40] A.M. Best, "A.M. Best Downgrades Ratings of ULLICO Inc.'s Insurance Operations," Press Release (March 3, 2003).
[41] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding May 30, 2002, Interview with Frank Manley, Simbson & Company (June 12, 2002) (Exhibit 7).

authorized the stock offers to insiders in 1998 and 1999, even though it lacked the authority to do so. In 1998, the Compensation Committee consisted of Directors John Barry, Jacob West, and William Wynn. In 1999, John Cullerton was added to the Committee. Two of these four directors (Cullerton and Wynn) are since deceased and the other two are among those directors refusing to return their profits as requested by ULLICO's new management.

Of the dozens of directors not on the Compensation Committee, it appears that few if any were aware of the full extent of the level of compensation and benefits granted to Georgine and other senior executives. Director James La Sala told Committee staff that he was surprised when he learned from the Thompson Report the level of executive compensation paid by ULLICO.[42] He noted particularly that he did not realize that executives were allowed to make "deemed investments" in ULLICO stock inside the deferred compensation plan and was, therefore, unaware of the large sums of deemed profits claimed by the senior executives inside that plan.[43] Until reading the Thompson Report, La Sala was also unaware of the $2.2 million loan and 40,000-share stock purchase by Georgine, and he was unaware of Georgine's supplemental retirement trust.[44] Similarly, Director James McNulty told Committee staff that he was shocked to learn from the Thompson Report about the level of executive compensation at ULLICO, noting particularly the profits from deemed investments claimed under the deferred compensation program.[45]

Likewise, some directors indicated that they were not informed of important details at the time they approved the 2000 repurchase program. Terence O'Sullivan, who later replaced Robert Georgine as Chairman, testified that the first ULLICO Board meeting he attended after his election was the November 2000 meeting at which the 2000 repurchase program was approved:

> Directors had no prior notice of the modifications to the stock repurchase program that were going to be proposed at that meeting. There was no disclosure at that meeting of the 1998 and 1999 stock offerings to directors and officers. There was no disclosure of the significant changes in the rules of the repurchase program from those approved in May 2000, including the increase from 100 shares to 10,000 shares of those stock tenders that would be excused from proration. There was no disclosure of the way the decline in the price of Global Crossing stock affected the price of the ULLICO stock that was being repurchased. Finally, there was no disclosure of the way the 10,000 share proration rule would benefit insiders.
>
> I voted with the majority at that meeting, a decision I now regret. I can only say that because of the lack of disclosure of the salient facts, my vote

[42] Interview with James La Sala, former Director, ULLICO, Inc. (July 30, 2003).
[43] *Id*.
[44] *Id*.
[45] Interview with James McNulty, former Director, ULLICO, Inc. (July 31, 2003).

was uninformed. My conduct after that meeting shows that I would have voted differently had I been fully advised.[46]

Few directors were aware of the extent to which Georgine used company funds to repurchase ULLICO shares from officers and directors at the artificially inflated, historically high price of $146 in 2000. Director Roy Wyse was surprised to learn how much money ($13.7 million) had gone to repurchase shares from insiders at that price and said he would have objected had he understood it at the time.[47] Several directors (John Wilhelm, Frank Hanley, and Linda Chavez-Thompson among others) expressed surprise or shock when they learned that so much money had been used to repurchase shares from insiders.[48]

While the Board's failure to prevent abuses by management was due in large part to the failure by management to disclose information, the Board enabled the abuses by being too passive, trusting, and uninterested. Even though the Board only met about twice a year, attendance was poor, dropping near or below fifty percent in 2000 and 2001.[49] Generally speaking, a more active, more inquisitive board would have been likely to ask the right questions early enough to prevent this scandal from going as far and doing as much damage to the company as it did. However, some directors were active participants in the abuses committed by Georgine and senior management. Many of the directors benefited personally by participating in the stock transactions. Some, such as those on the Compensation Committee, approved bonuses and benefits being provided to senior management, which suggests complicity rather than mere passivity. Nevertheless, the corporate governance reforms suggested in the Thompson Report, such as rotating committee memberships, would help ensure that more directors are involved and prepared to combat potential abuses by management.[50] Two examples of the type of activities that might have been prevented by a more active board are ULLICO's employment of and business dealings with Georgine's relatives and Georgine's use of the corporate jet.

1. ULLICO's Employment and Business Dealings with Robert Georgine's Relatives

During his chairmanship of ULLICO, Georgine used the company to provide employment to at least four of his relatives: his daughter, two sons-in-law, and a

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[46] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 30 (June 19, 2003).
[47] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 18, 2002, Interview with Roy O. Wyse, Director, ULLICO, Inc. (July 26, 2002) (Exhibit 10).
[48] *See, e.g.*, Memorandum from John Kramer, Winston & Strawn, to ULLICO File regarding August 16, 2002, Interview with John W. Wilhelm, Director, ULLICO, Inc. (September 3, 2002) (Exhibit 11); memorandum from Christopher McClellan, Winston & Strawn, to ULLICO File regarding August 21, 2002, Interview with Frank Hanley, Director, ULLICO, Inc. (August 27, 2002) (Exhibit 12); memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 11, 2002, Interview with Linda Chavez-Thompson, Director, Executive Vice President, AFL-CIO (July 17, 2002) (Exhibit 13).
[49] Thompson Report, Exhibit 7 (Appendix 1).
[50] *See generally* Section IV.C.6, "Recommendations of the Thompson Report."

nephew.[51] His daughter Rosemarie Hechinger and her husband Brian Hechinger both began working for ULLICO in the early 1990s.[52] Mrs. Hechinger, who is no longer employed by ULLICO, was a Branch/Account Manager until December 2001 when she became a Claims Technical Review Specialists.[53] By December 2001 ULLICO was paying her a salary of $65,429 per year; this salary was changed to $36 per hour when she began working part time as a Claims Technical Review Specialist.[54] Mr. Hechinger was a ULLICO attorney until February 2001 when he became Vice President for Investment Operations.[55] By the time Mr. Hechinger left ULLICO, the company was paying him a salary of $160,000 per year.[56] Another son-in-law, Michael A. Baugher, who is also no longer employed by ULLICO, was the Building Manager for ULLICO headquarters after June 2000, and had been retained in that position by new management following Georgine's ouster.[57] He was paid a salary of $104,300 per year.[58] In total, by late 2000, ULLICO was paying Georgine's daughter and two sons-in-law a combined salary of more than $300,000 per year.[59]

Georgine's nephew, Patrick J. Mertz, was a Regional Marketing Director for ULLICO from April 2000 to June 2003.[60] Mertz was paid based on the sales leads he generated and received operating subsidies from ULLICO of $2,000 to $4,000 per month. More importantly, ULLICO made three unsecured loans to Mertz' company, Planners & Insurers ("P&I") totaling $380,000.[61] The first two notes, for $250,000[62] and $90,000,[63] were due in full on April 30, 2003. The third, for $40,000,[64] was due in full on November 30, 2003. Mertz never repaid any portion of the loans, and has no plans to do so. The total amount due with interest is more than $430,000.[65]

According to ULLICO's new management, company files do not contain the sort of loan documentation that one would expect to see in a bona fide, arms-length transaction.[66] There is also no indication in ULLICO's records that the Board was ever asked to approve the transactions,[67] which one might have expected, given the familial relationship between Georgine and Mertz. The only documentation provided to ULLICO appears to have been optimistic projections of the income Mertz expected to generate by

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[51] Relatives of Robert Georgine Employed by ULLICO, Inc. or its subsidiaries during his Chairmanship (December 5, 1990 – May 8, 2003) (Table prepared by ULLICO) (Exhibit 14).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Promissory Note (May 31, 2000) (Exhibit 15).
[63] Promissory Note (February 28, 2001) (Exhibit 16).
[64] Promissory Note (October 31, 2001) (Exhibit 17).
[65] Letter from Casey Rucker, Attorney, ULLICO, Inc., to Patrick J. Mertz (July 31, 2003) (Exhibit 18).
[66] Interview with Damon Silvers, Ted Green, Don Kaniewski (October 29, 2003).
[67] *Id.*

selling ULLICO life and casualty insurance[68] and a brief outline of a business plan.[69] Mertz said he thought it was odd that ULLICO had not asked for any collateral or a personal guarantee on the loan, but did not complain because he "didn't have anything to lose."[70] He said he only discussed the details of the loan agreement with ULLICO's CFO, John Grelle.[71] Documents show that Mertz also contacted his uncle directly. He wrote to Robert Georgine on April 24, 2000:

> Dear Uncle Bob,
>
> I wanted to send you a short note, and see if you have had the time to look into getting me a working capital loan? I know that you're extremely busy, so I apologize for bugging you, but there are things that I have had to put on hold, because I can't do them without financing.
>
> Thanks for your help Uncle Bob.[72]

Mertz wrote to his uncle at least twice more: once in June 2000 to thank him for arranging the loan[73] and once in November 2000 to try to obtain the exclusive right to sell ULLICO insurance products in four states.[74] Although these documents suggest that Mertz was actively seeking money and business with ULLICO through his uncle, his communications with other ULLICO personnel show that Mertz was defensive about suggestions that he was getting special treatment. For example, in one email to ULLICO insurance executives, Mertz complained that they thought he had received ULLICO business solely because of his relationship to Georgine.[75]

When ULLICO's new management learned of the unpaid loans, it demanded payment.[76] In response, ULLICO received a letter from a lawyer representing Mertz,

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[68] Letter from Patrick J. Mertz to John K Grelle, CFO, ULLICO, Inc. (April 25, 2000) (Exhibit 19).
[69] Letter from Patrick J. Mertz to John K Grelle, CFO, ULLICO, Inc. (May 18, 2000) (Exhibit 20).
[70] Interview with Patrick J. Mertz (November 21, 2003).
[71] *Id*.
[72] Facsimile from Patrick J. Mertz to Robert Georgine, Chairman and CEO, ULLICO, Inc. (April 24, 2000) (Exhibit 21).
[73] Letter from Patrick J. Mertz to Robert A. Georgine, Chairman and CEO, ULLICO, Inc. (June 12, 2000) (Exhibit 22).
[74] Letter from Patrick J. Mertz to Robert A. Georgine, Chairman and CEO, ULLICO, Inc. (November 2, 2000) (Exhibit 23).
[75] Mertz wrote:

> I know that you . . . think that I don't do anything, and that I am riding on my Uncle's coattails, but that is far from the truth. I have a very successful agency and I don't even need the ULLICO or Ullico Casualty business. I have done this as a favor to my Uncle, because he felt that a lot of the people who represented Ullico Casualty stunk. He knew I had a successful agency and so he asked me to help him. I don't even think Richard knows that. I think Richard thinks that I begged him for this job, and that is [expletive deleted].

E-mail from Patrick J. Mertz to Drew McDonough, ULLICO, Inc. (August 29, 2002) (Exhibit 24).
[76] Letter from Casey Rucker, Attorney, ULLICO, Inc., to Patrick J. Mertz (July 31, 2003) (Exhibit 18).

who refused to repay the loan, claiming that P&I was no longer operating and was "dissolved by the state of Nebraska."[77] However, according to the Nebraska Secretary of State's records, the company is, in fact, still in business.[78] Mertz told Committee staff that, nevertheless, P&I has no assets, is unable to repay the loan, and is no longer a functioning corporate entity.[79] He said he had considered filing bankruptcy in early 2003, but did not because he had been following the events surrounding the Thompson Report and wanted to wait and see what happened at ULLICO.[80]

Documents provided by ULLICO indicate that the money from the three loans was wired, at Mertz' instruction, into two different accounts at Commercial Federal Bank. The first loan[81] went into one account and the second[82] and third[83] loans went into a separate account. The name on the first account is listed as "Patrick Mertz" rather than P&I. Mertz provided multiple and conflicting explanations for why these accounts were used rather than a P&I business account. At one point he characterized the first Commercial Federal account as a personal checking account.[84] He explained that he had started P&I for the sole purpose of doing business with ULLICO and receiving the loan.[85] He said that he had not yet obtained a checking account for the business at the time he received the loan and that he, therefore, had the money wired to his personal account and later wrote a check to transfer the money from his personal account to a P&I business account at Mid City Bank.[86]

When asked about the later wire transfers into the other account at Commercial Federal Bank, Mertz admitted that it was also not a P&I business account.[87] He said it was used for his "other businesses" and called it a "transactional account."[88] Mertz said he did not have the money sent to P&I's business account at Mid City Bank because Mid City Bank could not accept out-of-state wire transfers.[89] However, according to Mid City Bank, it has always accepted out-of-state wire transfers.[90]

Mertz agreed on November 21, 2003, to provide records to verify that he had transferred the ULLICO loan proceeds to P&I's business account at Mid City Bank. The

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[77] Letter from George B. Achola, Attorney for Patrick J. Mertz, to Casey Rucker, Attorney, ULLICO, Inc., (August 15, 2003) (Exhibit 25).
[78] Letter from Casey Rucker, Attorney, ULLICO, Inc., to George B. Achola, Attorney for Patrick J. Mertz (October 30, 2003) (Exhibit 26).
[79] Interview with Patrick J. Mertz (November 21, 2003).
[80] Interview with Patrick J. Mertz (November 21, 2003).
[81] Letter from Patrick J. Mertz to John K. Grelle, CFO, ULLICO Inc. (June 1, 2000) (Exhibit 27).
[82] Facsimile from Patrick J. Mertz to John K. Grelle, CFO, ULLICO Inc. (February 28, 2001) (Exhibit 28).
[83] Facsimile from Patrick J. Mertz to John K. Grelle, CFO, ULLICO Inc. (October 24, 2001) (Exhibit 29).
[84] Interview with Patrick J. Mertz (November 21, 2003). His claim is inconsistent with a fax in which he identified that same account as a corporate account for P&I. Fax from Patrick J. Mertz to John K Grelle, CFO, ULLICO, Inc. (May 25, 2000) (Exhibit 30).
[85] Interview with Patrick J. Mertz (November 21, 2003).
[86] *Id*.
[87] Interview with Patrick J. Mertz (December 1, 2003).
[88] *Id*.
[89] *Id*.
[90] Interview with Ken Grigsby, Executive Vice President, Mid-City Bank (January 7, 2004).

Committee received records from Mertz on December 17, 2003, including bank statements, a list of check numbers prepared by Mertz, and a brokerage statement from Ameritrade in the name of P&I. On January 13, 2004, the Committee received copies of the checks identified earlier by Mertz. The checks and transfers identified by Mertz from the Commercial Federal bank account did not total the amount of money he received from ULLICO. Of the $380,000 Mertz received, he accounted for less than $320,000. When questioned about the records, Mertz indicated, contrary to his previous statements, that both Commercial Federal accounts and the Mid-City account were all P&I business accounts and that he paid P&I business expenses out of both of them as well as out of the Mid-City account.[91]

In his January 13, 2004, document production, Mertz also included what he called "a random income & expense statement, and a list of recurring expenses."[92] However, it appears to be a document from the Mertz Insurance Group rather than from P&I. Mertz described this other company, the Mertz Insurance Group, as a currently operating entity unlike P&I. Why he provided the document is unclear, as it was not requested. However, from the P&I documents he did provide, it is difficult to determine whether the expenses paid with the loan money from ULLICO were Mertz Insurance Group expenses or P&I expenses. Hence, to what extent Mertz maintained the operation of the two companies as separate entities has not been established conclusively.

The brokerage statements from Ameritrade that Mertz provided were also unsolicited, but Mertz explained that the money used to fund the account came from the ULLICO wire transfers.[93] Mertz said that he opened the account at the suggestions of some of his employees in an attempt to improve his return on the money borrowed from ULLICO beyond what he would earn in a savings account.[94] The account statements were sent to the attention of Allen Frisbee, who Mertz identified as the person authorized to make trades in the account.[95] Mertz claimed he did not make trades in the account and did not monitor the account activity.[96] According to the statements, the account was opened with a $40,000 deposit on November 8, 2000.[97] The money was used to make short term trades in various communications companies' stocks, with some securities being sold and repurchased within the same trading day. For example, the records indicate a sale of 250 shares of a company called Exodus Communications on December 20, 2000 at $28.50 per share.[98] Then, on the same date, the records indicate a purchase of 200 shares of the same stock at $34.25 per share.[99] By February 2, 2001, the value of stock in the account had decreased significantly, and a withdrawal of $28,300 on that date

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[91] Interview with Patrick J. Mertz (January 12, 2004).
[92] Letter from Patrick J. Mertz, to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate (January 12, 2004) (Exhibit 31).
[93] Interview with Patrick J. Mertz (January 12, 2004).
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] Letter from Patrick J. Mertz, to David Kass, Chief Investigative Counsel, Committee on Governmental Affairs, U.S. Senate (December 17, 2003) (documents attached) (Exhibit 32).
[98] *Id*.
[99] *Id*.

left less than $2,500 worth of securities in the account.[100] Records indicate the account remained open until December 2002. By then, the total value had decreased to below $500.[101]

Mertz said that he was not particularly upset that he was unable to repay the $380,000 to ULLICO, and he insinuated that ULLICO's CFO John Grelle had actually taken advantage of him rather than the reverse.[102] Nevertheless, Mertz claimed that he had sold enough ULLICO policies to ensure that the company would earn more in premiums than the amount of his loan.[103] ULLICO's new management is currently seeking to recover the $380,000 in its litigation with Robert Georgine.[104]

2. The ULLICO Corporate Jet

As ULLICO's businesses were struggling, as the unrealized gains from Global Crossing stock were disappearing, and as certain of ULLICO's senior executives were enriching themselves with special opportunities to dump their ULLICO stock at inflated prices—the company decided to lease an expensive corporate jet. CFO John Grelle said he had repeatedly and unsuccessfully tried to convince Georgine to terminate the lease, which cost about $3.7 million per year.[105] Terminating the corporate jet lease was one of the first reforms instituted by Chairman O'Sullivan. But, during Georgine's tenure, beginning in 2000, the jet was used to shuttle ULLICO executives and their guests around the country. Records of who used the jet do not reflect the name of every passenger on every flight. However, the "primary passenger" is generally listed.[106]

By far, the most frequent flyer listed in the flight logs is Georgine. Records reflect that he used the jet 248 times between April 2000 and September 2002—averaging about two flights per week.[107] The records list Georgine as the primary passenger for flights on the corporate jet to and from destinations like Italy, Switzerland, and Fiji. In January 2004, ULLICO wrote to Georgine's counsel, asking him to provide documentation that 107 of Georgine's flights were for a ULLICO business purpose.[108] The letter stated:

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[100] *Id.*
[101] *Id.*
[102] Interview with Patrick J. Mertz (January 12, 2004); Letter from Patrick J. Mertz, to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate (January 12, 2004) (Exhibit 31) ("That was when we found out that Grelle and Machanich had started a personal lines program with Farmers Insurance, and stabbed us in the back.").
[103] Interview with Patrick J. Mertz (January 12, 2004).
[104] Carabillo v. ULLICO, Inc., No. 1:03CV01556(RLJ), Defendants' Amended Answer and Counterclaim (D.DC.). Count XIII, p. 47, 50 (Exhibit 33).
[105] Interview with John K. Grelle, former CFO, ULLICO, Inc. (June 12, 2003).
[106] Letter from Teresa E. Valentine, Vice President and Associate General Counsel, ULLICO, Inc., to Susan M. Collins, Chairman, Committee on Governmental Affairs, United States Senate (September 23, 2003) (Exhibit 9).
[107] *See Id.*
[108] Letter from Mark E. Singleton, Chief Financial Officer, ULLICO, Inc., to Randall Turk, Counsel to Robert Georgine (January 21, 2004) (Exhibit 34).

> If Mr. Georgine is unable to establish that the purpose of his travel, or any portion thereof, was for Company business activities, ULLICO may be required to treat the value of such travel as income to Mr. Georgine for the pertinent tax years. Alternatively, the Company may seek reimbursement from Mr. Georgine of the expenses associated with any use of the Aircraft by him for personal purposes.[109]

Georgine's counsel replied to this request by asserting "that virtually all of the 107 flight logs you have forwarded were business related and that ULLICO, not Mr. Georgine, possesses the corporate records necessary to substantiate that business purpose."[110]

The two most frequent passengers other than Georgine were CFO John Grelle (65 flights) and Director John T. Joyce (40 flights).[111] ULLICO also sought reimbursement from Joyce of about $130,000 for his use of the plane on 15 occasions.[112] In his reply, Joyce cited a memo from Robert Georgine stating that Joyce should not be charged because commercial transportation would have added three days to his trips from Bar Harbor, Maine.[113] The memo was dated May 5, 2003, just three days before Georgine's resignation.

II. THE STOCK OFFERS: HOW OFFICERS AND DIRECTORS ACQUIRED ULLICO STOCK

A. The 1998 Employee Bonus Programs

Global Crossing completed its initial public offering in August 1998. ULLICO's initial $7.6 million investment in Global Crossing translated to approximately $423.9 million at the time of the IPO. By December 1998, Global Crossing was consistently trading above $14 per share and nearing $25 per share, creating huge unrealized gains for ULLICO. This success resulted in the creation of two programs designed to reward ULLICO's senior executives: the Global Incentive Program, and the "Top Hat" Nonqualified Deferred Compensation Plan. These two programs were never disclosed to ULLICO shareholders.[114]

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[109] *Id.*

[110] Letter from Randall Turk, Counsel to Robert Georgine, to Mark E. Singleton, Chief Financial Officer, ULLICO, Inc. (February 2, 2004) (Exhibit 35). Turk's letter also claimed that "the flight logs do not indicate who the passengers were on any given flight, but rather whose office at ULLICO requested that the plane be reserved for use." *Id.* This claim is contrary the logs themselves, which list Georgine not as "requester" or any similar designation, but rather as "PAX," a common abbreviation for passenger. Randall Turk's claim is also contrary to the explanation of the logs provided by ULLICO. *See* Letter from Teresa E. Valentine, Vice President and Associate General Counsel, ULLICO, Inc., to Susan M. Collins, Chairman, Committee on Governmental Affairs, United States Senate (September 23, 2003) (Exhibit 9).

[111] *Id.*

[112] Letter from Leanord N. Astflack, ULLICO Transport Company, to John T. Joyce, former ULLICO Director (September 1, 2003) (Exhibit 36).

[113] Memorandum from Robert Georgine, to Patrick Montgomery (May 5, 2003) (Exhibit 37).

[114] *See* Offer to Purchase for Cash By ULLICO, Inc. for up to 522,648 Shares of its Common Stock at $28.70 Net Per Share, November 9, 1998 at 24 (Exhibit 38).

1. The Global Incentive Program

The ULLICO Compensation Committee approved the Global Incentive Program in July 1998 to reward senior ULLICO executives for the success of the Global Crossing investment.[115] Under the Global Incentive Program, ULLICO paid a total of nearly $5.7 million in bonuses to ULLICO's five senior executives from 1998 through 2001.[116] The specific amounts of the bonuses were tied to the amount of ULLICO's profits from its Global Crossing investment. One half of the bonus was paid in cash at the time of the Global Crossing IPO.[117] The remainder of the bonus was calculated based on Global Crossing's market price. As Global Crossing's stock price increased or decreased, so did the bonus amounts over the next three years.

The following executives received the following amounts in Global Incentive Bonuses from 1998 and 2001:[118]

Year	Georgine	Steed	Grelle	Luce	Carabillo
1998	$727,273	$727,273	$272,727	$272,727	$272,727
1999	666,025	666,025	249,779	249,779	249,779
2000	516,862	N/A	193,830	193,830	193,830
2001	104,166	N/A	39,064	39,064	39,064
Total:	**$2,014,326**	**$1,393,298**	**$755,400**	**$755,400**	**$755,400**

These amounts were over and above the regular annual incentive bonuses paid to these executives. The compensation experts hired to develop the plan had recommended that the bulk of the bonus money go to Senior Vice President for Investments Michael Steed, presumably because he was most directly responsible for bringing the Global Crossing investment opportunity to ULLICO.[119] However, the Compensation Committee increased Georgine's award to equal that of Steed.[120]

When he presented the Global Incentive Program to the Compensation Committee, Georgine claimed that he would ask the ULLICO Executive Committee to ratify the program.[121] However, the Thompson Report concludes that there is no evidence indicating that he ever did so. Several Directors later expressed shock and surprise when they learned from the Thompson Report how much money the senior executives were being paid.[122] By then, the totals claimed by these five executives had been multiplied considerably through manipulation of "deemed investments" within ULLICO's deferred compensation plan.

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[115] Compensation Committee Meeting Minutes, July 27, 1998 (Exhibit 39).
[116] Thompson Report, Exhibit 2 (Appendix 1).
[117] William M. Mercer, Inc., Report on Development of Incentive Award Plans, July 26, 1998 (Exhibit 40).
[118] Thompson Report, Exhibit 2 (Appendix 1).
[119] William M. Mercer, Inc., Report on Development of Incentive Award Plans, July 26, 1998 (Exhibit 40).
[120] Compensation Committee Meeting Minutes, July 27, 1998 (Exhibit 39).
[121] Compensation Committee Meeting Transcript, July 27, 1998 (Exhibit 41).
[122] Thompson Report, Exhibit 2 (Appendix 1); La Sala and McNulty Interviews.

2. The "Top Hat" Nonqualified Deferred Compensation Plan

At the same time it adopted the Global Incentive Program, the Compensation Committee also adopted a deferred compensation plan. Under the Top Hat Nonqualified Deferred Compensation Plan, participants could defer up to 25% of their salary and up to 100% of their bonuses (including payments from the Global Incentive Program) in order to defer taxes on that income. Participants in the plan were able to make "deemed investments" of the deferred compensation in a range of investment alternatives, one of which was ULLICO stock. While the funds were not actually invested, the company was obligated under the terms of the plan to pay sums to plan participants as if the funds had been invested. Participation in the plan was limited to the same five executives who participated in the Global Incentive Program. The Thompson Report indicates that while such deferred compensation programs are common and are generally appropriate retirement planning vehicles for highly compensated executives, in this case the plan operated to provide the ULLICO executives with an unusual windfall in 2000 and 2001, over and above the profits from engaging in actual ULLICO stock transactions.[123]

The windfall occurred because the executives were able to allocate significant portions of their compensation to deemed investments in ULLICO stock when the price was artificially low and then reallocate the deferred compensation to deemed money market accounts to preserve the gains when the price was artificially high. For example, in September 1998, Georgine deferred about $717,000 of his bonus under the Global Incentive Program and allocated it all to a deemed investment in ULLICO stock at $28.70 per share.[124] This occurred just after Global Crossing had gone public and ULLICO's investment in Global Crossing had already increased exponentially. However, Global Crossing's growth was not yet reflected in ULLICO's annually-set stock price.

The same factors that made the actual stock transactions unfair and manipulative were also present in the deemed transactions, to an even greater degree in some ways. For example, participants in the plan could reallocate their deemed investments at the end of each month, making it even easier to "sell" their deemed stock than their actual stock. Therefore, the deemed investments entailed little actual risk and guaranteed the ability to lock in a substantial return before any decline in Global Crossing would be reflected in ULLICO's price. Indeed, in May 1999, when ULLICO's book value was readjusted based on the annual audit of 1998 financial information, Georgine's deemed investment was revalued at about $1.35 million.[125] Again in August 1999, Georgine deferred an additional $656,000 of compensation into ULLICO stock at the new book value of $53.94 per share,[126] and in 2000 when ULLICO's price was adjusted based on 1999 financial information to $146.04 per share, Georgine's deemed investment "grew" to

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[123] Thompson Report at 23 (Appendix 1).
[124] 1998 Plan Statement of Activity, ULLICO Deferred Compensation Plan (Exhibit 42).
[125] 1999 Plan Statement of Activity, ULLICO Deferred Compensation Plan (Attached to Letter from Teresa E. Valentine, Interim Chief Legal Officer, ULLICO, Inc., to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate, June 24, 2003) (Exhibit 43).
[126] *Id*.

more than $5.4 million.[127] In actuality, all that had grown was ULLICO's obligation to pay him in the future. Georgine then reallocated his deferred compensation to a deemed money market account just before ULLICO's price was revised downward in May 2001 to $74.87 per share.[128] Neither the program itself nor the deemed transactions into and out of ULLICO stock were disclosed in the tender offer documents made available to shareholders in the course of the company's formal stock repurchase program. Moreover, executive compensation information was generally unavailable to shareholders from any other source. In fact, the Thompson Report concluded, "in the course of our investigation, we found substantial evidence that ULLICO management engaged in a concerted effort to withhold executive compensation information from members of ULLICO's Board of Directors and its shareholders."[129]

Federal securities law requires that a tender offer include any material fact necessary to ensure that the tender offer is not misleading, fraudulent, deceptive, or manipulative.[130] While executive compensation information is generally not included in tender offer documents for public companies, it is available through other public filings. That is not the case with ULLICO, a private company. If the executive compensation in this case were simply salary and bonuses, it would probably not be material to the decision of other shareholders to participate in the tender offer. However, in this case, the bonuses were already tied to the value of Global Crossing stock, and their impact was magnified through the deferred compensation program in a way directly connected to deemed investments in ULLICO stock. Whether and to what extent senior executives were choosing to allocate their deferred compensation to deemed investments in ULLICO stock or money market accounts at particular times would arguably be material to other shareholders decisions whether to tender their shares to the company for repurchase. This was particularly so in December 1999, when senior executives dramatically increased their personal financial interest in ULLICO stock just after the company completed its stock repurchase program for that year. A reasonable shareholder selling shares back to the company that year would have wanted to reconsider that decision if he had known the full extent to which insiders were loading up on ULLICO stock. The senior officers acquired a large proportion of their interest in ULLICO stock through the deferred compensation plan. Thus, the failure to disclose the deferred

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[127] 2000 Plan Statement of Activity, ULLICO Deferred Compensation Plan (Attached to Letter from Teresa E. Valentine, Interim Chief Legal Officer, ULLICO, Inc., to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate, June 24, 2003) (Exhibit 43).

[128] Thompson Report at p. 25, n.15 (Appendix 1). *See also*, Letter from Teresa E. Valentine, Interim Chief Legal Officer, ULLICO, Inc., to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate, June 24, 2003 (Exhibit 43) ("It is my understanding that Mr. Georgine elected to have his investment track ULLICO stock from the inception of the program until this election was no longer an option.") Carabillo, Grelle, and Luce shifted their deemed investments into ULLICO stock in December 1999 and out of ULLICO stock in June 2000. *Id.*

[129] Thompson Report at 70–71 (Appendix 1).

[130] Section 14 (e) of the Williams Act states that it "shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." 15 U.S.C. § 78n (e).

compensation plan and the deemed transactions in ULLICO stock within that plan contributed to the ULLICO tender offers being misleading and manipulative.

B. 1998 and 1999 Director/Officer Stock Offers

1. The 1998 Director/Officer Stock Offers

In addition to the Global Incentive Program and the Top Hat Deferred Compensation Plan, directors and senior officers were also given exclusive offers in 1998 to purchase ULLICO stock at an artificially low price: the annually fixed price calculated from the previous year's audited financial statements. The Board of Directors' Executive Committee appointed a Compensation Committee in February 1998.[131] The Compensation Committee authorized Georgine to offer the opportunity to officers and directors to purchase ULLICO stock.[132] Georgine made two such offers in 1998: one in July and one in October.[133] These offers were made only to insiders—not to the unions and pension funds who were ULLICO's principal shareholders.

The Compensation Committee had decided to offer each director and officer this exclusive opportunity "[b]ecause of the unusual nature of this significant event" (referring to the extraordinary growth of the Global Crossing investment).[134] In October, Georgine once again offered officers and directors the exclusive right to purchase an additional 2000 shares of ULLICO stock. Some former officers and directors indicated that while they had received opportunities in years past to purchase ULLICO stock, 4,000 shares was substantially more than they had ever been allowed to purchase before.[135] This opportunity to purchase company stock appears to be unprecedented, at least in terms of its size.

In July, just before Global Crossing's IPO, Georgine reported to the Compensation Committee that Global Crossing shares were expected to trade between $17 and $19 per share, creating an unrealized gain for ULLICO of approximately $280 to $315 million.[136] The shares consistently traded in that range and higher through the end of the year, making it clear that ULLICO's book value per share would be significantly higher when calculated and announced in May 1999. The following senior officers and directors purchased the following numbers of ULLICO shares in 1998:

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[131] In 1998, the Compensation Committee consisted of Directors John Barry, Jacob West, and William Wynn. Executive Committee Meeting Minutes, February 11, 1998 (Exhibit 44).
[132] Compensation Committee Meeting Minutes, July 27, 1998 (Exhibit 39).
[133] *See, e.g.*, Letter from Robert Georgine to Joseph F. Maloney, July 29, 1998 (Exhibit 45).
[134] Compensation Committee Meeting Minutes, July 27, 1998 (Exhibit 39).
[135] *See, e.g.*, Luce Interview, McNulty Interview.
[136] Compensation Committee Meeting Transcript, July 27, 1998 (Exhibit 41).

4,000	3,000	2,000	250-1,000	No Shares
Georgine Grelle M. Maloney Biller Casstevens West	Carabillo Luce	Steed Barry Bernard Boede Cullerton Maddaloni J. Maloney McCarron Wynn	Bahr Gentleman LaSala McNulty Sweeney Upshaw	Brown Kruse Wyse

The Thompson Report raises three questions about whether the offers of these shares were properly authorized by ULLICO's Board and its by-laws. First, Georgine said at the Compensation Committee meeting, "Each Director and Officer will have the opportunity to buy ULLICO stock, up to 2000 shares (can go up to 4000) at the current $28.70 book value."[137] However, as the Thompson Report notes, the Compensation Committee minutes do not reflect any authorization for 4000 shares, only 2000.[138] Moreover, as the Thompson Report also argues, the Compensation Committee exceeded the authority granted to it by the Executive Committee. The Executive Committee resolution creating the Compensation Committee stated that, "No member of the Committee shall participate in the determination of any matter affecting his own compensation."[139] Yet, the Compensation Committee purportedly authorized the issuance of undervalued stock to each officer and director, including themselves. Therefore, the Compensation Committee members apparently violated the express prohibition against participating in matters affecting their own compensation. Third, the Thompson Report argues that neither the Executive Committee nor the Compensation Committee had the authority to issue stock because of a prohibition in the company by-laws. ULLICO's by-laws expressly state that the Executive Committee "shall not have authority to … issue stock."[140] Since the Compensation Committee derived its authority exclusively from the Executive Committee, it too had no authority to issue stock.

On this last point, the company's Chief Legal Officer, Joseph Carabillo, conceded that the Compensation Committee lacked authority to issue stock.[141] However, Carabillo argued that in May 1997 the Board had authorized Chairman Georgine, "at his sole discretion," to offer any stock that had been repurchased by the company to "authorized investors."[142] The Thompson report argues that there are at least three reasons that Carabillo's argument may be flawed. First, the Board's attempted delegation of authority may be excessive, and therefore, impermissible. Second, the Board did not specifically delegate its authority to grant the right of purchase to directors or officers. According to the by-laws, "authorized investors" include, among others, "such directors or officers as

[137] *Id.*
[138] Thompson Report at 25 (Appendix 1).
[139] Executive Committee Meeting Minutes, February 11, 1998 (Exhibit 44).
[140] By-Laws, ULLICO, Inc., Article VI, §2 (Exhibit 2).
[141] Thompson Report at 27 (Appendix 1).
[142] *Id.*

may be elected or employed by the company as the Board of Directors *may from time to time grant the right of purchase*."[143] Thus, while the May 1997 authorization might be said to allow Georgine to issue repurchased stock to other types of authorized investors, the by-laws appear to require the Board to specifically grant the right of purchase to officers and directors on particular occasions. Third, even if the May 1997 authorization allowed Georgine to issue stock to other officers and directors, the Thompson Report argues that there is no indication that Georgine was authorized to issue stock to himself.[144]

The Thompson Report's characterizations of these stock offers are more persuasive than the after-the-fact rationalizations offered by Georgine, Carabillo, and the former management. The offers were not properly authorized at the time, but those involved apparently believed that the approval of Georgine was the only authorization required. This is consistent with a pattern at ULLICO of relying heavily on the authority of the President and CEO with little regard to any rules placing limits on that authority and virtually no recognition or acknowledgment that such limitations might be necessary or prudent.

2. The 1999 Director/Officer Stock Offer

In February 1999, the Executive Committee appointed a Compensation Committee[145] and granted it "full authority to act on all matters concerning compensation . . . *including the issuance of stock*."[146] Unlike in 1998, this time the Executive Committee attempted to explicitly delegate the authority to issue stock. As noted before, however, the by-laws expressly prohibited the Executive Committee from issuing stock, and thus, it could not delegate such authority. Nevertheless, in May, the Compensation Committee authorized Georgine to issue 4,000 shares of ULLICO stock to senior officers and directors.[147] As in 1998, Committee members West, Berry, and Wynn participated in a matter relating to their own compensation in violation of the Executive Committee resolution establishing the Compensation Committee.

In 1998, the Compensation Committee had instructed Georgine to make shares available "at the earliest opportunity."[148] However, in May 1999, he was authorized to make the offer sometime during the year at his own discretion.[149] In fact, Georgine did not make the offer until December 17, 1999. By waiting so long, Georgine ensured that there was virtually no risk to him and other inside purchasers because there were only a few more trading days left in the year. Therefore, there were only a few more days in which fluctuations in Global Crossing's stock price could have an effect on ULLICO's May 2000 stock price. By December 31, 1999, the impact of Global Crossing's current

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[143] By-Laws, ULLICO, Inc., Article II(B), §2 (Exhibit 2).
[144] Thompson Report at 27 (Appendix 1).
[145] In 1999, the Compensation Committee consisted of Directors John Barry, John Cullerton, Jacob West, and William Wynn.
[146] Executive Committee Meeting Minutes, February 13, 1999 (Exhibit 46).
[147] Compensation Committee Meeting Minutes, May 13, 1999 (Exhibit 47).
[148] Compensation Committee Meeting Minutes, July 27, 1998 (Exhibit 39).
[149] Compensation Committee Meeting Minutes, May 13, 1999 (Exhibit 47).

price on ULLICO stock would be fixed. It would appear in the May 2000 calculation and then be frozen for the next year. On December 10, 1999, Chief Legal Officer Joseph Carabillo sent a memo to Georgine suggesting that ULLICO help finance the purchase of stock by officers and directors.[150] The Compensation Committee also considered Carabillo's suggestion that the company offer loans to officers and directors to help them purchase stock.[151] When asked by Committee staff why he suggested that ULLICO finance purchases of its stock, Carabillo replied that at the current ULLICO share price, $53.94, purchasing 4,000 shares would have required more than $215,000.[152] Carabillo said he was not familiar with the directors' and officers' finances, but presumed that they, like he, would not be able to afford to purchase 4,000 shares without a loan.[153] However, the Compensation Committee decided not to make any such loans. When asked why this was the case, Carabillo indicated that there were concerns about how it would appear.[154] Yet, on December 28, 1999, Georgine sent letters to Mellon Bank on behalf of ULLICO indirectly guaranteeing loans to Carabillo and his wife, as well as Chief Financial Officer John K. Grelle and his wife.[155] Carabillo also sent a similar letter concerning a loan to Georgine and his wife.[156] In each case, the amount of the loan was $215,760, the amount necessary to purchase the 4,000 shares offered at the share price of $53.94. The Thompson investigators found nothing in any corporate records to indicate that the letters to Mellon Bank were ever disclosed to the Board or any of its Committees. When interviewed by Committee staff, even the second highest-ranking officer at the company, Executive Vice President James Luce, indicated he had been unaware of the letters and the loans.[157]

The loans obtained by Georgine, Carabillo, and Grelle suggest that they clearly understood that the purchases involved little or no risk. The fact that Mellon Bank was willing to finance one hundred percent of the stock purchased and accept the stock as collateral on the loan suggests that the bank saw little risk in the transaction as well. Indeed, Georgine Carabillo, and Grelle had arranged for the company to guarantee that, if necessary, it would repurchase the stock for enough money to pay off the outstanding loan balance. However, that eventuality was extremely unlikely. There were only a few trading days left in the year, and therefore very little opportunity for Global Crossing's

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[150] Memorandum from Joseph Carabillo to Robert Georgine, December 10, 1999 (Exhibit 48).
[151] Interview with Joseph Carabillo, former Chief Legal Officer, ULLICO, Inc., June 4, 2003 ("Carabillo Interview").
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] Letter from Robert Georgine, President and CEO, ULLICO, Inc., to Foster Mays, Mellon Bank (MD) N.A., December 28, 1999 (Exhibit 49); Letter from Robert Georgine, President and CEO, ULLICO, Inc., to Foster Mays, Mellon Bank (MD) N.A., December 28, 1999 (Exhibit 50). Carabillo stated that he and Grelle decided to seek loans to buy the stock, and that at the last minute, the bank sought ULLICO's guarantee on the loan. Carabillo asked Georgine to provide the guarantee, and he agreed. In the course of these discussions, Georgine told Carabillo that a loan to purchase ULLICO stock seemed like a good idea, and asked if he could do so as well. It was then that Carabillo put Georgine in touch with the bank, and Georgine obtained a similar loan soon thereafter. Carabillo Interview.
[156] Letter from Joseph Carabillo, Chief Legal Officer, ULLICO, Inc., to Foster Mays, Mellon Bank (MD) N.A., December 28, 1999 (Exhibit 51).
[157] Luce Interview.

price to decrease before ULLICO's books closed. Yet, despite these circumstances, Carabillo and Grelle both insisted that simply because they had to invest their own money, these transactions involved substantial risk.[158] Governor Thompson disagreed:

> CHAIRMAN COLLINS: Were they taking on any sort of serious risk? Or essentially were they in a position to know what the stock price was going to be or likely to be?
>
> THOMPSON: I think the issue of whether they, in fact, had to purchase this stock with their own money is of little relevance because that is the common experience in corporations. Occasionally a corporation will loan officers money to make stock purchases, to get them invested in the company. But the days when that was more freely done are over, and now corporate loans to officers for the purchase of stock are disfavored and looked upon with some suspicion.
>
> But passing that issue, my belief is that there was little or no risk. And second, that they were in a position to know and control the increasing share price. So I would not agree with their conclusions.[159]

Moreover, ULLICO's auditor, PricewaterhouseCoopers ("PwC"), later revised the accounting treatment for the stock purchases in both 1998 and 1999 because the transactions involved little if any investment risk. Pursuant to its 2001 audit, PwC revised compensation expenses upward by $11.7 million.[160] The revision could require the directors and officers to treat their profits on ULLICO stock as ordinary income and subject them to a higher tax rate than if the profits were treated as capital gains.[161]

Each of ULLICO's senior officers[162] purchased 4,000 shares, the maximum amount of stock allowed in 1999.[163] Twelve of the directors (other than Georgine) purchased a total of 15,400 shares at the 1999 share price of $53.94.[164] All of the purchases were recorded on December 29, 1999, two days before the date used to

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[158] Carabillo interview; Grelle interview. However, neither of them invested their own money in 1999. They invested money borrowed from a bank.
[159] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 18–19 (June 19, 2003).
[160] Thompson Report at 33 (Appendix 1).
[161] *Id.*at 33.
[162] Michael Steed resigned in December 1999 and was not permitted to purchase stock after his resignation. Thompson Report at 33 (Appendix 1).
[163] Thompson Report, Exhibit 1 (Appendix 1).
[164] *Id*.

calculate the new 2000 share price of $146.04.[165] At this time, ULLICO had already realized a $192 million gain on the Global Crossing investment and its remaining shares had skyrocketed in value.[166] The following officers and directors purchased shares in the following amounts:

4,000	**2,000**	**1,000**	**50-500**	**No Shares**
Georgine Carabillo Grelle Luce M. Maloney Casstevens West	J. Maloney McCarron	Bernard Maddaloni	Barry Biller Brown Kruse McNulty Wyse	Bahr Boede Cullerton Gentleman LaSala Sweeney Upshaw Wynn

3. Potential Legal Issues Concerning the 1998 and 1999 Offers

As with the information regarding executive compensation, the omission of information about the 1998 and 1999 purchases from tender offer disclosure documents could constitute a violation of federal securities law if the omission were material and done with the requisite intent.[167] Between 1997 and 2001, the only director/officer stock transactions that were specifically disclosed in the tender offer documents were the purchases of ULLICO stock in Fall 1998.[168] Neither the first 1998 stock offer nor the 1999 stock offer was clearly disclosed to shareholders.[169] Nor was the fact that executives were borrowing money to purchase ULLICO stock. Whether, when, and to what extent insiders are purchasing ULLICO stock is arguably material to the other shareholders' decision to participate in the repurchase program. In other words, a reasonable shareholder would likely consider information that insiders were buying considerably more shares than ever before important to his decision whether or not to sell his shares back to the company.

With both the 1998 and 1999 stock offers, the issue also arises of whether certain directors fulfilled their statutory duties to ULLICO under Maryland law to act in good faith, in the best interests of the company, and as an ordinarily prudent person would. The Thompson Report concludes that "a strong argument" could be made that the members of the Compensation Committee who approved the 1998 and 1999 stock offers were not acting in good faith and in the best interests of the company.[170] As discussed above, they apparently acted outside their authority in approving the stock transactions, and they derived substantial personal benefit from those same transactions all of which suggests bad faith. As to other Board members, the Thompson Report suggests that—by

[165] *Id.* at 32.
[166] *Id.* at 17.
[167] *See* Section IV.C.2, "Federal Securities Law."
[168] Thompson Report at 70 (Appendix 1).
[169] *Id.*
[170] *Id.* at 56.

delegating the authority to issue stock to the Compensation Committee, or alternatively to Georgine alone, without requiring sufficient methods or procedures to govern the amount or price of shares to be offered or the timing of any such offer—the Board members failed to uphold their duty to act with due care.[171]

C. Chairman Georgine's Employment Agreements

On September 22, 1999, ULLICO's Board approved a five-year employment agreement with Georgine.[172] At the same Board meeting, a major topic of discussion was the company's $28 million in operating losses in the first six months of 1999.[173] Georgine was rewarded with a generous five-year employment contract despite this poor performance. The Board delegated to the Compensation Committee the authority to negotiate the terms and conditions of the contract.[174] Georgine and the Committee entered an employment agreement in December 1999.[175] Georgine also entered into several other agreements relating to his compensation, including life insurance, deferred compensation, supplemental retirement, and a trust agreement.[176] While these were properly authorized, the Thompson Report mentions two more agreements that though approved by the Compensation Committee "may not have been" duly authorized by the Board: (1) a 40,000 share stock purchase and credit agreement and (2) an October 2000 addendum to Georgine's December 1999 employment agreement retroactively including a put option to provide after-the-fact authorization of his July 2000 redemption of ULLICO stock.[177]

1. Stock Purchase and Credit Agreement

In December 1999, the Compensation Committee approved a "bonus" of 40,000 shares of ULLICO stock provided through a stock purchase and credit agreement.[178] Under the agreement, Georgine was able to purchase 40,000 shares of ULLICO stock at the 1999 share price of $53.94 with a loan from the company of more than $2 million dollars.[179] The loan was to be forgiven over the next five years if Georgine remained Chairman, President, and CEO.[180] This loan was in addition to the $215,000 Georgine borrowed about the same time from Mellon Bank with a guarantee from ULLICO and using 4,000 shares of stock as collateral. The stock purchase credit agreement, which was ten times larger than the loan from Mellon Bank, was dated just after the Compensation Committee rejected Carabillo's suggestion that ULLICO finance stock

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[171] *Id.* at 62.
[172] Board of Directors Meeting Minutes, September 22, 1999 (Exhibit 52).
[173] *Id.*
[174] *Id.*
[175] Employment Agreement between ULLICO, Inc. and Robert Georgine, October 1, 1999 (Exhibit 53).
[176] Memorandum from Ed Bintz and Jim Joseph, Arnold & Porter, to Joseph Carabillo, Chief Legal Officer, ULLICO, Inc., April 13, 2000 (Exhibit 53).
[177] Thompson Report at 50 (Appendix 1).
[178] Stock Purchase Credit Agreement, December 30, 1999 (Exhibit 54).
[179] *Id.*
[180] *Id.* The agreement also contained a put option, allowing Georgine to require the company to repurchase shares from him at the most recently announced book value per share. In February 2001, Georgine sold 8,000 shares at $146.04 per share using the put option contained in the agreement. Thompson Report at 52 (Appendix 1).

purchases for officers and directors. Although the agreement is dated December 30, 1999, and Georgine received the shares on February 11, 2000, all the directors on the Compensation Committee did not execute the agreement until May 10, 2000.[181] The reason for this delay is unexplained. One Arnold & Porter attorney indicated to Thompson's investigators that, given the timing and price, the delay might raise tax and accounting issues.[182]

The agreement was belatedly and inadequately disclosed through an obscure footnote in ULLICO's 2001 annual report. The footnote does not connect the transaction to Georgine by name or title. It does not even indicate that the recipient was an employee of the company or explain why this benefit was being conferred on him. The footnote reads in total:

> In 1999, the Company entered into an incentive arrangement which included the issuance of 40,000 shares of Class A stock in exchange for a receivable from the stockholder which was secured by the stock issued. The receivable may be forgiven in five equal installments over the five-year term of the agreement.[183]

This vague, even misleading, disclosure was made nearly two-and-a-half years after the transaction. So closely-held was the secret of this $2 million dollar transaction that even ULLICO's Executive Vice President was unaware of the agreement at the time. When interviewed by Committee staff, James Luce indicated that he first learned of the agreement by reading the footnote in question in the annual report. Luce presumed that this footnote referred to Georgine, but he was uncertain until he read about it in the Thompson Report.[184] Such secrecy was apparently the rule of thumb at ULLICO under Georgine's leadership. Chief Legal Officer Carabillo told Committee staff that he understood from Georgine that, as a general matter, no compensation matters should be disclosed to anyone unless required by law.[185] According to Carabillo, the disclosure of the stock purchase credit agreement was only included in the 2001 annual report at the insistence of the auditors at PwC.[186] It is noteworthy that the annual report was finalized and released in May 2002, just as stories about the improper stock transactions were beginning to appear in the press.[187]

The Thompson Report concludes that there is a "serious question" whether the 40,000 share bonus and the loan used to purchase the shares was duly authorized.[188] There is no question, however, that the few people who were aware of the transaction attempted to keep it secret even as late as May 2002. At least part of the reason for this

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[181] Wynn executed the agreement on February 28. West and Barry did so on April 6. Finally Cullerton executed the agreement on May 10. *Id.* at 51.
[182] *Id.*
[183] 2001 Annual Report, ULLICO, Inc. (Exhibit 55).
[184] Luce Interview.
[185] Carabillo Interview.
[186] *Id.*
[187] *Id.*
[188] Thompson Report at 52 (Appendix 1).

secrecy may have been fear that directors and shareholders would have opposed that level of compensation and questioned whether it was properly approved. The Board did not authorize the Compensation Committee to issue any stock, and the Committee lacked authority to issue stock on its own without authorization from the Board because of the provision in the by-laws discussed earlier.[189] Neither this 40,000 share bonus nor the put rights under his employment contract were contemporaneously disclosed to shareholders. As with other omissions, this information may have been material to shareholder decisions about whether to participate in ULLICO's stock repurchase program in 1999. It seems likely that a reasonable investor would consider it important to know, before deciding to sell his shares back to the company, that the Chairman and CEO is borrowing well over $2 million to purchase company stock. Therefore, the failure to disclose the full extent to which Georgine was purchasing shares of ULLICO stock in late 1999, especially given the size of this purchase and the fact that it was affected through a loan from the company, may violate federal securities law.[190]

In February 2001, ULLICO repurchased 8,000 shares from Georgine at ULLICO's all-time high price of $146.04 per share pursuant to the put option in his Stock Purchase Credit Agreement.[191] He had purchased these shares the previous year for $53.94, before the phenomenal growth of Global Crossing was reflected in ULLICO's share price.[192] By the time of his sale, Global Crossing's price had declined by 75 percent from what it had been on December 31, 1999, the date of the Stock Purchase Credit Agreement.[193] However, that decline would not be manifested in ULLICO's stock price until May 2001. The authority for this extremely lucrative repurchase from Georgine at a price inflated above the actual value of the stock rests on the questionable validity of the stock purchase credit agreement, which purports to grant him a put option. However, ULLICO also repurchased 8,000 additional shares that Georgine had purchased pursuant to the 1998 and 1999 director/officer stock offers.[194] ULLICO repurchased 4,000 of these shares in July 2000 and the remainder in February 2001, all at $146.04.[195] These repurchases could not be authorized by the stock purchase credit agreement because the shares were not acquired through that agreement. This led to a retroactive amendment to Georgine's employment contract.

2. Employment Agreement Addendum

ULLICO's July 2000 repurchase of Georgine's shares could only have been done pursuant to the "discretionary repurchase program" (discussed below), which was administered solely by Georgine.[196] As this created a conflict of interest, Carabillo brought the matter to the attention of the Compensation Committee.[197] In October 2000,

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[189] *See* Section II.B.2, "The 1999 Director/Officer Stock Offer."
[190] *See* Section IV.C.2, "Federal Securities Law."
[191] ULLICO Class A Ledger, May 21, 2002 (Exhibit 56).
[192] Thompson Report, Exhibit 1 (Appendix 1).
[193] Thompson Report, Exhibit 3 (Appendix 1).
[194] ULLICO also repurchased approximately 4,800 shares Georgine had owned before the director/officer stock offers.
[195] Thompson Report, Exhibit 1 (Appendix 1).
[196] Thompson Report at 53 (Appendix 1).
[197] *Id*.

the Compensation Committee concluded that it had inadvertently omitted a put option from Georgine's October 1999 employment agreement.[198] While the 40,000-share stock purchase credit agreement contained a put option allowing him to resell shares acquired under that agreement, it did not provide him the right to put other shares to the company. The Compensation Committee approved an addendum to Georgine's employment agreement that was deemed to be effective retroactively.[199] As amended, the put option in Georgine's employment agreement allowed him to require to the company to purchase shares from him at book value at any time.[200] Despite the Compensation Committee's attempt to ratify the July 2000 repurchases and cure Georgine's conflict of interest, the Thompson Report properly notes that the Board of Directors never expressly ratified the purchases, and it describes as "suspect" the Compensation Committee's basis of authority for retroactively amending Georgine's employment contract to include the put option.[201]

3. Georgine's Total Compensation

The 40,000-share "bonus" of stock was over and above other bonuses intended to reward Georgine for the Global Crossing investment success. He had already received substantial sums under the Global Incentive Program and was able to magnify the effect of those bonuses using deemed investments in ULLICO stock available through the deferred compensation program. Moreover, he had participated in the 1998 and 1999 officer/director stock purchase offers, and he borrowed additional money with the help of the company in 1999 in order to do so.

In total, Georgine received or claimed more than $20 million in bonuses, stock profits, and benefits from 1998 to 2001. That amount was in addition to his annual salary of $650,000.[202] It includes $2.6 million in profits from transactions in ULLICO stock, $4.1 million in profits from "deemed" ULLICO stock transactions within the deferred compensation program,[203] $6.3 million in a supplemental retirement trust,[204] $2 million in severance pay,[205] a $2.2 million loan to be forgiven over five years,[206] $2 million in Global Incentive bonuses,[207] $1.1 million in annual incentive bonuses,[208] and a split dollar life insurance policy at a cost to the company of $350,000 per year.[209] Given the massive array of compensation and benefits Georgine expected from ULLICO, his instruction to Carabillo to ensure that compensation information only be disclosed if legally required is understandable. Perhaps he knew that a fully informed board,

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[198] Compensation Committee Meeting Minutes (October 20, 2000) (Exhibit 57).
[199] *Id*.
[200] Employment Agreement between ULLICO, Inc. and Robert Georgine, October 1, 1999 (Exhibit 58).
[201] Thompson Report at 53 (Appendix 1).
[202] Thompson Report, Exhibit 2 (Appendix 1).
[203] *Id*.
[204] "Georgine's SERP/Rabbi Trust," (Chart provided by Winston & Strawn) (Exhibit 59).
[205] Letter from Robert Georgine to Terence O'Sullivan (May 8, 2003) (Exhibit 60).
[206] Stock Purchase Credit Agreement, December 30, 1999 (Exhibit 54).
[207] Thompson Report, Exhibit 2 (Appendix 1).
[208] *Id*.
[209] Split Dollar Life Insurance Agreement between ULLICO, Inc. and the Robert A. and Mary Rita Georgine Life Insurance Trust, February 9, 2000 (Exhibit 53).

especially one dominated by labor leaders, would not have approved of that level of compensation.

III. THE REPURCHASE PROGRAMS: HOW ULLICO OFFICERS AND DIRECTORS SOLD STOCK BACK TO THE COMPANY

While the exclusive stock offers to ULLICO directors and insiders were troubling on their own, they were combined with a repurchase program that discriminated against ULLICO's institutional shareholders and provided an unfair benefit to ULLICO insiders.

A. The Creation of the Repurchase Program, and the 1997 Stock Repurchase

Prior to 1997, the value of ULLICO's stock was fixed, and the company distributed profits through relatively large dividends.[210] In the mid-1990s, ULLICO officers debated a change from this fixed valuation, as many ULLICO shareholders had been seeking greater liquidity.[211] By 1997, ULLICO decided to move to a fluctuating stock price based on the book value per share. Several explanations were advanced for this change, including that capital gains are taxed at a lower rate than dividends. Thus ULLICO shareholders would not be taxed as much if earnings were passed along to them through a rising share price rather than through dividends.[212] This rationale, however, did not apply to the vast majority of ULLICO shareholders because unions and pension funds are generally tax-exempt. However, capital gains treatment was a significant benefit for individual shareholders, such as officers and directors.

In order to replace dividend income with capital gains, the Board of Directors adopted a repurchase program in May 1997.[213] Under the program, ULLICO would offer to repurchase $30 million worth of stock in 1997 and $15 million of stock in each of the subsequent 10 years if there were "sufficient earnings and cash flow from operations."[214] In a statement to the Board at the time of the adoption of the repurchase program, Chairman and CEO Robert Georgine explained that the program "is a means for us to provide liquidity to our larger stockholders."[215] The program had the opposite effect. As it was operated over the next three years, the program ensured liquidity to smaller stockholders such as directors and officers while providing very little liquidity to larger institutional shareholders.

In the company's first formal stock repurchase in November 1997, ULLICO offered to repurchase $30 million of stock at $27.06 per share. The offer was oversubscribed. The terms of the tender offer allowed those with fewer than 10,000

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[210] ULLICO Inc. Confidential Offering Memorandum, May 22, 1992 at 7 (Exhibit 61).
[211] Carabillo and Grelle interviews.
[212] Executive Committee Meeting Minutes, May 5, 1997 (Exhibit 62).; Memorandum from Timothy M. Broas, Winston & Strawn, to ULLICO File regarding May 9, 2002 Interview with Joseph A. Carabillo, Former Vice President and Chief Legal Officer, ULLICO, (May 12, 2002) at 5 (Exhibit 63).
[213] Board of Directors Meeting Minutes, May 6, 1997 (Exhibit 64).
[214] *Id*.
[215] Robert Georgine, Report of the Chairman, Stockholders Meeting, May 6, 1997 (Exhibit 65).

shares to avoid proration if they tendered all of their shares for repurchase.[216] In the initial draft tender offer documents, tenders of fewer than 10 shares would be accepted without proration.[217] Later, one ULLICO lawyer suggested that the threshold be changed to 100 shares,[218] and then finally, a threshold of 10,000 was adopted. This threshold would be critical in limiting the number of shares that large shareholders could sell in the 2000 repurchase.

ULLICO officers have offered several justifications for having a proration threshold. Such a threshold would help the company eliminate very small shareholders, and thus ease the administrative burden of tracking these shareholders. Also, the threshold would help the company stay below the 500-shareholder limit before private companies are subject to certain SEC reporting requirements. Finally, ULLICO officers have claimed that the threshold would help ensure favorable tax treatment of the proceeds from the repurchase. There are questions about the validity of these claims. For example, the Thompson Report notes that none of the ULLICO outside attorneys interviewed in the course of their investigation recalled offering such advice to ULLICO.[219] Additionally, it is not clear how well-founded the concerns were that ULLICO was approaching the 500 shareholder mark. At the time of the adoption of the 1997 repurchase program, ULLICO had only 341 shareholders.[220] Most importantly, ULLICO's supposed concern about eliminating small shareholders was in direct opposition to Georgine's practice of making exclusive stock offers to company insiders, thereby creating more shareholders with fewer than 10,000 shares.

There is little information about why this particular threshold of 10,000 shares was adopted in 1997. Governor Thompson's report states that no one interviewed at ULLICO could offer any explanation why the 1997 proration threshold was changed from 10 shares to 100 shares, and then to 10,000 shares.[221] However, during his interview with Committee staff, former ULLICO General Counsel Joseph Carabillo offered an explanation. He asserted that the earlier proposed thresholds of 10 and 100 shares were meaningless, since there were no holders of Class A or B shares who held 100 or fewer shares. There were many holders of Capital stock who had less than 100 shares, but their shares were not covered by the 1997 repurchase. However, ULLICO had other options besides a 10-, 100-, or 10,000-share threshold. The Thompson Report notes that at about the same time the 10,000 share threshold was set, 14 shareholders held fewer than 5,000 Class A shares and 10 held fewer than 1,000 Class A shares.[222] Thus,

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[216] Offer to Purchase for Cash By ULLICO, Inc. for up to 1,108,647 Shares of its Common Stock at $27.06 Net Per Share, November 10, 1997 (Exhibit 66).
[217] Memorandum from Joseph Carabillo to John Grelle, James Luce, C.R. Sormani, and Michael Steed, May 30, 1997 (Exhibit 67).
[218] Handwritten Comments from C.R. Sormani to Joseph Carabillo, May 19, 1997, to Memorandum from Joseph Carabillo to James Luce, C.R. Sormani, and Michael Steed, May 14, 1997 (Exhibit 68).
[219] Thompson Report at 21 (Appendix 1).
[220] Letter from Damon A. Silvers, ULLICO, Inc., to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs (February 2, 2004) (Exhibit 69).
[221] Thompson Report at 21 (Appendix 1).
[222] *Id.* at 19.

ULLICO could have used a 5,000- or 1,000-share threshold to reduce the number of small shareholders.

Regardless of the original reasons for the 10,000-share threshold, it was to have a dramatic effect. ULLICO's management arranged to readopt it in 2000 and 2001 even though it would tilt the repurchase program drastically and disproportionately in favor of insiders. The effect of the threshold was to protect officers and directors if far more shares were tendered than the amount ULLICO was going to repurchase. In that situation, which occurred in 2000 and 2001, large shareholders were severely prorated, with only a small portion of their shares being repurchased. The funds that the company devoted to repurchasing stock were distributed disproportionately to small, insider shareholders. In fact, two ULLICO directors explicitly stated that the purpose of the 10,000-share threshold was to benefit ULLICO officers and directors. William G. Bernard, former President of the Asbestos Workers Union and former ULLICO director, stated that it was possible that the threshold could be viewed as a form of compensation for directors who were generally viewed as under-compensated.[223] Morton Bahr, President of the Communications Workers of America and former ULLICO director, stated unequivocally that the sole purpose of the threshold was to allow directors and officers to sell their stock without being prorated.[224] That may not have been the intent in 1997. In subsequent years, however, management failed to implement a more reasonable threshold even though the 10,000-share threshold had become manifestly unfair to the larger shareholders who owned the vast majority of ULLICO stock.

B. 1998 Stock Repurchase Program

In November 1998, ULLICO offered to repurchase $15 million of its stock at $28.70 per share,[225] with the same 10,000 share proration threshold that was used in the 1997 tender offer.[226] The offer was under-subscribed, therefore no proration was applied to any shareholder, and ULLICO only repurchased $4.3 million of stock. The under subscription is not surprising given that the substantial growth in Global Crossing's stock price virtually guaranteed that ULLICO's book value would increase when the new price was set in 1999. There is a question, though, regarding the disclosures made to ULLICO shareholders in the tender offer documents related to the 1998 repurchase. The disclosure documents provided to shareholders did not mention the July 1998 stock purchase offer Georgine made exclusively to officers and directors or how many ULLICO insiders had purchased stock pursuant to the offer. Such information might have been of interest to a shareholder wanting to know how company insiders viewed the prospects for ULLICO stock.

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[223] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding September 3, 2002, Interview with William G. Bernard, Director, ULLICO, Inc., at 3 (September 4, 2002) (Exhibit 70).
[224] Memorandum from Christopher M. McClellan, Winston & Strawn, to ULLICO File regarding July 15, 2002, Interview with Morton Bahr, Director, ULLICO, Inc., at 6 (August 21, 2002) (Exhibit 71).
[225] Executive Committee Meeting Minutes, May 4, 1998 (Exhibit 72).
[226] Offer to Purchase for Cash By ULLICO, Inc. for up to 522,648 Shares of its Common Stock at $28.70 Net Per Share, November 9, 1998 at 24 (Exhibit 38).

C. The 1999 Stock Repurchase Program

The third major repurchase of ULLICO stock took place in 1999. The Executive Committee approved a $15 million repurchase program in May at the 1999 share price of $53.94.[227] There was no dividend authorized for that year and Board meeting minutes regarding the repurchase program made no mention of the 10,000 share proration threshold. The offer was not made until November 1999 and expired on December 17, 1999—the same day that Georgine exclusively offered officers and directors the opportunity to purchase ULLICO stock and gave indirect loan guarantees from ULLICO for himself and others to borrow money in order to do so. Since the director/officer purchases occurred after the repurchase offer expired, these purchases were not disclosed in the tender offer disclosure documents. No officer or director sold any shares in 1999 that were acquired in 1998, even though the price had doubled and they would have made substantial profits if they had sold. This is likely because by December 1999, it was clear from the continuing success of Global Crossing that the 1999 ULLICO book value would reflect an even higher price once it was calculated and announced in May 2000. In fact, those who knew the most—some of ULLICO senior officers—were borrowing large amounts of money in December 1999 to buy company stock. Nevertheless, other shareholders did offer their shares for repurchase, and the offer was over-subscribed slightly, with about 92% of the tendered shares redeemed.

D. The Discretionary Stock Repurchases

Historically, the Chairman of ULLICO had the power to make discretionary repurchases of ULLICO stock. Other than the formal repurchases, which the Board of Directors approved, these discretionary repurchases were the only practical way that ULLICO shareholders could redeem their stock. Typically, the Chairman exercised his discretionary repurchase authority when a shareholder died, when an officer or director resigned, or when a union had a financial emergency. However, as ULLICO's share price reached an all-time high in 2000, Georgine began to use his discretionary authority to repurchase stock from company insiders merely so that they could take profits.

According to Georgine, the Chairman's discretionary repurchase authority was "neither advertised nor encouraged."[228] Before November 2000, the closest the Board came to authorizing the discretionary repurchasing authority was to note that the company would offer to pay book value for Capital Stock when exercising its right of first refusal upon the death of a shareholder.[229] There was no mention of any intent to repurchase Class A shares just to give shareholders a chance to take profits. In November 2000, the Board finally attempted to authorize the Chairman's discretionary repurchase authority, after the Chairman had already made more than $4.5 million worth of repurchases from insiders.

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[227] Executive Committee Meeting Minutes, May 17, 1999 (Exhibit 73).
[228] Board of Directors Meeting Minutes, November 3, 2000 (Exhibit 74).
[229] Board of Directors Meeting Minutes, May 6, 1997 (Exhibit 64).

There is also little evidence that the Chairman's discretionary repurchase authority was disclosed to the shareholders. The closest that the company came to disclosing it was in a June 15, 1997, letter sent by Georgine to shareholders, and a similar letter sent in 1998, in which Georgine stated that "Holders of Capital Stock, while not included within the formal repurchase program, still are expected to comply with the requirement that any company stock be offered for sale to the corporation first, and so long as the Corporation is able, and it is within a good corporate policy, we will continue our past practice of repurchasing Capital Stock[.]"[230] This was not a disclosure of the discretionary repurchase program as it made no mention of Class A shares, and the majority of the discretionary repurchases Georgine authorized were for Class A shares.

1. Discretionary Repurchases Between May and November 2000

Between May and November 2000, Georgine made substantial repurchases of stock from ULLICO insiders through his discretionary repurchase authority. Unlike in earlier years, these repurchases were not made because of financial emergency, death, or resignation from the company. Between May and November 2000, Georgine directed ULLICO to make the following discretionary repurchases from ULLICO directors or officers, all at $146.04 per share:

Name	**Shares**	**Date**	**Value**
Joseph Carabillo	3,000 Class A	May 31, 2000	$438,120
John Grelle	4,000 Class A	June 1, 2000	$584,160
Robert Georgine	4,000 Class A	July 20, 2000	$584,160
Jacob West	4,000 Class A 1,250 Capital	August 9, 2000	$766,710
James Luce	3,386 Class A 886 Capital	August 9, 2000	$623,883
William Bernard	8,664 Class A	September 13, 2000	$1,265,290
Martin Maddaloni	2,000 Class A	October 10, 2000	$292,080
		Total Value:	$4,554,403

The Thompson Report concluded that officers and directors redeemed their stock through the discretionary program for four main reasons. First, some wanted to redeem only some of their stock, and under the formal repurchase programs, shareholders had to tender all of their shares.[231] Second, some wanted to redeem Capital Stock, which traditionally was not included in the formal repurchase program.[232] Third, some needed the money.[233] Fourth, some wanted to take advantage of the record-high ULLICO share price.[234]

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[230] Letter from Robert Georgine, ULLICO, Inc., to James McNulty, Director, ULLICO, Inc. (June 15, 1997) (Exhibit 75).
[231] Thompson Report at 38 (Appendix 1).
[232] *Id.*
[233] *Id.*
[234] *Id.*

The Committee interviews of ULLICO officers James Luce and Joseph Carabillo revealed new information regarding the legitimacy of the discretionary repurchases. Luce, former Executive Vice President of ULLICO, claims that in the summer of 2000, Carabillo circulated to him a blank form titled "Director/Officer Request for Repurchase."[235] Luce assumed that the form was being circulated only to other senior officers and directors.[236] In fact, Luce referred to the discretionary repurchases made in the summer of 2000 as the "Director and Officer Repurchase Program," suggesting that he viewed this as a concerted effort made by the company to buy back shares exclusively from directors and officers.[237] However, Luce knew little about the why there was such a program and said he did not discuss it with anyone else at the company. When Committee staff asked Carabillo, ULLICO's former Chief Legal Officer, about this matter, he denied that the "Director/Officer Request for Repurchase" forms were distributed to officers and directors and claimed that he had developed the form to make it easier to deal with requests for repurchase initiated by directors and officers.[238] He did not explain why the form was designed only for officers and directors, and not other shareholders.

It is unclear how much the sale of stock through the Chairman's discretionary repurchase authority was coordinated among ULLICO insiders. ULLICO CFO John Grelle said that he decided to redeem his shares through a discretionary repurchase after receiving a note indicating that Georgine intended to redeem some of his shares.[239] Grelle stated that he received the note from Carabillo shortly before the June 1, 2000, discretionary repurchase of 4,000 of the shares.[240] The note informed Grelle that Georgine intended to sell his own ULLICO shares back to the company. Grelle said that when he called Carabillo to inquire about the note, Carabillo gave him the impression that he was similarly informing other officers and directors so that everyone would know that they had the opportunity to sell.[241] During this conversation Grelle asked Carabillo what he needed to do to request a sale, and Carabillo told him to fill out one of the "Director/Officer Request for Repurchase" forms.[242] Grelle's recollection appears to be consistent with Luce's in that in both instances, Carabillo took some initiative to let other officers know that they could sell. By contrast, Grelle's and Luce's recollections are inconsistent with Carabillo's statement to Committee staff that he merely developed the form to respond to requests initiated by officers and directors.

ULLICO's outside counsel questioned the authority for the discretionary repurchases. In September 2000, Arnold & Porter attorney Dennis Lyons informed another partner at the firm that he doubted that the Board of Directors had authorized the

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[235] See, e.g., ULLICO, Inc. Director/Officer Request for Repurchase (Exhibit 76).
[236] Luce Interview.
[237] *Id*.
[238] Carabillo Interview.
[239] Grelle Interview.
[240] *Id*.
[241] *Id*.
[242] *Id*.

discretionary repurchases.[243] Arnold & Porter recommended that ULLICO attempt to formalize the discretionary repurchases through a Board resolution and that the Board attempt to ratify prior discretionary repurchases. However, Carabillo suggested that reports regarding discretionary repurchases should be made to the Board's Compensation Committee instead. Yet, according to one Arnold & Porter e-mail, Carabillo was even "reluctant to have specific information on repurchases go to the Comp[ensation] Committee[.]"[244] Carabillo and Georgine ultimately had the Board approve a resolution that required a report to the Compensation Committee of repurchases from officers and directors. Carabillo and Georgine apparently believed that this was not necessary but that it "buttressed the optics."[245]

2. The Attempt to Have the Board of Directors Authorize Discretionary Repurchases

At the same November 3, 2000, Board meeting at which the Directors authorized the $30 million formal repurchase program for the year 2000, an attempt was made to ratify prior discretionary repurchases and to authorize future discretionary repurchases. Georgine explained the need for the discretionary repurchases to the Board:

> Since the founding of this Corporation we have repurchased stock, from individuals, from unions, and from estates. It is part of the essence of a closely-held corporation. <u>We do not advertise this and we do not encourage it</u>. As we have said from the very beginning, ULLICO, Inc. is a long-term investment and has been a long-term investment since 1925.
>
> I have decided that it would be good to have the Board's confirmation of my authority and it is limited in a number of ways. Repurchases cannot be made at a price greater than that set by the Executive Committee or the Board and it cannot be from any single stockholder for more than 1 percent of the aggregate total of shares outstanding. Those are simple safeguards so that the Board has not granted unlimited authority to an individual but a reasonable exercise of authority to keep the business of the Corporation functioning.[246]

The Board approved Georgine's request and further approved a resolution stating that "any and all actions taken by the Chairman or other appropriate officers of the Corporation falling within the scope of any of the preceding resolutions and consistent therewith taken at any time, whether prior or subsequent hereto, are hereby confirmed, ratified, and approved."[247] Although the Board adopted this resolution, it did so without

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[243] Memorandum from Joseph Carabillo, ULLICO, Inc., to Robert Georgine, ULLICO, Inc. (October 30, 2000) (Exhibit 77).
[244] E-mail from Carey Smith, Arnold & Porter, to Richard Baltz, Arnold & Porter (October 17, 2000) (Exhibit 78).
[245] E-mail from Carey Smith, Arnold & Porter, to Paul Berger, Richard Baltz, and Dennis Lyons, Arnold & Porter (November 1, 2000) (Exhibit 79).
[246] Board of Directors Meeting Minutes, November 3, 2000 (Exhibit 74) (emphasis added).
[247] *Id*.

knowing that Georgine had approved $4.5 million in repurchases, because Georgine did not disclose the specific transactions being ratified. Georgine and his allies have argued that by approving this resolution, the Board of Directors ratified Georgine's discretionary repurchases prior to November 3, 2000. However, ULLICO's outside counsel, Arnold & Porter, expressly refused to provide an opinion regarding whether the Board's vote was effective.[248]

3. Discretionary Repurchases Between November 2000 and March 2001

After the November 3, 2000, Board meeting, Georgine made a number of additional discretionary repurchases of stock from officers and directors, all at $146.04 per share:

Name	Shares	Date	Value
Bill Casstevens	7,312 Class A	January 16, 2001	$1,067,844
John Cullerton	1,500 Class A	January 16, 2001	$219,060
James Luce	2,900 Class A	January 16, 2001	$423,516
Robert Georgine	12,523 Class A 4,345 Capital	February 14, 2001	$2,463,402
John Gentleman	1,097 Capital	March 2, 2001	$160,206
James McNulty	1,535 Capital	March 2, 2001	$224,171
		Total Value:	$4,558,199

ULLICO directors and officers accounted for 62.6% of all discretionary repurchases at the $146.04 share price, even though they owned less than 2% of ULLICO stock (as of May 2000). Georgine made discretionary repurchases from shareholders other than directors and officers in this time period as well. After the close of the formal repurchase program in January 2001, four unions and pension funds requested repurchases of stock. Georgine directed the repurchase of only half of the shares tendered in these requests.[249]

4. Analysis of Discretionary Repurchases

There are substantial questions as to whether the discretionary repurchase of stock, as it was carried out, was ever properly authorized, ratified, or permissible under applicable law. Before Georgine began making discretionary repurchases at the $146.04 share price, the Board had made a passing reference to the company's "right of first refusal" in the case of a shareholder's death, but this statement provides no authority for the widespread repurchase of shares unconnected to the deaths of shareholders. There is also a question as to whether the Board's attempt to authorize the discretionary program in November 2000 was valid. Georgine's description of the program to the Board was misleading. Georgine told the Board, "we do not advertise this and we do not encourage it," which was only true with regard to most shareholders. The program was made

[248] Memorandum from Carey Smith, Arnold & Porter, to Files – Ullico/General Corporate (May 31, 2001) (Exhibit 80).

[249] Thompson Report at 46 (Appendix 1); Letter from Robert Georgine, ULLICO, to Kurt Freeman, Graphic Communications International Union (April 10, 2001) (Exhibit 81); Letter from Robert Georgine, ULLICO, to Kurt Freeman, Graphic Communications International Union (April 10, 2001) (Exhibit 82); Letter from Robert Georgine, ULLICO, to John Sweeney, AFL-CIO (January 24, 2001) (Exhibit 83).

known to insiders, and Georgine did nothing to discourage officer and director requests. In fact, there is evidence that Carabillo encouraged such repurchases by circulating the "Officer/Director Request for Repurchase" form. Georgine also told the Board that ULLICO is a "long-term investment," even though he and select insiders were selling their shares through the discretionary program. If the Board did not understand the way that Georgine was using the discretionary repurchase program, and if Georgine materially misled the Board, then it follows that the Board's vote to approve the program was invalid.

Finally, there is a question as to whether the Board's attempt in November 2000 to ratify prior discretionary repurchases was valid. Georgine failed to inform the Board of the $4.5 million in discretionary repurchases he had already made from directors and officers. Under Maryland law, in order for a corporate board to ratify a self-interested transaction, the self-interested transactions must be first fully disclosed to the board. In this case, it appears that the Board had not been made aware of any of the earlier discretionary repurchases at the time it purported to ratify them. In fact, the ULLICO management never informed the Board of the discretionary repurchases.[250]

E. 2000 Formal Repurchase Program

In May 2000, the ULLICO Board set a new ULLICO stock price of $146.04, almost triple the previous price of $53.94. At the time it was set, this stock price was already inaccurate. The new ULLICO stock price was based on ULLICO's book value as of December 31, 1999, when Global Crossing closed at $50. By May 2000, when the new price was set, Global Crossing had dropped to $33, and ULLICO's book value had suffered a significant decline. Also in May 2000, the Board approved an "extraordinary" repurchase program for up to $240 million of ULLICO stock rather than the $15 million annual repurchase contemplated by the 1997 repurchase plan. This plan was approved, but was never implemented, due to the failure of Global Crossing to reach a required trigger price. When the "extraordinary" repurchase failed to be triggered, the Board of Directors met in November 2000 and approved a new $30 million repurchase program, which became a major source of controversy.

1. Proposed "Extraordinary" Repurchase Program

On May 10, 2000, the ULLICO Executive Committee adjusted the ULLICO share price from $53.94 to $146.04, based on the usual methodology of dividing the total stockholder equity as of December 31, 1999, by the number of shares outstanding. However, even as early as May 2000, it was clear that the new share price of $146.04 did not accurately reflect the decline in Global Crossing's share price, and the resulting decline in ULLICO's value. Nevertheless, the proposed "extraordinary" repurchase plan was approved by the Executive Committee on May 10, 2000, and by the Board of

[250] According to draft minutes, in March 2001, the Compensation Committee was provided with a list of all discretionary repurchases of stock made at the $146.04 share price. The Compensation Committee was not asked to approve of the sales, and this information was never provided to the Board of Directors. Thompson Report at 40 (Appendix 1); Draft Compensation Committee Meeting Minutes, March 6, 2001 at U 21066 (Exhibit 84).

Directors on May 11, 2000. The plan would have had ULLICO purchase $240 million worth of stock from shareholders at $146.04 per share.

Three important conditions were imposed on the "extraordinary" repurchase program:

- First, by the end of the repurchase offer, Global Crossing had to be trading at no less than $43 per share.[251] At the time that the plan was approved, it was trading at $33 per share. This $43 trigger was to ensure that the company could realize gains on Global Crossing sufficient to fund the program. Because Global Crossing never again reached $43, the "extraordinary" repurchase program was never implemented.

- Second, either 93% of all outstanding shares had to be tendered, or all shareholders holding more than 1% of outstanding stock had to participate.[252] Georgine told the Board that this condition was required in order to protect the company from "a significant reapportionment of the ownership of the Corporation through a repurchase of this magnitude."[253]

- Third, instead of using the 10,000-share threshold used in 1997-99, the extraordinary repurchase program used a 100 share threshold, so that only tenders by holders of 100 shares or fewer would be accepted in total.[254] All shareholders with greater than 100 shares would be treated the same. Regardless of who they were, they would be allowed to redeem 20% of their ULLICO stock. Georgine told the Board at a May 2000 meeting that this threshold was intended to "eliminate unnecessary bookkeeping—we have many shareholders with less than 100 shares of Capital Stock, our older form of stock, that have been on the books for many years."[255]

The "extraordinary" repurchase program is notable for its differences from the repurchase program that replaced it in November 2000. First, it was for $240 million, not $30 million. Global Crossing's continued decline in share price meant that by November 2000, ULLICO could no longer afford a $240 million repurchase. Second, it had a proration threshold of 100 shares, not 10,000 shares. When he was interviewed by attorneys from Winston & Strawn, Georgine stated that he believed that the reference to a 100 share threshold was a typographical error, despite multiple references to "100" in various documents relating to the repurchase offer and despite his own statement at the May Board meeting about Capital shareholders with fewer than 100 shares.[256] Thompson

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[251] *Id.*
[252] *Id.*
[253] Board of Directors Meeting Minutes, May 11, 2000 (Exhibit 85).
[254] *Id.*
[255] *Id.*
[256] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File, regarding September 18, 2002 with Robert Georgine, Chairman, President, and Chief Executive Officer, ULLICO, Inc. (September 23, 2002) at 6 (Exhibit 86). Interestingly, Directors John Joyce and Billy Casstevens stated that they believed the initial 10 share threshold in the 1997 stock repurchase was a typographical error, but did not

found no supporting evidence that the 100-share threshold in the extraordinary repurchase program resulted from a typographical error.[257] The difference between this 100-share threshold and the 10,000-share threshold is significant because the 10,000-share threshold kept institutional shareholders from redeeming most of their shares. Yet, many directors and officers who held fewer than 10,000 shares (but more than 100), were able to redeem all of their shares. Third, the "extraordinary" repurchase program allowed the repurchase of Capital stock, whereas the repurchase program approved in the Fall of 2000 did not. If Georgine truly wanted to eliminate the bookkeeping hassles of the many Capital shareholders with fewer than 100 shares—as he had told the Board in May 2000—then the 10,000-share threshold in the Fall 2000 program would not achieve that goal. Thus, it is more likely that by then the threshold was adopted to ensure that officers and directors could sell all their shares.

2. Concerns that Questions Would be Raised About Executive Compensation

In April 2000, ULLICO executives prepared for the May 2000 Board meeting at which they would set the new ULLICO stock price and implement the extraordinary repurchase program. At this same time, they apparently became concerned that a director might raise questions about ULLICO executive compensation practices. In April 2000, Carabillo asked Arnold & Porter to address potential questions from directors and shareholders concerning the disclosure of executive compensation, particularly compensation received by Georgine.[258] In one internal Arnold & Porter e-mail, partner Carey Smith noted:

> If challenge is raised [that compensation ought to be disclosed] at Board of Directors meeting, the question is more difficult. On one hand, the Board is clearly within its rights to delegate to the Compensation Committee the right to set executive compensation. However, such delegation does not necessarily discharge the non-committee directors' duty of care. Thus, a director may be able to win the right to learn what the Committee is doing on the theory that such information is vital to the director's performance of duties to the corporation.[259]

To address these concerns, Arnold & Porter drafted a "2000 Strategy Book" for management's use at the May 2000 Board meeting. The Strategy Book lays out a number of possible responses to different challenges that might be made at the meeting. The Strategy Book states that "[a]ll of the responses assume that no disclosure will be

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have information about the 100 share threshold in the extraordinary repurchase. Memorandum from Christopher M. McClellan, Winston & Strawn, to ULLICO File, regarding September 17, 2002 Interview with John T. Joyce, Director, ULLICO, Inc. (September 19, 2002) at 3 (Exhibit 87).

[257] Thompson report at 37 (Appendix 1).

[258] Letter from Joseph Carabillo, ULLICO, Inc., to Rick Baltz and Carey Smith, Arnold & Porter (April 14, 2000) (Exhibit 88).

[259] E-mail from Carey Smith, Arnold & Porter, to Paul Berger, Arnold & Porter (April 17, 2000) (Exhibit 89).

made with respect to actual executive compensation. We understand that ULLICO is considering options such as obtaining a compensation consultant's report stating that the levels of executive compensation are reasonable."[260] One of the suggestions for how to handle criticism regarding compensation was the formation of a "blue ribbon" corporate governance committee to review issues relating to compensation. Arnold & Porter suggested that the creation of such a committee could be an effective "pre-emptive strike" against criticisms regarding compensation levels of ULLICO executives.[261]

While no director raised any concerns about executive compensation at the meeting, the company did proceed with the creation of the Corporate Governance Committee. The clear concern among officers and their outside counsel that the Board might raise questions about executive compensation raises serious questions about what ULLICO's management was attempting to hide and why.

3. Preparation and Execution of the 2000 Formal Stock Repurchase Plan

On November 3, 2000, Georgine convened a special meeting of the Board of Directors. At this meeting, the Board abandoned the "extraordinary" repurchase plan because Global Crossing had failed to meet the $43 trigger price. Georgine told the Board he still believed some form of repurchase was merited, and recommended that ULLICO repurchase $30 million worth of stock from shareholders at $146.04 per share.

During October 2000, attorneys at Arnold & Porter assisted Carabillo in drafting Board resolutions to authorize this repurchase program. Two Arnold & Porter attorneys made edits to the resolutions in which they proposed changing the 10,000 share threshold to 5,000 shares.[262] However, Carabillo rejected these edits. The Thompson Report states that it is unclear why the 5,000-share threshold was proposed, and why management insisted on the 10,000-share threshold instead. However, when interviewed by the Thompson staff, Grover McKean, former ULLICO general counsel and ULLICO director, stated that the 10,000-share threshold "may have been too high," and that a 5,000 share threshold would have been more appropriate to accomplish the goal of eliminating small shareholders.[263] Rick Baltz of Arnold & Porter told the Thompson staff that he informed Carabillo that 10,000 shares was not a typical "odd lot" as defined in SEC tender offer rules, which define "odd lots" as less than 100 shares.[264] However,

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[260] ULLICO, Inc. 2000 Strategy Book, May 10, 2000 (Exhibit 90).
[261] *Id*.
[262] Fax from Carey Smith, Arnold & Porter, to Joseph Carabillo, ULLICO (October 31, 2000) (Exhibit 91); Memorandum from Joseph Carabillo, ULLICO, Inc., to Robert Georgine, ULLICO, Inc. (October 30, 2000) (Exhibit 77).
[263] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 9, 2002 Interview with Grover McKean, Senior Vice President of Investments, ULLICO, Inc. (July 16, 2002) at 4 (Exhibit 92).
[264] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 25, 2002 Interview with Richard Baltz, Arnold & Porter (July 26, 2002) at 5 (Exhibit 93).

Carabillo told Baltz that the 10,000-share threshold was consistent with past practices, and with "ULLICO's goal of eliminating small shareholders."[265]

Before the November 2000 Board meeting, Arnold & Porter attorney Dennis Lyons had a discussion with Carabillo regarding the impact of the 10,000-share proration threshold. Lyons told Carabillo that under the proposed resolution, directors who owned fewer than 10,000 shares of ULLICO stock were being asked to approve a transaction that would grant them preferential treatment over shareholders holding more than 10,000 shares.[266] Lyons advised Carabillo that this action needed to be approved by a majority of disinterested directors.[267] Lyons informed Carabillo that "no interested director should be permitted to vote for the November 2000 repurchase program."[268] Carabillo never presented this advice to the Board, and all of the directors who attended the November 2000 Board meeting voted on the resolutions, including those with a personal, financial interest in the outcome. Carabillo has denied that Lyons ever provided him with this advice.[269]

Prior to the November 2000 Board meeting, there was also discussion about whether shareholders under 10,000 shares should be categorically exempt from proration. Carabillo considered a proposal to allow Georgine to purchase some, but not all, of the shares tendered by shareholders under 10,000 shares.[270] This proposal was not incorporated in the final resolution. However, the fact that Carabillo proposed it calls into question Carabillo's claim that one of the two reasons for the 10,000-share threshold was the company's desire to eliminate small shareholders.

The formal repurchase program for 2000 had the following key elements. First, the repurchases would take place at the share price of $146.04, despite the decline in Global Crossing's value since the time ULLICO's stock price was last set. Second, shareholders holding less than 10,000 shares would be able to have all of their shares repurchased if they tendered them.[271] Shareholders holding more than 10,000 shares would only have a tiny fraction of their shares repurchased.[272] Third, the implementation of the plan was subject to the company receiving tenders of 100% of shares owned by all stockholders holding in excess of 2% of outstanding stock.[273] The so-called "2%" rule meant that the Company expected that at least $883 million of stock would be tendered in an offering capped at $30 million.

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[265] *Id*.
[266] Memoradum from Charles B. Klein , Winston & Strawn, to ULLICO File regarding July 30, 2002 Interview with Dennis Lyons, Arnold & Porter (August 2, 2002) at 5 (Exhibit 94).
[267] *Id*.
[268] *Id*.
[269] Thompson Report at 44 (Appendix 1).
[270] Fax from Joseph Carabillo, ULLICO, to Rick Baltz and Carey Smith, Arnold & Porter, (October 31, 2000) (Exhibit 95).
[271] Board of Directors Meeting Minutes, November 3, 2000 (Exhibit 74).
[272] *Id*.
[273] *Id*. This provision was subject to a waiver by the Chairman so long as the repurchase would not cause a significant redistribution of equity.

On November 21, 2000, Georgine sent a letter to all ULLICO shareholders announcing the new formal repurchase program. The letter stated that "the Company anticipates receiving shares in excess of the $30 million it is offering to repurchase, so it will pro-rate each submission so all participating stockholders share equitably in the offering."[274] This statement was false. Only shareholders above the 10,000-share threshold would be prorated. The formal offer to repurchase was made on December 14, 2000, and it lasted until January 16, 2001. The tender offer documents, unlike the Georgine letter, did fully disclose the 10,000-share proration threshold.[275] However, as explained in the Thompson report, the tender offer documents did not disclose: (1) the fact of the discretionary repurchase program; (2) the fact that all ULLICO directors and officers, with the exception of Georgine, owned fewer than 10,000 shares of stock; and (3) that several of the directors and officers had redeemed shares through the discretionary program even before the 2000 formal repurchase tender offer commenced.[276] ULLICO's outside counsel from the firm of LeBoeuf, Lamb, Greene & MacRae had recommended that ULLICO include in the tender offer documents a disclosure of how much stock was held by shareholders holding fewer than 10,000 shares.[277] However, for reasons that were not clear to the Thompson investigation, this suggestion was rejected.

As they had in prior years, the tender offer documents stated that "the Company has not been advised that any of its directors and senior officers presently intend to tender any Shares personally owned by them pursuant to the Offer."[278] However, there was no attempt by the company to determine whether the directors or officers actually intended to tender shares.[279] Also, the company failed to disclose the fact that several of its directors and senior officers had participated in the discretionary repurchase program shortly before the 2000 repurchase.

The 2000 repurchase offer was oversubscribed, and shareholders holding more than 10,000 shares were severely prorated, being able to redeem on average 2.2% of the shares they tendered.[280] By contrast, the company repurchased 100% of the shares tendered by insiders.[281] In all, shareholders holding more than 10,000 shares tendered 7,400,693 shares of Class A stock, worth more than $1 billion, and ULLICO repurchased 162,891 of those shares for $23.8 million.[282] Shareholders holding fewer than 10,000 shares tendered 42,532 shares, all of which were repurchased by ULLICO for

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[274] Letter from Robert Georgine to James McNulty (November 21, 2000) (Exhibit 96).
[275] Offer to Purchase for Cash By ULLICO, Inc. for up to 205, 423 Shares of its Common Stock at $146.04 Net Per Share, December 14, 2000 (Exhibit 97).
[276] *See Id.*
[277] *See* Fax from Douglas N. Beck, LeBoeuf, Lamb, Greene & MacRae, LLP, to Teresa Valentine, ULLICO (November 16, 2000) (Exhibit 98).
[278] Offer to Purchase for Cash By ULLICO, Inc. for up to 205, 423 Shares of its Common Stock at $146.04 Net Per Share, December 14, 2000 (Exhibit 97).
[279] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding May 23, 2002 Interview with Teresa Valentine, ULLICO (May 30, 2002) at 2 (Exhibit 99).
[280] Thompson Report, Exhibit 6 (Appendix 1).
[281] Thompson Report at 45 (Appendix 1).
[282] Thompson Report, Exhibit 6 (Appendix 1).

$6,211,373.[283] If the repurchase had taken place under the extraordinary repurchase program, with its $240 million cap and its 100-share proration threshold, the directors and senior officers would not have been able to redeem as many shares, even though the overall offer was eight times larger.[284]

4. Summary of All Repurchases Made at $146.04

The Thompson investigation revealed a number of important facts about the repurchases of company stock made at the $146.04 share price:

- Between the formal repurchase program and discretionary repurchases directed by Georgine, ULLICO repurchased a total of 305,636 shares of Class A and Capital Stock at the $146.04 share price, using $44.6 million in company funds.

- 20 directors and officers redeemed a total of 93,923 shares at the $146.04 share price, and received $13.7 million, or 31% of the company funds that were used to repurchase stock at the $146.04 share price.

- $9.63 million of the $13.7 million used to repurchase stock from directors and officers was used to repurchase stock that they had purchased pursuant to the exclusive 1998 and 1999 offers.

- $4 million of the $13.7 million in stock repurchased from officers and directors was repurchased through the formal repurchase program, and $9.7 million was repurchased through the discretionary repurchase program.

- ULLICO directors and officers realized a pre-tax profit of at least $10.7 million on the repurchases made from them at the $146.04 share price.

ULLICO directors interviewed by the Thompson staff had varying reactions when these statistics were described to them. Director Wyse stated that he was surprised to learn that officers and directors received one-third of the funds used for repurchases at the $146.04 share price.[285] He said that if he had known this, he would have spoken out on the issue. Director Bahr stated that if he knew that large shareholders were going to be severely prorated, he would not have approved the 2000 repurchase program.[286] Director McNulty, who was also General Counsel of Union Labor Life Insurance Company, expressed no concern about the 10,000-share threshold, but stated that if he had known about the severe proration, he would have considered whether it raised fiduciary duty

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[283] "Total Repurchases of Stock from Under-10,000 Shareholders," (Chart provided by Winston & Strawn) (Exhibit 100).
[284] Thompson Report at 45–6 (Appendix 1).
[285] Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 18, 2002, Interview with Roy O. Wyse, Director, ULLICO, Inc. at 5 (July 26, 2002) (Exhibit 10).
[286] Memorandum from Christopher M. McClellan, Winston & Strawn, to ULLICO File regarding July 15, 2002, Interview with Morton Bahr, Director, ULLICO, Inc. at 6 (August 21, 2002) (Exhibit 71)

issues.[287] Directors Sweeney and Chavez-Thompson expressed concern about whether the repurchases were consistent with positions taken by the AFL-CIO.[288] Several other directors, including Wilhelm, Hanley, and Chavez-Thompson expressed surprise or shock at the $13.7 million in director and officer repurchases.[289] Other directors, however, including Brown, Hurt, Kruse, Casstevens, and Joyce, indicated that they were either not surprised, not troubled, or saw no problem with the repurchases.[290]

IV. THE INVESTIGATION AND REPORT BY GOVERNOR JAMES THOMPSON

A. The Initiation of the Thompson Investigation

The ULLICO stock trades were reportedly uncovered during a federal grand jury investigation of the Ironworkers Union and Jacob West, its president, who was also a member of ULLICO's Board of Directors. The United States Attorney's office in Washington, D.C. had been investigating West on charges of embezzling from the Ironworkers' Union. During this investigation, questionable stock trades were discovered when investigators were trying to determine the source of some of West's money.[291] Ultimately, West pled guilty in October 2002 to charges of embezzlement and falsifying a financial report and was sentenced to three years in prison and fined $125,000. As a result of the broader probe into the Ironworkers Union, seven union officials, two outside accountants, and an insurance broker all pled guilty.[292]

In mid-March, 2002, the media reported that the grand jury's investigation was broadening to include ULLICO stock trades. On March 15, 2002, *The Wall Street Journal* reported that the grand jury was investigating ULLICO and that at least two ULLICO officers had been subpoenaed to appear before the grand jury and testify regarding the stock trades.[293] Over the next several weeks, more details about the ULLICO stock transactions emerged in the press.

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[287] Memorandum from Charles B. Klein to ULLICO File regarding July 10, 2002 Interview of James McNulty, General Counsel of Union Labor Life Insurance Company at 4 (July 18, 2002) (Exhibit 101).
[288] Memorandum from Timothy M. Broas to ULLICO File regarding May 31, 2002 Interview of John Sweeney, President AFL-CIO at 2 (June 1, 2002) (Exhibit 102); Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 11, 2002 Interview with Linda Chavez-Thompson, Executive Vice President, AFL-CIO (July 17, 2002) at 3 (Exhibit 13).
[289] Thompson Report at 47–48 (Appendix 1).
[290] *Id.* at 48.
[291] Aaron Bernstein, "Global Crossing: Labor's Questionable Windfall," *Business Week Online*, March 18, 2002; Tom Hamburger and John Harwood, "Inside Deal: How Union Bosses Enriched Themselves On An Insurer's Board," *The Wall Street Journal*, April 5, 2002.
[292] Allan Lengel, "Ex-Boss Of Ironworkers Union Sentenced," *The Washington Post*, October 9, 2003.
[293] Tom Hamburger and John Harwood, "Grand Jury Reviews Stock Transactions By Insurance Firm," *The Wall Street Journal*, March 15, 2002; Tom Hamburger and John Harwood, "Inside Deal: How Union Bosses Enriched Themselves On An Insurer's Board," *The Wall Street Journal*, April 5, 2002; Memorandum from Raymond W. Mitchell, Winston & Strawn to ULLICO File, regarding May 9, 2002 Interview with Joseph A. Carabillo, Former Vice President and Chief Legal Officer, ULLICO, at 4–5 (May 11, 2002) (Exhibit 103).

The notoriety of ULLICO's stock trades was particularly embarrassing for labor unions because the news reports and investigations came at approximately the same time corporate problems at Enron and Arthur Anderson were surfacing. One report in *Business Week* stated that the controversy over the stock trades "undercut" the AFL-CIO's clout while it was preparing to push for corporate governance reforms.

A variety of other investigations of ULLICO were opened in this time period, adding to the company's troubles. In addition to the federal grand jury investigation, the Department of Labor, the Maryland Insurance Administration ("MIA"), the Securities and Exchange Commission, and the National Labor Relations Board all opened investigations of ULLICO. The Department of Labor investigation focused on whether certain stock transactions violated the Employee Retirement Income Security Act ("ERISA").[294] The MIA investigation focused on whether the stock transactions should have a bearing on ULLICO's ability to sell insurance in Maryland.[295] The SEC investigation reportedly focused on whether any of the stock transactions violated federal securities laws.[296] The NLRB investigation sought to determine whether ULLICO engaged in unfair labor practices under sections 8(a)(1) or 8(a)(2) of the National Labor Relations Act.[297]

On April 29, 2002, approximately a month-and-a-half after the initial stories on the ULLICO stock trades appeared, Chairman and CEO Robert Georgine called a special meeting of the ULLICO Board of Directors to discuss the appointment of an independent counsel to investigate the ULLICO stock trades.[298] This meeting followed the release of a proxy statement in late April confirming what had been previously reported in the press and a March 21, 2002, letter from AFL-CIO President John Sweeney to Chairman Georgine calling for an independent investigation of the controversy. The meeting also resulted from concerns among many union members and leaders that the controversy would continue to harm labor's reputation until it was resolved.[299] On April 26, 2002, the

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[294] Tom Hamburger, "Finance Chief Of Unions' Ullico Quits in Protest," *The Wall Street Journal*, March 6, 2003; Tom Hamburger and John Harwood, "Inside Deal: How Union Bosses Enriched Themselves On An Insurer's Board," *The Wall Street Journal*, April 5, 2002; ULLICO, Inc., Subpoena, (United States Department of Labor Pension and Welfare Benefits Administration, April 11, 2002) (Exhibit 104).

[295] Tom Hamburger, "Maryland Joins Investigations Into Deals by ULLICO Directors," *The Wall Street Journal*, December 4, 2002; Letter from Steven B. Larsen, Insurance Commissioner, State of Maryland, to Joseph Carabillo, ULLICO, Inc. (October 18, 2002) (Exhibit 105).

[296] Custodian of Records, ULLICO, Inc., Attachment to Subpoena (United States Securities and Exchange Commission, July 25, 2002) (Exhibit 106).

[297] Charge Against Employer, National Right to Work Legal Defense Fund against ULLICO, Inc. (National Labor Relations Board, August 2, 2002) (Exhibit 107).

[298] Board of Directors Meeting Minutes, April 29, 2002 (Exhibit 108).

[299] Tom Hamburger and John Harwood, "ULICO [sic] Officials Plan To Seek Probe Of Stock Deals," *The Wall Street Journal*, April 26, 2002; Aaron Bernstein, "A Black Eye For Labor," *Business Week*, April 8, 2002. AFL-CIO Executive Vice President Linda Chavez-Thompson noted in her interview with the Winston & Strawn investigators that "there was talk" of appointing a special committee of the board to investigate the stock trades instead of an independent counsel, but AFL-CIO President Sweeney opposed this proposal because he felt such a board committee would not be independent enough. Chavez-Thompson was a ULLICO Director at the time of this conversation. Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding July 11, 2002, Interview with Linda Chavez-Thompson, Executive Vice President, AFL-CIO (July 17, 2002) at 2–3 (Exhibit 13).

Friday prior to the Monday, April 29th meeting, *The Wall Street Journal* reported that the meeting was scheduled and that members of the Board were expected to call for an independent investigation. In particular, it quoted Sweeney as arguing that "ULLICO must live up to the standards we ask others to meet," clearly referencing concerns that a lack of action on the ULLICO stock trades could expose union leadership to charges of hypocrisy.[300]

The April 29th ULLICO Board meeting began with Georgine reading a short statement, in which he cited the negative press coverage of the stock trades as the reason for calling the meeting. In his statement, he described *The Wall Street Journal* and *Business Week* as "two notoriously anti-labor publications" and complained that they had "painted ULLICO in an adverse light for almost a month." Georgine also rejected comparisons being made between ULLICO and Enron and Global Crossing, which he stated was being done "for the purpose of generating a negative picture of our Company and members of its Board of Directors."[301] He also stated that the negative publicity was "having an adverse impact on our Company in the market place" and that ULLICO's "people in the field are feeling the effects of this anti-labor attack on our company."[302] He defended ULLICO as "healthy" and as having "no financial problems," despite Standard & Poor's lowering the financial strength ratings for several of its affiliates. Georgine reiterated "NOTHING justifies the way ULLICO is being pilloried by *The Wall Street Journal* and *Business Week*."[303]

Georgine told the Board that he had concluded that the best course of action was for the controversy to be investigated by "an outside independent counsel of impeccable credentials" who would "investigate all of the facts and circumstances surrounding these press reports with respect to the company's actions."[304] It was also apparently the case that there was limited notice to the Board of his intent to discuss appointing an independent counsel, as Georgine noted in his remarks that he knew "there has been concern among some of you about the absence of the kind of notice you would want to have."[305] Georgine stated that this limited notice was due to the risk of "premature public disclosure" in the media.[306] Georgine summed up his position by stating that ULLICO "should have an independent counsel to find out what was wrong and advise us on how to correct it."[307]

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[300] Tom Hamburger and John Harwood, "ULICO [sic] Officials Plan To Seek Probe Of Stock Deals," *The Wall Street Journal*, April 26, 2002.
[301] Board of Directors Meeting Minutes, April 29, 2002 (Exhibit 108).
[302] *Id*.
[303] *Id*. (Emphasis in original). On March 22, 2002, Standard & Poor's lowered the financial strength rating for Ullico Casualty Co. and Ullico Indemnity Co. to single 'Bpi' and Ullico Standard of America to Casualty Co. to triple-'Cpi'. On March 27, 2002, Standard & Poor's lowered Union Labor Life Insurance Co. to single-'Bpi.' (Standard & Poor's, "S&P Lowers Ullico Casualty Co, Affiliate Ratings to 'Bpi,'" *Press Release*, March 22, 2002; Standard & Poor's, "S&P Lowers Ullico Standard of America Ratings to 'CCCpi,'" *Press Release*, March 22, 2002; Standard & Poor's, "S&P Lowers The Union Labor Life Ins. Co. FSR to 'Bpi,'" *Press Release*, March 27, 2002.)
[304] Board of Directors Meeting Minutes, April 29, 2002 (Exhibit 108).
[305] *Id*.
[306] *Id*.
[307] *Id*.

According to a *Wall Street Journal* account of the Board meeting, the ULLICO Board agreed unanimously to appoint Governor Thompson to investigate the stock trades after four hours of debate that was described as "contentious."[308] The resolution adopted at that meeting retained Thompson and described his mandate: as "to review the facts and circumstances surrounding the Company's issuance and repurchase of its own stock since 1997, and any actions of the Company and persons associated with the Company in connection with the initial public offering of Global Crossing, Inc., and to render legal advice to the Board on such matters and in connection with possible litigation."[309]

Despite the initiation of an investigation, pressure on ULLICO continued to build as a result of the resignations of various ULLICO officials. Over the course of the investigation and its aftermath, six ULLICO directors resigned: AFL-CIO President John Sweeney; AFL-CIO Executive Vice President Linda Chavez-Thompson; Operating Engineers President Frank Hanley; Carpenters President Doug McCarron; NFL Players Association President Gene Upshaw; and Hotel Employees and Restaurant Employees President John Wilhelm.[310] In addition, ULLICO Chief Financial Officer John Grelle resigned on February 25, 2003, writing in his resignation letter "I could not sit by and watch ULLICO disintegrate because corrective actions have not been taken. . . . I find it impossible to continue to represent the company to outside parties because we no longer have a cohesive organization and because there are surreptitious activities taking place that prevent me from properly carrying out my duties as Chief Financial Officer."[311]

B. ULLICO's Management of the Thompson Investigation

While the ULLICO Board gave Thompson a mandate "to investigate the events surrounding ULLICO's 1998 and 1999 stock purchase offers to directors and senior officers, its stock repurchase programs and the Global Crossing investment," his investigation was limited in several important ways.[312]

Because Georgine was intimately involved in the transactions under investigation, he should not have been overseeing Thompson's work. However, unlike several other investigations of corporate wrongdoing, no special, independent investigative committee of the Board of Directors was created at the outset to insulate the investigation from conflicts of interest.[313] By contrast, the internal investigations undertaken by the boards of Enron and WorldCom were created at the start of the investigations to provide such insulation. On October 28, 2001, Enron's Board established the Special Investigative Committee of the Board of Directors, chaired by Dean William C. Powers of the

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[308] "ULLICO Taps Thompson For Stock-Sale Review," *The Wall Street Journal*, April 30, 2002.
[309] Board of Directors Meeting Minutes, April 29, 2002 (Exhibit 108).
[310] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 31 (June 19, 2003).
[311] Letter from John K. Grelle, ULLICO, to Robert A. Georgine, ULLICO (February 25, 2003) (Exhibit 109).
[312] Thompson Report at ii (Appendix 1).
[313] Report of the Special Committee to the Board of Directors (March 25, 2003) (Exhibit 3).

University of Texas School of Law, to investigate Enron's related party transactions.[314] In addition, Powers and the committee's other two directors, none of whom were Enron employees, wrote the report with the legal assistance of an outside law firm that acted as the special committee's legal counsel.[315] Similarly, WorldCom's Board created a special committee of three newly elected members of WorldCom's Board, none of whom were affiliated with the company during the period under investigation, to conduct the company's internal investigation.[316] As with the Enron internal investigation, WorldCom's Special Committee retained an outside law firm to act as its legal counsel.[317] In both cases, the special committees' oversight of the investigations helped insulate them from conflicts of interest involving the board. By contrast, ULLICO's Board retained Winston & Strawn to conduct internal investigation, and the firm reported directly to the entire Board without the oversight of a special independent committee.[318] Thus, Georgine and others who profited from the stock deals were in a position to hinder the investigation.

1. Attempts to Limit Dissemination of the Thompson Report

One way management controlled the investigation was by limiting the dissemination of the report. Initially, before the Thompson Report's release, ULLICO only allowed directors to read the documents at the offices of Winston & Strawn, Thompson's law firm. Directors could not make a copy for their personal use or even take notes. These restrictions prevented ULLICO's shareholders from learning what was in the report.[319] Some of ULLICO's directors even tried to prevent the production of a written report altogether in favor of an oral presentation. Thompson successfully resisted this. As he explained at this Committee's June 19, 2003 hearing:

> And I am pleased to say that [we were authorized to issue a written report] after an initial period of resistance by the old board, who first wanted us to make only an oral report. And I said absolutely not. I am not spending 6 months investigating a very complex set of transactions to come in and give this Board an oral report. Then they wanted to keep the report confidential. Of course, I was bound by that judgment. I had no way to release the report, so we never did and never talked about it. It eventually leaked, as you would suspect it would.[320]

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[314] Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. at 31 (February 1, 2002).
[315] *Id.* at 32.
[316] Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. at 40 (March 31, 2003).
[317] *Id.* at 40–41.
[318] Board of Directors Meeting Minutes, April 29, 2002 (Exhibit 108).
[319] Aaron Bernstein, "A New Twist In Labor's ULLICO Scandal," *Business Week Online*, November 18, 2002.
[320] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 18 (June 19, 2003).

This attempt to maintain control over the dissemination of the Thompson Report ultimately failed. Georgine initially canceled the November 20, 2002, board meeting at which Thompson was to present his report. Thompson responded by writing to all directors and offering to present his report to the directors individually.[321] This was followed by the resignations of AFL-CIO President John Sweeney, AFL-CIO Executive Vice President Linda Chavez-Thompson, and International Union of Operating Engineers President Frank Hanley from ULLICO's Board. In his letter of resignation, Sweeney stated that, "I am forced to conclude that, if I am to fulfill my duty as a director to read Governor Thompson's report, I may be required to withhold the report from the labor-movement institutions that are ULLICO shareholders. . . . I cannot adequately fulfill both my obligation to ULLICO and to the labor movement under these circumstances."[322] In addition, Hanley criticized the "seemingly adversarial approach taken towards Governor Thompson's investigation, his presentation of his findings to the Board, and the release of his report."[323] At the end of the following month, the pressure to release the Thompson Report increased further when the United Auto Workers Union, whose pension fund is a ULLICO shareholder, sued ULLICO seeking its release.[324] Ultimately, the Thompson Report was released in early April 2003.[325]

2. ULLICO's Hiring of Lawyers to Defend Against the Thompson Investigation

Another sign that ULLICO management did not genuinely support the Thompson investigation was the fact that it hired a cadre of lawyers to represent the company during the investigation. Prior to Georgine's departure, ULLICO paid Winston & Strawn $2,141,183 to investigate the stock transactions.[326] It also paid more than $2 million to ten different law firms to represent officers and directors who were investigated by Winston & Strawn.[327] In addition, ULLICO paid Sidley Austin Brown & Wood, as well as two consultants, almost $2 million more to review and critique the Thompson report.[328] Therefore, prior to the arrival of new management in May 2003, ULLICO spent more than $6 million on the internal investigation of the stock transactions. Two thirds of that money was spent either defending officers and directors in the investigation, or paying outside lawyers and consultants to review and criticize Thompson's work.

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[321] Aaron Bernstein, "A New Twist In Labor's ULLICO Scandal," *Business Week Online*, November 18, 2002.
[322] Letter from John J. Sweeney, AFL-CIO, to Robert Georgine, ULLICO (December 2, 2002) (Exhibit 110); Letter from Linda Chavez-Thompson, AFL-CIO, to Robert Georgine, ULLICO (December 2, 2002) (Exhibit 111).
[323] Letter from Frank Hanley, International Union of Operating Engineers, to Robert Georgine, ULLICO (December 1, 2002) (Exhibit 6).
[324] "UAW Sues Insurer For Disclosure of Stock Sales to Directors," *Securities Litigation & Regulation Reporter*, February 12, 2003.
[325] ULLICO, Inc., "ULLICO Releases Expert Legal Reviews and Analyses of Thompson Report; No Crimes Committed, No Securities Laws Violated," *Press Release*, April 2, 2003.
[326] Stock Sale Purchases Investigation (Spreadsheet provided by ULLICO management to Committee staff) (Exhibit 112).
[327] *Id*.
[328] *Id*.

The decision by ULLICO management to hire Sidley Austin Brown & Wood to review and critique the Thompson Report stands out as particularly questionable. While a resolution of the Board of Directors was required to initiate the internal investigation and hire Winston & Strawn, ULLICO management hired Sidley without the approval of the Board. ULLICO's new Chairman drew attention to this fact at the Committee's hearing:

COLLINS:	Governor Thompson informed us that after he concluded his investigation and presented his report that ULLICO hired another outside law firm, Sidley Austin Brown and Wood, to prepare a counter-report refuting his findings and recommendations. Do you believe that it was a prudent use of company funds, after hiring a prestigious law firm headed by Governor Thompson to do a fair evaluation of what happened, to then go and hire another law firm to try and counter what was found?
O'SULLIVAN:	Whether it was prudent or not, I found it interesting. They were hired by the company, not with the approval of the Board. I should have stated it before—
COLLINS:	Excuse me, can I clarify? The Board did not approve the hiring of the second firm?
O'SULLIVAN:	Not to my knowledge, it was hired by the company.

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LEVIN:	On that one comment of yours, you say that second firm which was hired to review the Thompson report was hired by the company. You meant by the management?
O'SULLIVAN:	Yes, Senator.
LEVIN:	As far as you know, not by the Board?
O'SULLIVAN:	As far as I know, not by the Board.[329]

[329] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 35 (June 19, 2003).

It is also remarkable how much Sidley and other consultants were paid. Prior to Georgine's departure, Sidley was paid $1,569,065.[330] Sidley's work consisted largely of reviewing the Thompson Report and preparing a 29-page rebuttal. Sidley did little or no fact finding of its own. Rather, it conducted a legal analysis based on the facts already gathered by Thompson. It is noteworthy that Sidley charged almost $1.6 million for its work, while Winston & Strawn charged just $500,000 more for its far more extensive work of conducting the investigation, interviewing dozens of witnesses, and drafting a detailed report. The Special Committee used Sidley's work product in deciding not to adopt the Thompson report in full, but since new management came to ULLICO in May 2003, the Sidley report has essentially been rejected. ULLICO ceased using Sidley almost immediately after the new management took over, and in fact, ULLICO's new management has committed to investigate the decision to hire Sidley and the services provided by Sidley.

In addition to the $1.6 million spent on Sidley's services, ULLICO paid substantial amounts to others to review or criticize Winston & Strawn's work. The company paid $107,071 to AON Consulting to prepare a report that was submitted together with the Sidley rebuttal.[331] The AON report concluded that ULLICO officers and directors were under-compensated, and this report was used, in effect, to try to justify the stock profits made by many ULLICO officers and directors.[332]

ULLICO also paid more than $300,000 to lobbyist Robert Juliano to consult with management about the report.[333] Juliano describes himself as a "friend and professional contact" of Georgine.[334] He states that he was brought into the ULLICO matter by lawyers at Feder Semo & Bard and Baker & Botts, two of the law firms defending Georgine.[335] What is most remarkable about Mr. Juliano's involvement is that he worked on the ULLICO matter for over a year, billed the company for 647 hours at $500 per hour, and yet never produced a single piece of written work product for ULLICO.[336] ULLICO did not possess a single letter, memo, or note from Mr. Juliano reflecting his 647 hours of work, other than copies of the bills he submitted.[337] In fact, there was not even a written contract or agreement between Mr. Juliano and ULLICO.[338] In an interview with Committee staff, Mr. Juliano explained that he sat in many meetings and conference calls with ULLICO management, and that he explained the importance of ULLICO to people in the labor movement. Mr. Juliano did not review any of the

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[330] Stock Sale Purchases Investigation (Spreadsheet provided by ULLICO management to Committee staff) (Exhibit 112).
[331] *Id*.
[332] Preliminary Analysis of Total Direct Compensation for Select Officers and Directors of ULLICO, Robert B. Jones, AON Consulting (Jan. 2003) (Exhibit 113).
[333] Stock Sale Purchases Investigation (Spreadsheet provided by ULLICO management to Committee staff) (Exhibit 112).
[334] Interview of Robert Juliano (December 1, 2003).
[335] *Id*.
[336] *Id*.
[337] Letter from Teresa Valentine, Associate General Counsel, ULLICO, to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs (November 14, 2003) (Exhibit 114).
[338] Interview of Robert Juliano (December 1, 2003)

documents ULLICO compiled and produced to Congress, and he said he never lobbied Congress regarding the ULLICO matter.[339]

Mr. Juliano stated that he was "surprised" that there were any questions about his work for the company, and suggested that Committee staff speak with Teresa Valentine, one of ULLICO's in-house lawyers.[340] For her part, Valentine stated that she was not very familiar with Juliano's services during the year that he worked on the ULLICO matter.[341] She said that Juliano did not participate in the weekly strategy meetings that management held on the matter.[342] She said that she did not see Juliano's bills as they were submitted and paid but that when she saw them as they were compiled pursuant to the Committee's request, she was "shocked" at the size of the payments.[343] Valentine also confirmed that Juliano was a friend of Georgine.[344]

In addition to the $6.6 million that ULLICO spent conducting and defending against the Thompson investigation, the company spent more than $7.3 million defending the company, its officers, and directors in the various investigations being conducted by federal and state authorities. The almost $14 million in total legal and consulting fees paid by ULLICO costs should be considered as part of the overall financial loss that the misconduct of ULLICO's senior management caused to ULLICO. The following table summarizes how much ULLICO spent on legal fees:

FEES RELATING TO THOMPSON INVESTIGATION

	Prior to New Management	***After New Management***
Counsel Conducting Investigation		
Winston & Strawn	$2,141,183.29	$224,046.90
Total Counsel Conducting Investigation	***$2,141,183.29***	***$224,046.90***
Counsel for Directors & Officers		
Baker Botts	$544,844.14	$57,561.88
Janis, Schuelke & Wechsler	$451,745.95	$6,919.69
William Himelman	$26,637.00	$0.00
Davis, Cowell & Bowe	$15,517.96	$92.50
DeCarlo, Connor & Selvo	$181,434.02	$1,457.50
Irell & Manella	$62,916.88	$0.00
John W. Kern	$0.00	$5,830.34
Manatt Phelps	$617,937.92	$8,463.11
Rotatori Bender	$101,583.94	$0.00

[339] *Id.*
[340] *Id.*
[341] Interview of Teresa Valentine (November 18, 2003).
[342] *Id.*
[343] *Id.*
[344] *Id.*

Shaw Pittman	$31,669.36	$0.00
Total	***$2,034,287.17***	***$80,325.02***
Counsel/Consultants Reviewing Thompson Investigation		
Sidley Austin Brown	$1,569,065.64	$123,899.13
AON Consulting	$107,071.00	$0.00
Robert Juliano	$323,500.00	$0.00
Total	***$1,999,636.64***	***$123,899.13***
Other Counsel		
LeBoef, Lamb	$6,137.46	$8,602.52
TOTAL THOMPSON INVESTIGATION	***$6,181,244.56***	***$436,873.57***

FEES RELATING TO INVESTIGATION OF STOCK OFFERS

	Prior to New Management	***After New Management***
Counsel		
Arnold & Porter[345]	$1,712,553.36	$14,220.44
Baker Botts[346]	$1,561,025.37	$12,043.95
Ballard Spahr Andrews & Ingersoll	$230,598.55	$0.00
Feder Semo Clark[347]	$2,407,863.75	$540,045.71
Gibson Dunn & Crutcher	$11,981.70	$0.00
McKenna Long & Aldridge	$0.00	$250,000.00
Miller & Chevalier	$0.00	251,670.24
Piper Rudnick	$46,431.40	$1,398.38
Rees, Broome & Diaz	$0.00	$9,426.05
Ross, Dixon & Bell	$2,311.38	$0.00
Yablonski, Both & Edelman	$37,575.34	$0.00
Total	***$6,010,340.85***	***$1,078,804.77***
Consultants		
PriceWaterhouseCoopers	$22,028.50	$0.00
Computer Expenses		

[345] The fees for Arnold & Porter, Baker Botts and Feder Semo also included services regarding the Thompson Investigation. However, bills did not differentiate between the Thompson Investigation and the Stock Offer Matter.
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[347] The fees for Arnold & Porter, Baker Botts and Feder Semo also included services regarding the Thompson Investigation. However, bills did not differentiate between the Thompson Investigation and the Stock Offer Matter.

CoreFacts	$0.00	$15,351.81
Production Expenses		
On-Site Sourcing	$1,447.53	$135,260.05
Sequential Copying	$107,163.89	$0.00
Total	***$108,611.42***	***$135,260.05***
TOTAL STOCK OFFER INVESTIGATION	***$6,140,980.77***	***$1,229,416.63***
TOTAL STOCK OFFERS & REPURCHASE AND THOMPSON INVESTIGATIONS		***$13,988,515.53***

3. Substantive Limits on the Thompson Investigation

Governor Thompson's investigation did not include a review of whether the transactions at issue may have violated provisions of the Employment Retirement Income Security Act's ("ERISA").[348] ERISA imposes fiduciary duties on the trustees of pension plans. A number of ULLICO directors were also trustees of pension funds and their conduct in participating in the stock offers and repurchases may implicate their fiduciary duties under ERISA. According to Thompson's staff, they began to analyze ERISA issues because of their clear relevance to the activities under review. However, outside lawyers representing the company informed Thompson's staff that they were not authorized to look at ERISA issues as part of their investigation despite the fact that the resolution authorizing the Thompson investigation did not limit the investigation to whether certain laws were violated. After discussions between Thompson staff and lawyers at Feder, Semo & Bard, Thompson acceded to their request to not investigate or analyze ERISA issues further. It is clear that a comprehensive review of the ULLICO stock transactions should have looked at ERISA, in addition to other statutes. The new leadership of ULLICO has informed Committee staff that they disagreed with the company's decision to limit the Thompson investigation, and intend to determine why Thompson did not investigate ERISA issues.[349]

The Thompson investigation also did not review possible Labor-Management Reporting and Disclosure Act ("LMRDA") implications of these transactions.[350] The LMRDA imposes fiduciary duties on officers of labor unions. The LMRDA states, in relevant part, that it is the duty of union officers to "refrain from dealing with such organization as an adverse party or on behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization[.]"[351] This provision is enforced solely through private litigation brought by union members. It is not enforced by the Department of Labor or any other federal agency. As it had done with respect to ERISA,

[348] 29 U.S.C. §1100 *et seq*.; Thompson Report at 65 (Appendix 1).
[349] Interview with Terence O'Sullivan, Damon Silvers (May 8, 2003).
[350] 29 U.S.C. §501 *et seq*,; Thompson Report at 65 (Appendix 1).
[351] 29 U.S.C. § 501(a).

Governor Thompson's team considered analyzing possible LMRDA implications. However, once again the team was informed by counsel for ULLICO that such analysis was not part of Thompson's charter.

Other factors hindered the Thompson investigation. Directors Biller, Maddaloni, and West did not participate in interviews with the Thompson investigators, citing health problems.[352] Credit Suisse First Boston refused to participate in an interview or provide its work papers to the investigation, citing "corporate policy." The impact of these refusals is unclear. Credit Suisse played a significant role in the matters under investigation, first in designing the repurchase program in 1997, and then in reviewing the extraordinary repurchase program in 2000. Maddaloni and West also participated significantly in the purchase and sales of stock between 1998-2000.

C. The Findings of the Thompson Investigation

The transactions reviewed by the Thompson investigation implicate five main bodies of law: Maryland corporate law; federal securities law; ERISA; the LMRDA; and federal criminal law. The Thompson Report concluded that there was a compelling argument that certain directors and officers had violated their fiduciary duties under Maryland corporate law.[353] Thompson concluded that it would be difficult to make a case that federal securities laws had been violated, and found no evidence of violation of criminal laws.[354] As noted, Thompson's investigation did not examine either ERISA or the LMRDA.[355]

1. Maryland Law

Maryland law defines fiduciary duties for directors slightly differently than it does for officers. So, the Thompson Report analyzed the directors' conduct separately from the officers' conduct. Under Maryland law, a director must perform his duties in good faith; in a manner he reasonably believes to be in the best interests of the corporation; and with the care that an ordinarily prudent person in a like position would use under similar circumstances.[356] A failure to satisfy any one of these three conditions results in a breach of the fiduciary duty of the director. However, Maryland law imposes two significant limitations. First, directors enjoy the protection of the business judgment rule, under which courts presume that directors have acted in accordance with their fiduciary duties. Any person attacking a director's actions has the burden of establishing the lack of good faith or an informed basis for the director's action. Once sufficient evidence is presented to rebut the presumption of the business judgment rule, the burden is on the director to establish that he has satisfied his fiduciary duties. The second limitation is that Maryland law allows a corporation to limit the recovery of damages from officers and directors for

[352] Thompson Report at 14 (Appendix 1).
[353] *Id.* at 91.
[354] *Id.* at 93; *Id.* at 94.
[355] *Id.* at 65.
[356] MGCL § 2-405.1(a).

certain breaches of fiduciary duty. The Thompson Report states that under this limitation and the relevant sections of ULLICO's Articles of Incorporation, "those directors who did not personally benefit from the transactions at issue would not likely be held liable for money damages to the Company or its stockholders."[357]

The report's analysis of the 1998 and 1999 stock offers and 2000 repurchase program concludes that some of ULLICO's directors breached all three statutory standards of fiduciary duty required of ULLICO's directors. The report noted that the 1998 and 1999 stock offers involved:

- The Board approving matters outside their authority and from which they derived a substantial personal benefit, thus possibly breaching the duty of good faith.[358]

- Programs with no coherent or discernible business purpose, thus causing the directors to possibly breach their duty to act in a manner they reasonably believe to be in the best interests of the corporation.[359]

- The Board approving an excessive and possibly impermissible delegation of authority to the Compensation Committee to approve the stock offers, thus possibly breaching the directors' duty to act with the care that an ordinarily prudent person would use under similar circumstances.[360]

The Thompson Report also noted that the 2000 stock repurchase program involved:

- The directors who participated in and disproportionately benefited from the program acting to the detriment of ULLICO's larger shareholders, thus arguably breaching their duty to act in good faith. In addition those directors who participated in the discretionary repurchase program before the November 3, 2000, Board meeting may have violated their duty of good faith by not fully disclosing those repurchases to the Board.[361]

- Benefits to certain directors and officers at the expense of other shareholders with no rational basis for this disparate treatment, thus causing the directors to possibly breach their duty to perform in a manner they reasonably believe to be in the best interests of the corporation.[362]

- Certain directors engaging in little meaningful discussion regarding the repurchase program, with most directors unable to later articulate a reason for the 10,000 share threshold. As a result, the Thompson Report concludes that with

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[357] MGCL § 2-405.2; ULLICO, Inc. Articles of Amendment to Articles of Incorporation (May 24, 1989) (Exhibit 115); Thompson Report at 55-56, 63 (Appendix 1).
[358] Thompson Report at 56 (Appendix 1).
[359] *Id.* at 58.
[360] *Id.* at 61.
[361] *Id.* at 56–57.
[362] *Id.* at 59–60.

> respect to the repurchase program, certain directors may have failed to exercise due care in approving the formal and "discretionary" repurchase programs in 2000.[363]

The Thompson Report further concludes that, given the facts in this case, the business judgment rule would be unlikely to protect the directors who benefited from the programs in question.[364]

The Thompson Report states that under Maryland law, officers owe the corporation the duties of loyalty, obedience, and care. It further notes that "implicit in the officer's duties of loyalty and care is the obligation to disclose to the board all information in his possession that is required by members of the board to perform their responsibilities." This responsibility is heightened when the officer has an interest that conflicts with the interests of the corporation or its shareholders. When an officer has this type of conflict, he must disclose it prior to acting on behalf of the corporation.[365]

The Thompson Report points out that Georgine and Carabillo were intimately involved with the creation and implementation of the 1998 and 1999 stock offers, and the 2000 repurchases. They also had significant personal interests in these programs. However, they failed to disclose to the Board their significant personal interests in the programs. Thompson points out that the "senior management engaged in a concerted effort to withhold executive compensation information from the Board, including compensation received indirectly from the stock offer and repurchase programs." The Thompson Report concludes that, on several occasions "the Board was asked to act without receiving all relevant information," and that "[h]ad management made adequate and complete disclosure of all relevant information regarding the stock offer and repurchase programs to the Board, including their personal interests in these programs, it is possible that the Board and its committees would have acted differently."[366] In conclusion, the Thompson Report finds that "[a] forceful argument exists that certain senior officers of the Company, principally Georgine and Carabillo, violated their duties of loyalty and care to the Company."[367]

Thompson concludes that "a compelling argument exists that directors, particularly those that benefited from self-interested transactions, did not satisfy their fiduciary duties to the Company and its shareholders in connection with the exclusive stock offers to directors and senior officers in 1998 and 1999 and the formal and 'discretionary' repurchase programs in 2000."[368] In his testimony to this Committee, Thompson went one step further:

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[363] *Id.* at 62–63.
[364] *Id.* at 63.
[365] *Id.* at 63–64.
[366] *Id.* at 64–65.
[367] *Id.* at 92.
[368] *Id.* at 54.

> We found that at ULLICO, the stock purchase and repurchase programs were conceived and implemented in such a fashion as to benefit what we call the insiders, the officers and directors, who were allowed to purchase shares without risk, to resell them to the company without restriction both within the context of formal programs and informal programs, and that they violated their fiduciary duties under Maryland law, the State of their incorporation.[369]

2. Federal Securities Law

The Thompson Report's conclusion as to whether federal securities law was violated is different from its conclusions with regard to Maryland corporate law, even though the analysis entails examination of many of the same facts and circumstances. While the report finds clear violations of Maryland corporate law, it hedges its conclusions with regard to federal securities law. The primary difference appears to be the level of intent that the authors believe is required. The report describes the level of intent necessary to establish a violation of Maryland corporate law as negligence, but for federal securities law, it says the level of intent required is "severe recklessness." The report concludes that, although the directors and officers may have acted negligently, "in our view, they did not act with the severe recklessness required to establish a federal securities law violation, particularly given their reliance on counsel concerning securities law matters."[370]

ULLICO is a closely held corporation whose stock is not required to be registered with the Securities and Exchange Commission and is not publicly traded. Nevertheless, the general anti-fraud provisions of Section 10(b)[371] of the Securities Exchange Act and its implementing rule, 10b-5[372] still apply to actions related to the purchase or sale of any

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[369] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 28 (June 19, 2003).

[370] Thompson Report at 93 (Appendix 1).

[371] Section 10(b) states that it is unlawful for any person, directly or indirectly:

> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

[372] Rule 10b-5 states that it is unlawful for any person, directly or indirectly:

> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 CFR § 240.10b-5.

security. The general anti-fraud provisions regarding tender offers under the Williams Act also apply to the tender offer of a non-public company like ULLICO. These provisions are embodied in Rule 14(e), the relevant portion of which provides that "[i]t shall be unlawful for any person … to make any untrue statement of a material fact *or omit to state any material fact* necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with *any* tender offer."[373]

The anti-fraud provision of 14(e) is explicitly addressed to circumstances in connection with a tender offer while the general anti-fraud provision of Rule 10b-5 is addressed to circumstances in connection with any purchase or sale of a security. However, under the facts as described in the Thompson Report, the SEC's Enforcement Division indicated to Committee staff that there is essentially no difference between the elements necessary to establish a violation of the two provisions other than that there must have been a tender offer for 14(e) to apply. To establish a 10b-5(b) violation, one must show that (1) the defendant made a false statement or omission of material fact, (2) with scienter (guilty knowledge), (3) upon which the plaintiff justifiably relied, (4) that proximately caused the plaintiff's damages. Subsections (a) and (c) of Rule 10b-5 arguably do not require a material false statement or omission of fact.

The Thompson Report asserts that a violation of 10b-5 or 14(e) requires that directors have acted with "extreme or severe recklessness,"[374] citing *In re Baan Co. Sec. Litig.*[375] However *Baan* describes recklessness in this context as behavior, which "presents a danger of misleading buyers or sellers that is either known to the defendants or is so obvious that the actor must have been aware of it."[376] The fact that one is aware of the danger of misleading buyers or sellers is what takes the action out of the realm of simple negligence and indicates the type of guilty knowledge sufficient to establish a securities law violation. One need not demonstrate a specific intent to deceive or commit fraud, but merely a knowledge that one is in danger of misleading buyers or sellers and a failure to avoid doing so. With this standard in mind, the circumstances here suggest that at least some of ULLICO's officers had such knowledge and yet allowed other shareholders to be mislead so that insiders could profit.

a. Disclosure Issues: Misrepresentations and Omissions

When announcing the 2000 formal repurchase program to the shareholders in his November 21 letter, Georgine stated that all shareholders would "share equitably in the offering." In fact, however, because of the 10,000 share proration threshold, officers and directors were treated significantly better than other shareholders, which two of the directors admitted was the purpose of the threshold. The Thompson Report states that the disclosure documents related to the 2000 formal repurchase program "arguably" contained material misstatements or omissions in violation of 10b-5 and 14(e). To be

[373] 15 U.S.C. 78n(e) (Emphasis added).
[374] Thompson Report at 67 (Appendix 1).
[375] 103 F. Supp. 2d 1, 19 (D.D.C. 2000)
[376] *Baan* at 20–21.

material, an omission or misstatement must create a substantial likelihood that a reasonable investor would consider it important in making an investment decision. After an independent examination of the evidence, the Thompson Report's conclusion appears to be understated. When viewed in their totality, the misstatements and omissions in the disclosure documents are such that a reasonable investor would consider them important in making investment decisions.

The disclosure documents related to the 2000 formal repurchase program did not disclose any of the following:

- the individual stock ownership of directors and officers,
- the July 1998 or December 1999 exclusive stock offers to directors and officers,
- Georgine's 40,000-share stock purchase credit agreement,
- the put rights under Georgine's employment contract,
- the existence of the "discretionary" repurchase program,
- that Georgine had approved the repurchase from directors and officers of a significant number of shares in 2000 pursuant to the "discretionary" program,
- the impact of the proration provision or how it benefited officers and directors,
- any information regarding executive compensation through the Global Incentive Program or the deferred compensation program, or
- the deemed transactions in ULLICO stock within the deferred compensation program.

If disclosure of these facts would have been considered important to whether an investor would have participated in the repurchase program, then these omissions are material. If these omissions presented an obvious danger of misleading investors, then their omission was reckless as well. Shareholders had three options in response to the tender offer. They could tender their shares, not tender their shares, or take legal action to enjoin the repurchase program. A reasonable shareholder who had been fully informed of the facts outlined above would have known that the proration formula benefited insiders, that insiders had purchased ULLICO stock at artificially low prices, and that insiders were able to sell stock at artificially high prices. Such an informed investor may well have sued to enjoin the transactions upon concluding that the Board was breaching its fiduciary duties.[377] But, most ULLICO shareholders were unaware of those facts at the time of the 2000 and 2001 tender offers because of management's failure to disclose these circumstances to the shareholders.

In addition to these omissions, the Thompson Report also identifies disclosures that were "arguably misleading." For example, the tender offer disclosure documents state that ULLICO "has not been advised that any of its directors and executive officers

[377] Plaintiffs have successfully argued in cases related to proxy statements that misstatements and material omissions deterred them from pursuing appraisal remedies state court. *See, e.g.*, *Wilson v. Great American Indus., Inc.*, 979 F.2d 924 (2d Cir., 1992). Similarly, in this case, more complete and accurate disclosures would have been important to a shareholder's decision whether to pursue state court remedies for breach of fiduciary duty.

presently intend to tender any shares personally owned by them pursuant to the offer."[378] The 2000 disclosure documents also stated that ULLICO and the Board believed the shares to be an "excellent investment opportunity for investors seeking long-term growth of capital."[379] According to the Thompson Report, however, the company had no basis for making the first statement and the second does not appear credible.[380] If the shares were truly thought to be an excellent opportunity, then why would officers and directors sell $13.7 million worth of stock back to ULLICO in early 2000 and 2001? Georgine made similarly misleading statements at the same time he was arranging to sell his own shares at the all time high price of $146.04. Disclosing these repurchases would have provided information to other shareholders that was material, at a minimum, to their ability to evaluate the truthfulness of Georgine's statements

From 1997 to 2001, the only director/officer stock transactions specifically disclosed in the tender offer documents were purchases in the Fall of 1998. The other transactions were never clearly disclosed, purportedly because ULLICO followed a "40 business day" standard used in the disclosure documents, and none of the other transactions happened to fall within that 40 business day period. The documents stated that:

> [B]ased upon ULLICO's records and upon information provided to ULLICO by its directors and executive officers, neither ULLICO nor any of its subsidiaries nor, to the best of ULLICO's knowledge, any of the directors or officers of ULLICO, . . . has effected any transactions in ULLICO's shares during the 40 business days prior to the date [of the relevant disclosure document].[381]

Thompson's investigators were unable to determine why this 40 business day standard was used. One outside attorney for ULLICO indicated to Thomson's staff that it may

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[378] This disclosure is an acknowledgement that the decisions insiders may make as to the disposition of their personal stock may be material to the investment decisions of other shareholders. Offer to Purchase for Cash By ULLICO, Inc. for up to 1,108,647 Shares of its Common Stock at $27.06 Net Per Share, November 10, 1997 at 30 (Exhibit 66); Offer to Purchase for Cash By ULLICO, Inc. for up to 522,648 Shares of its Common Stock at $28.70 Net Per Share, November 9, 1998 at 24 (Exhibit 38); Offer to Purchase for Cash By ULLICO, Inc. for up to 278,086 Shares of its Common Stock at $53.94 Net Per Share, November 16, 1999 at 33 (Exhibit 116); Offer to Purchase for Cash By ULLICO, Inc. for up to 205, 423 Shares of its Common Stock at $146.04 Net Per Share, December 14, 2000 at 35 (Exhibit 97); Offer to Purchase for Cash By ULLICO, Inc. for up to 200,348 Shares of its Common Stock at $74.87 Net Per Share, December 17, 2001 at 37 (Exhibit 117).

[379] Offer to Purchase for Cash By ULLICO, Inc. for up to 205, 423 Shares of its Common Stock at $146.04 Net Per Share, December 14, 2000 (Exhibit 97).

[380] Thompson Report at 69 (Appendix 1).

[381] Offer to Purchase for Cash By ULLICO, Inc. for up to 1,108,647 Shares of its Common Stock at $27.06 Net Per Share, November 10, 1997 at 30 (Exhibit 66); Offer to Purchase for Cash By ULLICO, Inc. for up to 522,648 Shares of its Common Stock at $28.70 Net Per Share, November 9, 1998 at 24 (Exhibit 38); Offer to Purchase for Cash By ULLICO, Inc. for up to 278,086 Shares of its Common Stock at $53.94 Net Per Share, November 16, 1999 at 33 (Exhibit 116); Offer to Purchase for Cash By ULLICO, Inc. for up to 205, 423 Shares of its Common Stock at $146.04 Net Per Share, December 14, 2000 at 35 (Exhibit 97); Offer to Purchase for Cash By ULLICO, Inc. for up to 200,348 Shares of its Common Stock at $74.87 Net Per Share, December 17, 2001 at 37 (Exhibit 117).

have been used "by analogy" to a specific disclosure rule applicable to public company tender offers. However, when Committee staff asked about this explanation, personnel at the SEC's Corporate Finance division indicated that there is no 40 business day period of any kind in the rules applicable to public company tender offers, let alone one related to disclosure of officer and director transactions. While the disclosure statement may have been literally true, it misled by implying that officers and directors were less actively engaged in transactions of company stock than they actually were. This is particularly so in light of the fact that there appears to be no coherent explanation for why the 40 business day disclosure standard was used. Moreover, the failure to disclose the "Top Hat" deferred compensation program and the deemed transactions into and out of ULLICO stock within that program further obscured from other shareholders the extent and timing of actions taken by ULLICO's senior executives to personally benefit from changes in the company's stock price—changes which were easily predictable by ULLICO insiders because they were orchestrated by ULLICO insiders.

Viewed as a whole, if all of these omissions and misstatements together significantly altered the total mix of information available to shareholders, then they were material. It is not necessary that a shareholder would have made a different decision about whether to tender his shares had disclosure been adequate. It is enough that a reasonable shareholder would have considered the information important in deciding whether to participate, not participate, or seek a legal remedy. Nevertheless, the Thompson Report finds that "reasonable people could disagree over whether the disclosure deficiencies are actionable" and that "one could conclude that the disclosure inadequacies, while significant, should not give rise to a claim under 10b-5 or 14(e)."[382] This conclusion appears to rest primarily on the authors' view that the misstatements and omissions of fact in the disclosure documents were either (1) not material or (2) not done in a *severely* reckless manner. However, the misstatements and omissions should be viewed in their totality and in relation to a potential shareholder decision to seek a state court remedy as well as whether or not to participate in the tender offer. In this light, the misstatements and omissions here are material. As for intent, all that is required is scienter. At least with respect to certain officers and directors, the evidence is persuasive that the inadequate disclosures were made with reckless disregard for the possibility of misleading other shareholders. That is sufficient to establish scienter.

Put another way, given all the circumstances, the behavior of certain officers and directors indicates an awareness that they were, at a minimum, taking advantage of circumstances under their control to benefit themselves at the expense of other shareholders. That guilty knowledge is enough to establish a securities law violation, even if they did not set out from the beginning with an intent to defraud the other shareholders. Specifically, it is difficult to believe that, in designing, implementing, and controlling the timing of all of the transactions at issue, Georgine and Carabillo acted with mere negligence—that they accidentally enriched themselves and other insiders by millions of dollars at the expense of other shareholders.

[382] Thompson Report at 72 (Appendix 1).

The Thompson Report does not analyze the actions or state of knowledge of specific officers and directors separately, but rather states its conclusions generally, with regard to the entire group of individuals involved. As a general matter, it may be correct that the officers and directors involved, as a group were merely negligent. However, a more focused evaluation of the evidence leads to the conclusion that certain individuals, such as Georgine and Carabillo, were more than merely negligent.

The Thompson Report focuses its attention on the repurchase tender offer in 2000 in conducting its analysis of disclosure issues and actually states its conclusion with regard to potential securities laws violations solely in that context. It does not analyze the inadequate disclosures related to the 1999 tender offer.

In the 14 days between December 17 and the last day of 1999, Georgine and Carabillo engaged in several transactions in ULLICO stock, including borrowing money in order to purchase stock. However, planning and significant steps toward implementing the transactions occurred before the tender offer closed. For example, on December 10, 1999, Carabillo wrote a memo to Georgine in which Carabillo describes his discussions with Arnold and Porter lawyers about the timing of the proposed transactions and whether it might raise tax questions.[383] Therefore, at least 7 days before the end of the tender offer, Carabillo and Georgine were planning the transactions that, if executed earlier, would have been disclosed pursuant to the company's policy of disclosing officer/director transactions in the 40 business days prior to the tender offer. Conducting these transactions in the two weeks following the closing of the tender offer period suggest the possibility that Georgine and Carabillo engaged in a willful attempt to avoid disclosing the transactions through an orchestration of their timing. It is difficult to imagine that a reasonable shareholder who knew that the Chairman and CEO was going to great lengths to acquire stock before the upcoming revaluation, would not reconsider any decision to sell his shares back to the company. The effect of waiting until the end of the year was to eliminate much of the risk of investing in ULLICO shares. The effect of waiting until after the tender offer closed was to eliminate the necessity to disclose the transactions in the tender offer. Whether that was Georgine's conscious aim is unknown, and he has avoiding answering questions on this matter by asserting his right against self-incrimination. However, these two effects and their tendency to mislead other shareholders were so obvious at the time that Georgine and Carabillo must have known about them.

b. Deceptive Acts or Practices Issues

In addition to the issues surrounding inadequate disclosures in the tender offer documents, one could argue that, viewed as a whole, the combination of the exclusive stock offers and the repurchase programs (both "discretionary" and formal) operated as a "device, scheme, or artifice to defraud,"[384] "a practice in the course of business which operates . . . as a fraud,"[385] or a "fraudulent . . . or manipulative act or practice in

[383] *Id.* at 38.
[384] 17 CFR § 240.10b-5(a).
[385] 17 CFR § 240.10b-5(c).

connection with a tender offer."[386] Violations of Rule 10b-5 and section 14(e) do not necessarily require false statements or omissions of material facts. In its analysis of potential violations, the Thompson Report focuses on (1) the operation of the 10,000 share threshold in the formal repurchase program and (2) the mere fact that the directors and officers engaged in transactions in the company's stock during the tender offer process while arguably in possession of material, non-public information.

As discussed earlier, the 10,000-share threshold operated to protect smaller shareholders such as officers and directors in an environment where ULLICO's officially-set price was substantially higher than its true market value. The lack of any other clear explanation of a rational business purpose for the threshold does not in and of itself mean that it was designed to be a fraudulent or manipulative practice. However, one could conclude that it was an intentionally manipulative practice when viewed in the light of and in combination with surrounding facts and circumstances. While the stated purpose for the 10,000-share threshold was to eliminate small shareholders, the evidence suggests that its actual purpose was to benefit officers and directors. The Thompson Report states (without providing names) that two directors admitted that benefiting officers and directors was not merely the effect of the threshold, but its purpose.[387] Upon obtaining interview summaries prepared by Winston & Strawn, Committee staff learned that the two unnamed directors were Morton Bahr and William Bernard.[388] According to Bahr's interview summary, "Bahr was unequivocal that the sole purpose in his mind was to allow the directors and officers to resell shares of stock without being prorated."[389]

Even if it was not designed for that purpose in 1997, to readopt the threshold in 2000 and 2001, when other shareholders would have virtually no ability to sell, was to perpetrate a fraudulent and manipulative practice in connection with a tender offer—a violation of 15 U.S.C. 78n(e). The Thompson Report notes that, the SEC requires public companies to repurchase shares from all shareholders on a pro rata basis when their tender offers are oversubscribed. The only limited exception to this rule is that holders of less than 100 shares (odd lots) may sell their shares without proration.[390] Outside counsel for ULLICO from both LeBoeuf Lamb and Arnold & Porter questioned the appropriateness of the 10,000-share threshold, with some suggesting a 100 share threshold be used, as in the public company context. However, the Thompson Report

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[386] 15 U.S.C. 78n(e).
[387] Thompson Report at 21 (Appendix 1).
[388] Memorandum from Christopher M. McClellan, Winston & Strawn, to ULLICO File regarding July 15, 2002, Interview with Morton Bahr, Director, ULLICO, Inc. (August 21, 2002) (Exhibit 71); memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding September 3, 2002, Interview with William G. Bernard, Director, ULLICO, Inc. (September 4, 2002) (Exhibit 70).
[389] Memorandum from Christopher M. McClellan, Winston & Strawn, to ULLICO File regarding July 15, 2002, Interview with Morton Bahr, Director, ULLICO, Inc. (August 21, 2002) (Exhibit 71). The description of Bernard's statement was less definitive: "He vaguely recalled discussions of eliminating small shareholders, but he did not know if this was one of the reasons underlying the 10,000 share threshold. He also said that it is possible the 10,000 share threshold could be viewed as a form of compensation for directors who were generally deemed to be under-compensated." Memorandum from Charles B. Klein, Winston & Strawn, to ULLICO File regarding September 3, 2002, Interview with William G. Bernard, Director, ULLICO, Inc. (September 4, 2002) (Exhibit 70).
[390] 17 CFR 240.13e-4.

concludes that the company apparently ignored these concerns.[391] This conclusion undercuts the argument that reliance on outside counsel indicates a lack of willful or reckless intent. One can hardly argue that seeking counsel's advice signifies of lack of scienter if ULLICO executives ignored counsel's advice to lower the proration threshold.

The Thompson Report also concluded that "one could argue" that the stock purchases by officers and directors in 1999 violated Rule 14e-3, which prohibits insider and tippee trading in the tender offer context.[392] The Supreme Court has ruled that these requirements attach once a "substantial step" has been taken towards a tender offer.[393] In other words, under Rule 14e-3, once a company takes a "substantial step" to commence a tender offer, it is illegal for those with material information about the offer to purchase or sell securities of that company before the offer is publicly disclosed. At the time of the December 1999 officer and director purchases, ULLICO had taken substantial steps to commence the 2000 tender offer. Insiders were in a better position to understand the extent to which ULLICO had actually realized gains on Global Crossing or planned to realize such gains in the near future. They were also in a better position to assess whether the 2000 repurchase offer would be approved and the likely terms of the offer. Therefore, the Thompson Report concludes that "one could argue" that the officers and directors made the 1999 purchases in anticipation of the subsequent year's tender offer and with nonpublic information about their own ability to redeem the shares at a higher price per share.[394] The nonpublic information included the planned 2000 tender offer and the likely terms of that offer that were favorable to insiders. If the directors and officers possessed material, inside information regarding the 2000 repurchase offer at the time they purchased shares in 1999, then the purchases violated Rule 14(e).

Nevertheless, the Thompson Report concluded that the barriers to establishing such a violation would be significant. This conclusion rests on the same reasons stated earlier; a belief that the potentially illegal acts were not committed with "severe recklessness" or willfully. Thompson cites the complex, technical nature of the securities law requirements and the fact that ULLICO relied on outside counsel as reasons to believe that the intent was neither willful nor reckless,[395] even though ULLICO executives ignored counsel's advice to lower the proration threshold. The Thompson Report did not, as some have claimed, find that there was no securities law violation but merely that one would be difficult to prove. In fact, Winston & Strawn attorneys indicated to Committee staff that whether or not to include in its report a finding that federal securities laws were breached was one of the most hotly debated topics within the team of lawyers who drafted the report, with some arguing vigorously that there was such a violation.

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[391] Thompson Report at 73 (Appendix 1).
[392] 17 C.F.R. § 240.14e-3(a).
[393] *United States v. O'Hagan,* 521 U.S. 642, 672–673 (U.S., 1997).
[394] Thompson Report at 74–75 (Appendix 1).
[395] *Id.* at 75.

3. ERISA

As noted, Governor Thompson did not investigate or draw any conclusions regarding whether the transactions at issue may have violated the Employment Retirement Income Security Act ("ERISA") because he was advised that ERISA was beyond his mandate.[396] Nevertheless, there are two theories under which ERISA could conceivably be implicated by the facts in the ULLICO matter. First, it could be alleged that ULLICO directors and officers who were trustees of pension plans that invested in ULLICO breached the fiduciary duties they owed to those pension plans by participating in stock transactions that deprived the plans of potential profits. Under this theory, it could be alleged that certain directors bought stock cheaply and then participated disproportionately in the 2000 repurchase, therefore using up a disproportionate amount of the $30 million allocated for repurchases in 2000. By doing so, these directors and officers denied these funds to larger shareholders, including the very pension plans of which they are also trustees. However, courts generally require that a breach of fiduciary duty by a pension plan trustee involve some misuse of plan assets, an element that is arguably lacking in the ULLICO case. The second theory that could be pursued under ERISA is focused on the failure to disclose relevant information. One of the primary responsibilities of a fiduciary is to disclose relevant information. Even if a named plan fiduciary has properly delegated investment decisions to another fiduciary, the named fiduciary still has an obligation to provide material information to those making investment decisions. Therefore, one could attempt to make a claim against ULLICO directors who are also pension plan trustees based on those directors' failure to disclose to other fiduciaries or plan participants details regarding the 2000 formal repurchase program and the discretionary repurchases of ULLICO stock.[397]

Similar arguments were made in a lawsuit filed by a participant in the Ironworkers Pension Plan against Jacob West, a trustee of that plan and a former ULLICO director, as well as other former ULLICO directors. In a decision in March 2004, the court held that ULLICO directors who were not trustees of the Ironworkers Pension Plan did not have a fiduciary duty towards the plan.[398] The court refused to dismiss the complaint against West, finding that West was a fiduciary of the plan, and that the plaintiff had stated an adequate claim to survive a motion to dismiss based on West's self-dealing in ULLICO stock and his failure to disclose these transactions to plan participants.[399] The court also allowed the lawsuit to proceed against other ULLICO directors to the extent the plaintiff could demonstrate those directors knowingly participated in fiduciary breaches by West.[400]

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[396] 29 U.S.C. §1100 *et seq*.; Thompson at 65 (Appendix 1).
[397] *See* Memorandum from Jon O. Shimabukuro, Congressional Research Service, to James R. McKay, U.S. Senate Governmental Affairs Committee, regarding ULLICO and the Disclosure of Material Information Under ERISA (May 12, 2003) (Exhibit 118).
[398] Barry v. Trustees of Ironworkers Pension Plan at 10 (D.D.C. 2004).
[399] *Id*. at 18.
[400] *Id*. at 15.

4. LMRDA

Governor Thompson did not investigate or draw any conclusions regarding whether the Federal Labor-Management Reporting and Disclosure Act ("LMRDA") may have been violated as again he was advised that it was beyond his mandate.[401] Nevertheless, in this case, a claimant could allege that ULLICO directors who were also union officers participated in stock transactions that inured disproportionately to their benefit and to the detriment of large shareholders, including unions of which those same directors were also officers. They could claim that such transactions violate the LMRDA's prohibition on union officers acquiring a pecuniary interest that conflicts with the "interests" of the union. However, courts considering this provision have been divided as to whether a union officer can be held liable for transactions not involving union funds, and where they have held them liable for such transactions, they have not done so in circumstances like those in the ULLICO matter. Therefore, it is unknown whether a suit under the LMRDA relating to the ULLICO matter would be successful.[402]

5. Criminal Law

The Thompson investigation considered whether the ULLICO stock transactions violated any criminal laws, and concluded, with little explanation, that "no evidence of criminal intent has been uncovered and therefore, in our opinion, a prosecutor, based upon the present record, should not conclude that criminal statutes reviewed as part of our investigation have been violated."[403] The Thompson Report bases its conclusions about potential criminal liability in the ULLICO matter on the distinction between the level of intent required to establish civil liability (recklessness or negligence) and that required for criminal fraud (specific intent to defraud the victim). The Thompson Report found that:

> While the evidence gathered in our investigation demonstrates that certain ULLICO officers and directors were treated more favorably than other shareholders in the sales of their ULLICO stock, their actions in connection with these sales, while arguably improper, were not criminal. Based on the information available to the Special Counsel, no evidence of criminal intent has been uncovered[.][404]

The grand jury investigating the ULLICO matter is likely investigating, among other things, a possible violation of the mail fraud statute. There are two elements of mail fraud: (1) having devised or intending to devise a scheme to defraud, and (2) use of the mail for the purpose of executing or attempting to execute the scheme.[405] The

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[401] 29 U.S.C. §501 *et seq*; Thompson Report at 65 (Appendix 1).
[402] *See also* Memorandum from Jon O. Shimabukuro, Congressional Research Service, to James R. McKay, U.S. Senate Governmental Affairs Committee, regarding ULLICO and the Labor-Management Reporting and Disclosure Act (June 16, 2003) (concluding that it "seems unlikely" such actions constitute a breach of fiduciary duty under the LMRDA.) (Exhibit 119).
[403] Thompson Report at 76 (Appendix 1).
[404] *Id.* at 76.
[405] Schmuck v. United States, 489 U.S. 705, 721 n.10 (1989).

government must prove that the defendant had the specific intent to defraud. The requisite intent can be "inferred from the totality of the circumstances and need not be proven by direct evidence."[406] Fraudulent intent can be shown if a representation is made with reckless indifference to its truth or falsity.[407] Fraudulent intent can also be "inferred from the modus operandi of the scheme."[408]

Before one concludes that there is no evidence of criminal intent, one should examine Georgine's and senior ULLICO executives' behavior in its totality and consider whether it is consistent with a scheme to defraud.

- Georgine created three exclusive opportunities for ULLICO directors and senior officers to buy stock at prices that were below ULLICO's true market value. Directors and senior officers purchasing stock in these offers were almost certain to make large profits on their purchases. ULLICO management did not make these opportunities available to ULLICO's other shareholders and did not properly disclose the transactions.

- The Thompson Report itself found that the 1998 and 1999 stock offers had no discernable business purpose.

- Georgine arranged for loan guarantees from ULLICO of $215,000 for himself and two other senior officers so that they could purchase as much undervalued ULLICO stock as possible. These loan guarantees were not made available to any other ULLICO shareholders and were not approved by the Board or any of its committees. In fact, the Compensation Committee had rejected a proposal from Carabillo that ULLICO assist insiders with financing their purchases.

- Less than six months later, when Global Crossing's price was collapsing, Georgine began abusing his "discretionary authority" to repurchase overvalued shares of ULLICO stock from himself and other insiders with millions of dollars in company funds. Other shareholders were never informed of this program, and in fact, it was so exclusive that one officer referred to it as the "director and officer repurchase program."

- The formal repurchase of company stock in 2000, when ULLICO stock was dramatically overvalued, was constructed in such a way as to benefit company insiders. Shareholders holding fewer that 10,000 shares—including many of the company's directors and officers—could have all of their shares repurchased. Large shareholders—including unions and pension plans—could have only 2.2% of their shares repurchased.

- Many of these transactions were conducted in secrecy, without the knowledge of ULLICO's Board or shareholders. The Thompson Report concluded that "in the

[406] United States v. Alston, 609 F.2d 531, 538 (D.C. Cir. 1979).
[407] United States v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982).
[408] United States v. Reid, 533 F.2d 1255, 1264 n.34 (D.C. Cir. 1976).

course of our investigation, we found substantial evidence that ULLICO management engaged in a concerted effort to withhold executive compensation information from members of ULLICO's Board of Directors and its shareholders."[409]

It is difficult to believe that it was only by accident that Robert Georgine and other senior ULLICO officers created the conditions by which they made millions of dollars at the expense of ULLICO's shareholders. Rather, the facts in the ULLICO case suggest a series of intentional acts by Georgine and other senior ULLICO officers calculated to enrich them and other company insiders. The question then, is whether they acted with fraudulent intent. Looking at the overall "modus operandi of the scheme" in the ULLICO stock transactions, the circumstances suggest that Georgine and Carabillo intentionally orchestrated the timing of certain transactions in late 1999 so as to eliminate virtually all risk in the transactions and to conceal from other shareholders the extent to which they were loading up on ULLICO stock. They then arranged to bail themselves out with company funds as soon as it became clear that the stock was overvalued.

The Thompson Report stated that the actions of certain ULLICO officers and directors were "arguably improper" but "were not criminal." Thompson concluded at the time that "no evidence of criminal intent has been uncovered[.]" ULLICO management held up this finding as a vindication. However, it is important to understand the limited nature of Governor Thompson's conclusion. At the Committee's hearing, he stated that "a reasonable person could make the contrary argument" on criminal intent to the one made by his report. He explained that "if a reasonable person could say the criminal law was violated and a reasonable person could say that it was not violated, that a prosecutor would have a difficult time reaching the standard of proof beyond a reasonable doubt."[410]

Criminal charges must be proven beyond a reasonable doubt, and gathering the evidence necessary to meet that high burden requires a different sort of investigation than that conducted by Winston & Strawn or this Committee. A grand jury is reportedly investigating this matter, and that is the appropriate forum for gathering evidence to determine whether specific criminal charges ought to be filed against specific individuals. It should also be noted, however, that during the course of this investigation, five ULLICO directors, including Georgine, invoked their Fifth Amendment right against self-incrimination rather than answer even the most innocuous questions.

6. Recommendations of the Thompson Report

The Thompson Report makes six specific remedial recommendations and 19 recommendations related to corporate governance. The Thompson Report recommends that ULLICO create a special committee of disinterested directors to determine which of the recommendations ought to be adopted. The first recommendation is that "[e]ighteen Directors and officers should return to ULLICO profits from sales of stock purchased in

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[409] Thompson Report at 70–71 (Appendix 1).
[410] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 17 (June 19, 2003).

1998 and 1999, a total of $5.7 million."[411] Unlike the other five remedial recommendations, the first recommendation is not merely phrased in terms of something that a committee of disinterested directors should study. Rather, it "strongly" recommends that eighteen named officers and directors return the profits from stock purchased in 1998 and 1999. The recommendation is particularly strong with regard to Georgine and Carabillo. Thompson notes that even apart from these transactions, Georgine and Carabillo received substantial compensation and bonuses and that they were the two people most responsible for administering the stock offer programs, determining the timing of the transactions, and implementing the repurchase programs. The report leaves to the Board the question of whether any returned profits ought to be distributed to other shareholders who tendered stock in 2000 or whether the company ought to retain the funds. The other five recommendations were for the Special Committee to: (1) determine whether Georgine ought to return profits from his 40,000-share stock purchase credit agreement,[412] (2) determine whether a return of profits or ratification is appropriate for redemptions of stock at $146.06 per share in 2000, where such stock was acquired other than through the exclusive 1998 and 1999 offers,[413] (3) determine whether a return of profits is appropriate for officers Luce and Grelle,[414] (4) set the conditions for the sale of stock that officers and directors purchased in 1998 and 1999 but still hold,[415] and (5) to reexamine the methods and procedures ULLICO uses to set its stock price and impose safeguards that the price is more closely tied to the company's fair market value.[416]

In addition to the specific recommendations designed to remedy the damage done by the stock transactions at issue, the report also "strongly urges" the Board to undertake a series of steps to reform ULLICO's corporate governance. These steps primarily concern: (1) the adoption and enforcement of a code of conduct and ethics; (2) making the Board of Directors smaller, independent, and more effective; (3) increasing disclosure requirements for directors and officers; (4) replacing the discretionary repurchase program; (5) establishing a training program for officers and directors regarding their fiduciary obligations; (6) requiring that any proposed material transaction between ULLICO and its officer and directors be reviewed and approved by either ULLICO's shareholders or its Audit or Corporate Governance Committees; (7) increasing the financial and accounting experience on the Audit Committee; and (8) considering a bar to loans or financing for officer and directors.[417]

V. ULLICO'S RESPONSE TO THE THOMPSON INVESTIGATION

A. The ULLICO Special Committee's Consideration of the Thompson Report

[411] Thompson Report at 97–99 (Appendix 1).
[412] *Id.* at 99–100.
[413] *Id.* at 100–101.
[414] *Id.* at 101–102.
[415] *Id.* at 102.
[416] *Id.* at 102.
[417] *Id.* at 102–107.

On December 2, 2002, the ULLICO Board of Directors voted to create a Special Committee to review the Thompson Report and decide whether to implement its recommendations. The Special Committee was composed of eight directors who had not participated in the stock transactions that were investigated by Governor Thompson. The Special Committee met eight times (four of them by telephone) to discuss the Thompson Report. On March 25, 2003, the Special Committee issued its report.

On the key issue of whether certain ULLICO directors and senior officers violated their fiduciary duties, and should return the proceeds of their stock transactions, the Special Committee disagreed with the Thompson Report. The Special Committee stated that it "was persuaded in its deliberations by arguments advanced by [Sidley's corporate law expert James J.] Hanks that Maryland corporate law was not violated by the directors and officers in the areas in question." The Special Committee found that there was no basis to request that directors or officers disgorge any of the profits made in any of the transactions, stating, "it would be profoundly unfair and immoral to punish or make scapegoats of individuals innocent of any wrongdoing for reasons of pragmatism or expediency."[418] The Special Committee also found that the damage to ULLICO would be repaired not through a return of profits, but through "patient and thorough explanations" of what happened.[419] Three of the eight directors on the Special Committee dissented from the Special Committee's findings, among them was ULLICO's future Chairman and CEO, Terence O'Sullivan.[420]

There is evidence that some on the Special Committee approached their work with a hostile feelings towards the Thompson investigation.[421] For example, one draft of the Special Committee report, dated March 12, 2003, attributes some of the findings of the Thompson investigation to the personal backgrounds of the Thompson investigators:

> In general, we judge the Report to be thorough, well done and very helpful in directing the thoughts of the ULLICO Board to areas important to the next phase of ULLICO's development. The Committee, however, does not agree with all of the explicit and implicit characterizations and value judgements [sic] in the report. *Differences in point of view are not surprising given that the report is written by a staff of lawyers with no discernable labor, or for that matter business, background, and some discernable biases common to those with similar professional, educational*

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[418] Report of the Special Committee to the Board of Directors at 6–7 (March 25, 2003) (Exhibit 3).
[419] *Id*.
[420] Report of the Special Committee to the Board of Directors at 5–8 (March 25, 2003) (Exhibit 3). Interestingly, the final version of the Special Committee Report states that "Nor did the Committee find that the transactions materially injured the interests of any ULLICO employees, shareholders or the corporation," while at least two previous drafts did not include the qualifier "materially" with "injured." (Report of the Special Committee to the Board of Directors at 5–6 (March 25, 2003) (Exhibit 3); Draft Report of the Special Committee at 9 (BK00885) (March 12, 2003) (Exhibit 120); Draft Report of the Special Committee at 5 (BK 01204) (Undated) (Exhibit 121).
[421] In what appears to be a cover letter for the Special Committee Report, Director Mintz, a co-chair of the Special Committee, referred to the Thompson Report as the "Thompson Report 'Devil's Advocate' study." (Letter from Daniel Mintz, M.D. to Members of the Special Committee (March 17, 2003) (Exhibit 122)).

> *and economic backgrounds.* Rather than dwell on peripheral value judgements [sic], however, the Committee chooses to focus on what it sees as central issues.[422]

While the co-Chair of the Special Committee, Dr. Daniel Mintz, did the initial drafting of the report, and this particular draft was produced from his files, he claimed that he was not the source of this language, and did not know where it came from.[423]

A similar accusation is repeated in a letter from Director John Joyce to Director John Wilhelm, both members of the Special Committee:

> And I'm afraid that some of the Thompson report['s] suggestions would have the unintended consequence of damaging ULLICO's ability to effectively function as a business created for the benefit of workers. This should not be surprising in view of the fact that the report is written by a staff of lawyers with no discernable labor, or for that matter business, background—and some discernable biases—who are obviously trying to keep up with the currently fashionable notions about corporate governance. I'm primarily concerned with several recommendations, some innocuous in themselves, which reflect current fashionable notions rather than serious thought. More troubling, taken together they could have the effect of creating an unhealthy adversarial relationship between the Board and Management, weaken necessary Executive authority and inhibit the kind of innovative thinking that produced in [the] Global Crossing investment a half billion dollar gain for the company.[424]

It is noteworthy that seven of the eight members of the Special Committee, including Joyce, agreed to appoint Thompson to investigate in the first place.[425] When interviewed by Committee staff, Joyce explained that he felt that the Thompson investigators were unfairly trying to impose post-Enron standards of behavior on conduct that had occurred earlier.[426] He also claimed that the investigators had an "elitist" bias that union heads were not competent to make the decisions required of them as ULLICO directors.[427]

The co-chair of the Special Committee, Dr. Daniel Mintz, apparently was suspicious of the Thompson investigation as well. Handwritten notes prepared by Mintz

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[422] Sentences taken out in the final report are italicized; the remaining text is not materially different from what appeared in the final version of the Special Report. Draft Report of the Special Committee at 8–9 (BK00884–BK00885) (March 12, 2003) (Exhibit 120); Report of the Special Committee to the Board of Directors at 5 (March 25, 2003) (Exhibit 3).
[423] Interview of Dr. Daniel Mintz, March 22, 2004.
[424] Letter from John T. Joyce, International Construction Institute, to John W. Wilhelm, Hotel Employees and Restaurant Employees International Union (January 9, 2003) (Exhibit 123).
[425] The eighth, Director John T. Dunlop, was absent from that meeting. Report of the Special Committee to the Board of Directors at 18–19 (March 25, 2003) (Exhibit 3); Board of Directors Meeting Minutes, April 29, 2002 (Exhibit 108).
[426] Interview of John Joyce, March 4, 2004.
[427] *Id*.

before the first meeting of the Special Committee reflect some of his thoughts regarding the Thompson investigation:

> Thompson Report innuendo, except. clause, back tracking. . . legal trash talk. When I voted to have Thompson investigate I did not expect his junior staff to do so, and I did not expect for them to be the exclusive interviewers, investigators, editors of the report. I detect biases all over the report and I think they are based in dislike of Georgine/Carabillo—if not labor.[428]

When questioned about these notes, Mintz claimed that when he referred to the Thompson investigators as "biased," he did not mean that they were predisposed to a particular outcome, rather that they reached conclusions based upon speculation rather than incontrovertible evidence.[429] He also said that he could not fully explain why he wrote that "I think they are based in dislike of Georgine/Carabillo—if not labor," but he said that this represented a likely theory regarding why the Thompson report had reached its conclusions without having solid evidence.[430]

In his notes, Dr. Mintz also described his positive views regarding the Sidley rebuttal of the Thompson report:

> Sidley Report—did what I hoped. I was concerned about Maryland law—they removed it. They have been irritating in other respects—priv & confidentiality—but they are faced with mounting investigations—serious ones and they do not want to lose the [illegible] against their defense and let the Thompson Report be the dagger—not to BGeorgine and the officers but to labor.
>
> * * *
>
> Had Sidley been hired rather than Thompson, we'd be dealing with this entirely differently.[431]

Another document found in the files of Special Committee member John Joyce, apparently a strategy memo or a series of talking points, contemplates an "offense" consisting of attacking AFL-CIO President John Sweeney, who had been critical of the self-dealing at ULLICO. When questioned by the Committee staff, Joyce denied knowing about the document or its source, but he confirmed that many of the subjects in the memo had been discussed by ULLICO directors.[432] The memo states:

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[428] Handwritten notes of Dr. Daniel Mintz (BK00735) (Exhibit 124). Dr. Mintz informed the Committee that he prepared these notes as talking points to share with the Special Committee at the beginning of its first meeting. He stated that many of the issues were addressed by other directors at the meeting, and therefore, it was unnecessary for him to speak on many of these points at the meeting.
[429] Interview of Daniel Mintz, March 22, 2004.
[430] *Id*.
[431] Handwritten notes of Dr. Daniel Mintz (BK00735) (Exhibit 124).
[432] Interview of John Joyce (March 4, 2004).

> Someone (needs discussing) starts planting theories about why AFL is trying to push Georgine. [BNA reporter] Brian Lockett would love a story like that. In addition to finding a spot for the left to push Sweeney—the Union privilege folks are running out of capital. Sweeney doesn't have "clean hands"—did he return the $90,000 a year he got for more than ten years from his home local after he had assumed the international presidency? Or better yet, what did he do for that money?[433]

Joyce stated that there were discussions and speculation about why the AFL-CIO was being so critical of Georgine, and that one of the theories was that they wanted to take ULLICO over and use it as a "cash cow."[434] The document also contemplates investigating Damon Silvers, the Associate General Counsel of the AFL-CIO, "Someone should look into Damon Silver [sic]—he seems always to be the attack lawyer for them."[435]

The Special Committee's report, released on March 25, 2003, concluded that "the sales and repurchase of ULLICO shares to officers and directors were transacted in accordance with provisions and procedures developed by competent legal and accounting professionals, did not materially violate corporate by-laws or previous Board actions, and was [sic] consistent with the culture and traditional decision making procedures of ULLICO."[436] The report noted three "background factors" that it considered relevant and mitigating to ULLICO's conduct. First, the Special Committee report stated that the transactions must be examined against the phenomenal growth of ULLICO's investment in Global Crossing, which the report called a "very wise, bold investment."[437] Second, the report stated that the mechanisms for the repurchase program were in place "long before Global Crossing's unexpectedly meteoric rise."[438] Third, the report stated that "we were being asked to examine events that took place many years ago, and we were being asked to evaluate them against a background in which corporate scandals abound."[439] Against this background, the Special Committee voted unanimously to largely accept the Thompson Report's corporate governance recommendations, but rejected Thompson's remedial recommendations, including the recommendation that directors and officers return some of their stock profits.[440]

A majority of the Special Committee concluded that ULLICO management had not violated Maryland corporate law, or any other law. Three members of the Special Committee dissented. One director, Vincent Sombrotto, concluded that nothing illegal

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[433] Undated Typed Document (BK02612) (Exhibit 125). According to ULLICO this document was located in the files of Director John T. Joyce. Letter from James A. Bensfield, Miller & Chevalier, to David A. Kass, United States Senate Committee on Governmental Affairs (June 11, 2003) (Exhibit 126).
[434] Interview of John Joyce.
[435] Undated Typed Document (BK02612) (Exhibit 125).
[436] Report of the Special Committee to the Board of Directors at 5 (March 25, 2003) (Exhibit 3).
[437] *Id*. at 3.
[438] *Id.* at 3.
[439] *Id.* at 4.
[440] *Id.* at 7–9.

was done, but voluntary return of the profits from the stock transaction would repair much of the damage done to the company.[441] Two directors, Wilhelm and O'Sullivan, were agnostic as to whether any laws had been violated, but concluded that only full adoption of the Thompson Report's remedial recommendations would resolve the matter.[442] In contrast, the majority of the Special Committee concluded that the greatest danger to ULLICO came not from the stock transactions themselves, but from how they were characterized by labor.[443] Presumably, the Special Committee meant this to refer to the dissenting directors and other labor leaders, such as AFL-CIO President John Sweeney. Ultimately, the Special Committee's vote against accepting Thompson's remedial recommendations was cast aside almost immediately following Georgine's May 8, 2003, resignation. At the May 13, 2003, meeting, the new ULLICO Board of Directors voted to accept the Thompson Report's remedial recommendations, in effect endorsing the dissenting views held by Wilhelm and O'Sullivan in the Special Committee report.[444]

The previous management continued to use company resources to attack the Thompson Report until it no longer controlled the company. On April 2, 2003, ULLICO released a series of documents including the Thompson Report, the response prepared by Sidley, and supporting documents. In a press release announcing this action, ULLICO stated that "[a]ll of the documents agree that there was no violation of law. . . . In this regard, the company believes that Governor Thompson was ill-served inasmuch as the applicable law on the breach of fiduciary duty was not fully explored by his staff."[445] This statement clearly mischaracterized the Thompson Report, as Thompson himself pointed out in a letter sent on April 4:

> In recent days, ULLICO has made misleading, false and/or defamatory statements in connection with the Special Counsel Report. . . . Not only was the applicable fiduciary duty law, including your expert Mr. Hanks' treatise, thoroughly explored by my staff, but our conclusion that there was compelling evidence of breaches of fiduciary duty was reviewed and endorsed by Professor Mark Sargent whose expert credentials on Maryland law are at a minimum equal to Mr. Hanks' credentials.[446]

Thompson also criticized ULLICO's claim that: "[a]ll of the documents agree that there was no violation of law." Thompson replied "[t]his statement is misleading, as the 'documents' so referenced arguably included the Report of the Special Counsel which in fact, among other things, found compelling evidence that there were violations of

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[441] *Id.* at 7.
[442] *Id.* at 7.
[443] *Id.* at 8.
[444] Board of Directors Meeting Minutes, May 13, 2003 (BK04302–BK4304) (Exhibit 127).
[445] ULLICO, Inc., "ULLICO Releases Expert Legal Reviews and Analyses of Thompson Report; No Crimes Committed, No Securities Laws Violated," *Press Release*, April 2, 2003.
[446] Letter from James R. Thompson, Chairman, Winston & Strawn, to Robert Georgine, Chairman and Chief Executive Officer ULLICO Inc. (April 4, 2003) (Exhibit 128).

Maryland fiduciary law."[447] In addition, Thompson also objected to a statement made by ULLICO's press officer:

> In an April 4, 2003 article in the Daily Labor Report, John Rodgers, ULLICO's press officer was quoted as follows:
>
> > "ULLICO spokesman John Rodgers said the Thompson report showed 'very clearly that there was no violation of the fiduciary duty' either by Georgine or the board members."
>
> This statement is false as we found compelling evidence of such violations.[448]

B. O'Sullivan Takeover and Changes at ULLICO

In the month following the March 25, 2003, release of the Special Committee Report, Terence O'Sullivan, President of the Laborer's Union and a ULLICO director, organized a reform slate of 14 directors with the intention of taking control of ULLICO away from Georgine at the May 8, 2003, shareholders meeting.[449] O'Sullivan eventually gained the support of more than 70 percent of ULLICO's shareholders.[450] Just prior to the shareholders meeting, Georgine resigned under the threat of being forced out. In his May 8, 2003, resignation letter, Georgine wrote:

> I have been advised that were I to assert my rights under my employment contract to stay on as ULLICO's President, I would be stripped of my duties and responsibilities, reduced in effect to President in name only. I have also been told that if I do not resign, the new slate will effectuate a change in control in a matter of weeks for the explicit purpose of ousting me. Under these circumstances, I see no point in staying on.[451]

Later that day, O'Sullivan was named Chairman and Chief Executive Officer of ULLICO and his reform slate of directors were unanimously elected to ULLICO's Board. Shortly thereafter, Edward Grebow was named ULLICO's new President.[452]

On the evening of May 8, 2003, ULLICO also ordered the outside lawyers and consultants defending the controversial stock transactions to cease all such activities.

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[447] *Id*.
[448] *Id*.
[449] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 31 (June 19, 2003).
[450] *Id*.
[451] Letter from Robert Georgine to Terence O'Sullivan (May 8, 2003) (Exhibit 60).
[452] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 31–2 (June 19, 2003).

ULLICO's new leadership also directed its in-house counsel to cooperate fully with the authorities investigating the stock transactions.[453]

During this time, ULLICO also saw a number of significant personnel changes. All the remaining ULLICO officers who were involved in the stock trades were either leaving or being forced out.[454] On May 30, 2003, Joseph Carabillo was fired for cause. He had been on paid leave since the end of March, 2003.[455] That same day, James Luce retired.[456] As noted, Georgine resigned on May 8, 2003.[457] In addition, his daughter, Rosemarie Hechinger, resigned from ULLICO that same month, and his son-in-law, Brian Hechinger, was laid off on June 27, 2003.[458]

At the May 13, 2003, ULLICO Board of Directors meeting, ULLICO voted to adopt the remedial recommendations of the Thompson Report after hearing Thompson's presentation of his report.[459] The resolution, approved by the Board with a vote of 14 to 8 with three abstentions and one recusal, explicitly adopted Thompson's first six recommendations.[460] In particular, the resolution called for the return of the stock profits from the 1998 and 1999 sales of ULLICO stock by officers and directors, in accordance with Thompson's first recommendation.[461] The resolution also provided for ULLICO to "reserve its rights to take additional steps as may be in the best interests of ULLICO, Inc. at that time to recover the monies involved from such individuals."[462] In addition, the resolution also authorized the company to take "whatever steps are necessary and appropriate" to determine the liability of and recover any money owed to the company by service providers, such as law firms and consultants, related to the transactions examined by the Thompson Report.[463]

The May 13, 2003, Board meeting also appointed a Litigation and Regulatory Affairs Subcommittee, to be chaired by former federal judge and White House Counsel Abner Mikva. Terence O'Sullivan has described its mandate as "carrying out the Thompson report's remedial recommendations [two through four], reviewing past executive compensation, including the validity of the rabbi trusts and former Chairman Georgine's claim to be entitled to a 'golden parachute,' and reviewing service provider

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[453] Letter from Terence O'Sullivan to Senator Susan Collins and Senator Carl Levin (June 16, 2003) (Exhibit 129).
[454] ULLICO Chief Financial Officer John Grelle previously resigned on February 25, 2003, prior to ULLICO's leadership change. Letter from John K. Grelle, ULLICO, to Robert A.Georgine, ULLICO (February 25, 2003) (Exhibit 109).
[455] Letter from Edward Grebow, ULLICO, to Joseph Carabillo (May 30, 2003) (Exhibit 130).
[456] Luce Interview.
[457] Letter from Robert Georgine to Terence O'Sullivan (May 8, 2003) (Exhibit 60).
[458] Relatives of Robert Georgine Employed by ULLICO, Inc. or its subsidiaries during his Chairmanship (December 5, 1990 – May 8, 2003) (Table prepared by ULLICO) (Exhibit 14); Interview with Damon Silvers, Ted Green, Don Kaniewski (October 29, 2003).
[459] Board of Directors Meeting Minutes, May 13, 2003 (BK04302–BK4304) (Exhibit 127).
[460] *Id.* at BK04303–BK4304.
[461] *Id.* at BK04304.
[462] *Id.*
[463] *Id.*

conduct."[464] Put another way, the Litigation Subcommittee was given a wide mandate to shepherd Thompson's remedial recommendations through to their conclusion. The Litigation Subcommittee's work is reportedly approaching completion, except for its review of service provider conduct, which is ongoing.[465]

A revealing incident indicative of ULLICO's former management's actions can be found in Carabillo's remaining on ULLICO's payroll following his supposed resignation in March of 2003. Mr. O'Sullivan discussed this fact at the Committee's June 19, 2003 hearing:

> COLLINS: It is my understanding that Mr. Carabillo was supposed to have resigned from ULLICO in March but that upon taking control of the company in May, you discovered that he was still on the payroll even though he had not shown up at work for some time. And that if he had been on the payroll for just one more week he would have been eligible for a lucrative early retirement program.
>
> I know that you have since taken action to terminate him from the payroll, but have you learned how this happened?
>
> O'SULLIVAN: I have not. That matter has been turned over to Judge Mikva's committee to ascertain as to what role he played, what monies he received from the time that he left ULLICO until the time that we discovered that he was still on the payroll.
>
> COLLINS: And it was a surprise to you that he was still on the payroll?
>
> O'SULLIVAN: A complete and total surprise. And that is why once it came to our attention we immediately addressed the situation, and then terminated his employment with the company.[466]

Reportedly, Carabillo had been on paid leave since the end of March 2003. On May 30, 2003, ULLICO fired Carabillo for cause, citing the Thompson Report's findings.[467] The Committee staff has been informed by ULLICO that it is unclear why Georgine allowed

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[464] Letter from Terence O'Sullivan to Senator Susan Collins and Senator Carl Levin (June 16, 2003) (Exhibit 129). The rabbi trusts are supplemental retirement trusts provided to senior ULLICO executives. Georgine's was worth $6.3 million by 2001. "Georgine's SERP/Rabbi Trust," (Chart provided by Winston & Strawn) (Exhibit 59).

[465] Interview with Damon Silvers, Ted Green, Don Kaniewski (October 29, 2003). *See* "Status of Remedial Actions at ULLICO," V.E, for the current status of remedial efforts on behalf of ULLICO, including litigation. At the end of 2003, Judge Mikva resigned from ULLICO's Board for health reasons. He remains an advisor to the Board.

[466] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 39 (June 19, 2003).

[467] Letter from Edward Grebow, ULLICO, to Joseph Carabillo (May 30, 2003) (Exhibit 130)

Carabillo to remain on ULLICO's payroll, as no documentation of this decision exists. Carabillo is currently suing ULLICO, hoping to force the company to make him eligible for the early retirement program.

C. Georgine's Attempt to Influence the Board After his Departure

As noted above, Terence O'Sullivan took control of ULLICO on May 8, 2003. While Georgine resigned on May 8, there is evidence that he attempted to influence the company's decisionmaking, even after his departure. In his resignation letter, Georgine claimed to be entitled to a $2 million severance package and requested that this money be used to repay the profits gained from his sale of ULLICO stock, with the remaining balance to be used to repay the company for profits from the transactions received by six ULLICO directors:[468]

> I do not, however, intend to collect from the Company the more than $2 million in severance and amenities to which I am entitled under my contract. Instead, I want that money to remain as part of the Company's operating funds to help see ULLICO through its current financial difficulties. Equally important, I want that money to serve as repayment to the Company of the profits I made on the sale of ULLICO stock purchased in 1998 and 1999. . . . I want the balance of my severance to serve as repayment to the Company of the profits received by Messrs. Bernard, Boede, Casstevens, La Sala, Maloney and McNulty for those same stock transactions, in all cases calculated on an after-tax basis.[469]

As members of the ULLICO Board of Directors, all six individuals were expected to vote at the next Board meeting on a resolution regarding the return of the profits from the stock sales and the adoption of the Thompson Report's remedial recommendations. In fact, at that Board meeting, which took place five days later on May 13, five of the recipients of Georgine's attempted beneficence—Bernard, Boede, Casstevens, Maloney, and McNulty—did vote against both requiring a return of the profits from the stock sales and adopting the Thompson Report's remedial recommendations.[470] One recipient, La Sala, abstained.[471] Ultimately, the resolution was adopted by a vote of 14 to 8.[472]

At the Committee's June 19, 2003 hearing on the ULLICO matter, O'Sullivan was asked about Georgine's attempt repay the six directors' stock profits.

> COLLINS: When Mr. Georgine resigned or was forced out from ULLICO, it is my understanding that he sent you a letter in which he claimed he was entitled to a $2 million severance payment. My information is that he told you

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[468] Letter from Robert Georgine to Terence O'Sullivan (May 8, 2003) (Exhibit 60).
[469] *Id*.
[470] Board of Directors Meeting Minutes, May 13, 2003 (BK04303–BK4304) (Exhibit 127).
[471] *Id.* at BK04304.
[472] *Id.* at BK04303–BK4304.

> that he wanted the $2 million to count as his repayment of profits made on his stock deals, but also as a return of profits on behalf of six specific directors of the company. And five of those six directors that were singled out in Mr. Georgine's letter as the recipients of his largesse are still sitting on the Board of Directors. Do you know why Mr. Georgine is trying to bail out directors who are still sitting on the Board out of his severance pay?
>
> O'SULLIVAN: Chairman Collins, I did, in fact, receive Bob Georgine's resignation letter as you said. I did not have any conversations with Mr. Georgine as to how he chose that group of directors that he wanted his golden parachute or severance package to cover.[473]

At the hearing, O'Sullivan also indicated that on June 13, 2003, ULLICO had sent a letter to Georgine demanding the return of his stock profits, and an additional one that indicated that the company did not agree with "certain representations and characterizations" in Georgine's resignation letter.[474]

The Committee also invited Georgine and Carabillo[475] to attend the hearing to respond to questions about their roles in the stock transactions. However, both men declined to appear. Georgine provided a letter stating that if subpoenaed to testify, he would invoke his Fifth Amendment right against self-incrimination rather than answer any questions.[476]

Following the hearing, Committee staff requested that the six directors named in Georgine's May 8, 2003, resignation letter participate in voluntary interviews.[477] The Committee sought to learn whether they knew why they had been named in Georgine's letter or whether they discussed the matter with him. All six communicated through their counsel that they refused to voluntarily submit to an interview.

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[473] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 34 (June 19, 2003).

[474] *Id.* at 34–5 ; Letter from Terence O'Sullivan to Robert Georgine (June 13, 2003) (Exhibit 131); Letter from Terence O'Sullivan to Robert Georgine (June 13, 2003) (Exhibit 132).

[475] Mr. Carabillo agreed to a voluntary staff interview. However, he imposed an artificial limit on the length of the interview, which prevented a completed examination on all the relevant issues. Therefore, he was invited to testify at the hearing, but he declined to appear.

[476] Letter from Randall J. Turk, Baker Botts LLP, to Senator Susan M. Collins, Chairman, Senate Governmental Affairs Committee, and Senator Joseph I. Lieberman, Ranking Member (June 17, 2003) (Exhibit 1).

[477] Letter from Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate, to Henry F. Schuelke, Janis, Schuelke & Wechsler (June 24, 2003) (Exhibit 133); Letter from B. Michael Rauh, Manatt Phelps Phillips, to Jason A. Foster, Senior Counsel, Committee on Governmental Affairs, U.S. Senate (July 18, 2003) (Exhibit 134); Telephone conversation with S. Robert Sutton, Janis, Schuelke & Wechsler (July 3, 2003).

Given their obvious conflict of interest in casting such a vote and the appearance that Georgine may have been seeking to influence their votes through his attempted gift, the Committee then sought to compel the testimony of the six directors who had refused to participate in voluntary interviews. The Committee issued subpoenas to all six directors, compelling them to appear at depositions. Despite their earlier refusals, when Directors James La Sala and James McNulty learned of the subpoenas, they requested that they be excused from formal, sworn depositions and offered to make themselves available for informal, voluntary interviews instead.[478] Both La Sala and McNulty denied knowing why Georgine offered to repay their profits, and both denied having communicated with Georgine about his attempt to do so.[479] La Sala agreed to repay his profits and abstained from the new Board's vote on seeking a return of profits from others.[480] However, McNulty said he felt no need to abstain from the vote and that he never even considered abstaining.[481] McNulty refused to repay his profits, saying that the controversy was just about perception and that he did nothing wrong.[482]

The other four, however, refused to answer any questions, even under subpoena, citing their Fifth Amendment right against self-incrimination. Of the six directors named in Georgine's resignation letter, four were still on the Board when the Committee began the process of issuing subpoenas. However, by the time of their scheduled depositions, none of them were still sitting directors. Three of the four (Bernard, Boede, and Maloney) resigned and declared their intention not to return any of the profits from their stock transactions. The fourth, Casstevens, did not resign, but also declared his intention not to return any of his profits. Casstevens was then removed from the Board by a vote of the shareholders.

On July 25, 2003, Committee staff deposed William Bernard. He asserted his right against self-incrimination in response to the following questions:

- How did you come to be a director at ULLICO?
- Have you ever seen Georgine's May 8, 2003, resignation letter?
- Do you know why Mr. Georgine offered to repay your profits from the sale of ULLICO stock?
- Since Mr. Georgine's resignation on May 8, 2003, have you communicated with him about how you might vote on any matters coming before ULLICO's Board?

He also indicated under oath that he intended to assert his right against self-incrimination in response to every potential question regarding his communications with Georgine, the May 8th resignation letter, his vote at the May 13th Board meeting, his purchases of ULLICO stock, his sales of ULLICO stock, the formulation of the formal repurchase program, the 10,000 share threshold, issues of director and officer

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[478] After they each completed voluntary interviews with Committee staff, they were excused from appearing for a deposition.
[479] McNulty and La Sala Interviews.
[480] La Sala Interview.
[481] McNulty Interview.
[482] *Id*.

compensation, the Board's decision to hire Thompson, the preparation of Thompson's report, and the Board's response to that report.[483] Directors Boede, Casstevens, and Maloney each provided the Committee with letters indicating that they would similarly invoke the Fifth Amendment to every potential question in these particular subject areas and were subsequently excused from appearing in person.[484]

In total, Georgine and four other ULLICO directors asserted their rights against self-incrimination rather than answer any questions.[485] Given that the testimony of these five individuals is unavailable, it is difficult to draw any definitive conclusions about Robert Georgine's parting attempt to transfer the benefit of his claimed severance to sitting directors of ULLICO. While it raises many questions about why he would do so, circumstances suggest that he may have been attempting to influence their votes on other matters related to his compensation that were under review by ULLICO's new management. It is interesting to note that of all the Directors Georgine could have chosen to name as beneficiaries in his resignation letter, he did not choose even one among the many who had already resigned or failed to be reelected to the Board. Instead, he chose only those that remained on the Board at the time of his attempted gift. However, given the unwillingness of Georgine and four of his colleagues to answer any questions about it, one can only look to what those who voluntarily cooperated had to say about the matter: Directors La Sala and McNulty. Both indicated that they were not close social acquaintances of Georgine and had never received gifts from him in the past.[486] Therefore, Georgine's attempted gift appears to have no obviously legitimate purpose.

D. ULLICO's Efforts to Recover Funds Obtained Improperly

At its May 13, 2003 meeting, ULLICO's Board of Directors approved a resolution creating a Litigation and Regulatory Affairs Subcommittee authorized to "address all matters concerning regulatory and litigation issues facing ULLICO" and its subsidiaries. This committee, chaired initially by former Federal Judge and White House Counsel Abner Mikva, was ultimately charged with, in Chairman O'Sullivan's words, "reviewing the remaining stock transactions as well as past executive compensation and past attorney and other service provider conduct."[487] In addition to forming the Litigation Subcommittee, ULLICO and its current Board have also:

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[483] Deposition of William Bernard, July 25, 2003 (Exhibit 135).

[484] Letter from S. Robert Sutton, Janis, Schuelke & Wechsler, to Jason A. Foster, United States Senate Committee on Governmental Affairs, July 16, 2003 (Exhibit 136); Letter from S. Robert Sutton, Janis, Schuelke & Wechsler, to Jason A. Foster, United States Senate Committee on Governmental Affairs, July 29, 2003 (Exhibit 137).

[485] Letter from S. Robert Sutton, Janis, Schuelke & Wechsler, to Jason A. Foster, United States Senate Committee on Governmental Affairs, July 16, 2003 (Exhibit 136); Letter from S. Robert Sutton, Janis, Schuelke & Wechsler, to Jason A. Foster, United States Senate Committee on Governmental Affairs, July 29, 2003 (Exhibit 137).

[486] McNulty and La Sala Interviews.

[487] Board of Directors Meeting Minutes at 5, May 13, 2003 (Exhibit 127); "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 32 (June 19, 2003).

- Adopted all of Governor Thompson's remedial recommendations.[488]

- Asked the trustees of ULLICO's management's rabbi trusts to make no payments to anyone until a Board investigation of those trusts has been completed.[489]

- Stopped payment on a number of executive compensation plans, including a deferred compensation plan and contributions on an executive split-dollar life insurance plan.[490]

- Begun an inquiry into the role of outside service providers, such as attorneys, auditors, and consultants, in connection with the stock trades and their aftermath.[491] Specifically, ULLICO will be reviewing whether the following firms acted properly with respect to the company: Baker Botts, Sidley Austin Brown & Wood; AON; LeBoeuf, Lamb; Arnold & Porter; and PriceWaterhouse Coopers.[492]

ULLICO has also sent demand letters consistent with the remedial recommendations of the Thompson Report. At the June 19, 2003, hearing of the Committee, O'Sullivan reported that all currently active union presidents had either returned or pledged to return their profits from the stock transactions.[493] Unfortunately, Georgine, Carabillo, Grelle, and Luce have all refused to return their profits from the stock transactions.[494] In response to a lawsuit by Carabillo, ULLICO has filed a series of counterclaims to resolve outstanding issues regarding the return of the four officers' ill-gotten gains. As part of that counterclaim, ULLICO is currently suing:

- Georgine and Carabillo for Breach of Fiduciary Duty.[495]

- Carabillo for Professional Negligence.[496]

- Grelle for Breach of Fiduciary Duty: Aiding and Abetting Breaches of Fiduciary Duty and Unjust Enrichment.[497]

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[488] Board of Directors Meeting Minutes, May 13, 2003 (Exhibit 127); "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 32 (June 19, 2003).
[489] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 32 (June 19, 2003).
[490] *Id*.
[491] Board of Directors Meeting Minutes, May 13, 2003 (Exhibit 127).
[492] Interview with Damon Silvers, Ted Green, Don Kaniewski (October 29, 2003).
[493] "Self-Dealing and Breach of Duty: A Review of the ULLICO Matter," *Hearing before the Senate Comm. On Governmental Affairs*, 108th Cong. 32 (June 19, 2003).
[494] Letter from Randall Turk, Baker Botts LLP, to Terence O'Sullivan, ULLICO (July 8, 2003) (Exhibit 138); Letter from Joseph Carabillo to Terence O'Sullivan, ULLICO (July 15, 2003) (Exhibit 139); Letter from John Grelle to The Honorable Abner Mikva, ULLICO (July 14, 2003) (Exhibit 140); Letter from James Luce to The Honorable Abner Mikva, ULLICO (July 15, 2003) (Exhibit 141).
[495] Carabillo v. ULLICO, Inc., No. 1:03CV01556(RLJ), Defendants' Amended Answer and Counterclaim (D.DC.) (Exhibit 33). Count I, p. 30.
[496] *Id.* at 34 (Count II).

- Luce for Breach of Fiduciary Duty: Aiding and Abetting Breaches of Fiduciary Duty and Unjust Enrichment.[498]

- Georgine for Breach of his Employment Agreement.[499]

- Georgine, Carabillo, Luce, and Grelle for a Declaratory Judgment that they are not entitled to receive any benefits under the Auxiliary Retirement Benefits Plan.[500]

- Georgine and Luce for a Declaratory Judgment that they are not entitled to any distributions or benefits under the 1998 Non-Qualified Deferred Compensation Plan based on earning through deemed investments in stock.[501]

- Georgine and Carabillo for Breach of Fiduciary Duty and Return of Profits from the Deferred Compensation Plan (deemed investments) for amounts paid to Carabillo in 2001 and 2002.[502]

- Georgine, Carabillo, and Grelle for Breach of Fiduciary Duty and Return of Profits from the Deferred Compensation Plan (deemed investments) for amounts paid to Grelle in March 2003.[503]

- Georgine for a Declaratory Judgment that ULLICO has no further financial obligations to him based on the Supplemental Employee Retirement Plan.[504]

- Georgine for a Declaratory Judgment that he has no more interest in the Split Dollar Life Insurance Agreement, that the policy should be canceled, and that the value should be returned to ULLICO.[505]

- Georgine for a Declaratory Judgment that he has forfeited and is not entitled to benefits under the February 2000 Stock Purchase and Credit Agreement.[506]

- Georgine and Grelle for Breach of Fiduciary Duty for outstanding loans made to Planners and Insurers, Inc. of Omaha, Nebraska, owned by Patrick J. Mertz, nephew of Georgine.[507]

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[497] *Id.* at 35 (Count III).
[498] *Id.* at 36 (Count IV).
[499] *Id.* at 37 (Count V).
[500] *Id.* at 39, 49 (Count VI).
[501] *Id.* at 41, 49 (Count VII).
[502] *Id.* at 43, 49 (Count VIII).
[503] *Id.* at 44, 49 (Count IX).
[504] *Id.* at 44, 49 (Count X).
[505] *Id.* at 45, 49 (Count XI).
[506] *Id.* at 46, 50 (Count XII).
[507] *Id.* at 47, 50 (Count XIII).

As of this writing, this litigation is still ongoing.

CONCLUSION

Many former ULLICO officers and directors have argued in their defense that the profits they received from their stock transactions should be viewed in the favorable light of the enormous success of ULLICO's Global Crossing investment. Indeed, ULLICO's $7.6 million investment grew to be worth, at one point, around $1 billion. However, ULLICO was only able to realize a fraction of that growth, about $305 million after taxes. While this is still a phenomenal return on its initial investment, a disproportionate share of that total gain was transferred to insiders rather than to other shareholders. Furthermore, much of what was left was consumed by lawyers and lobbyists to defend officer and director misconduct.

The company's top five executives received direct bonuses totaling more than $5.6 million as reward for the success of the Global Crossing investment. From manipulative ULLICO stock transactions, they received $4.9 million and claimed $5.5 million worth of earnings through "deemed" ULLICO stock transactions. The Thompson Report strongly recommended that the directors return another $4 million in profits from ULLICO stock purchased in 1998 and 1999 and study the possible return of an additional $1.7 million in profits from other ULLICO stock sold in 2000 and 2001. In addition, Georgine had a $6.3 million supplemental retirement trust, a $350,000 per year split-dollar life insurance policy, and forgiveness of a $2.2 million loan—all funded at company expense. Much of this money is now the subject of extensive litigation. However, if Georgine and his fellow officers and directors had succeeded in fully realizing all these benefits, it would total approximately $30 million, or about ten percent of the company's total after tax gain on Global Crossing.

The actual magnitude of the rewards that Georgine and the other insiders sought to provide for themselves stands in stark contrast to what Georgine represented to the Compensation Committee in July 1998 when he presented his initial plan: "[t]he proposal before you sets aside less than 1% of the gain to ULLICO Stockholders [from Global Crossing] to be paid out to Senior Officers and selected individuals."[508] However, if the scandal had not led to a change in management, then a select few insiders who owned only about two percent of ULLICO stock would have received a full tenth of the total after tax gain.

Was this an accident or the result of mere negligence on the part of the two people most responsible for structuring the transactions: Robert Georgine and Joseph Carabillo? The evidence reviewed in this investigation suggests not. At a minimum, Georgine and Carabillo understood that by structuring the transactions as they did, they were ensuring that they and their fellow insiders would be receiving a disproportionate share of company funds while incurring little or no

[508] Compensation Committee Meeting Transcript, July 27, 1998 (Exhibit 41).

risk. Their conduct was not merely negligent. The evidence suggests that they consciously placed the interests of ULLICO insiders ahead of the interests of union members and pension holders who are ULLICO's principal shareholders.