SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK By ANDREW M. CUOMO, Attorney General of the State of New York, Plaintiff, - against - IVY ASSET MANAGEMENT LLC, LAWRENCE SIMON, and HOWARD WOHL, Defendants.	Index No. **COMPLAINT**

Plaintiff, the People of the State of New York, by Andrew M. Cuomo, Attorney General of the State of New York (the "Attorney General"), alleges upon information and belief the following against Ivy Asset Management LLC ("Ivy"), Lawrence Simon ("Simon"), and Howard Wohl ("Wohl") (together, "Defendants").

SUMMARY

1. Ivy, a New York investment adviser now owned by Bank of New York Mellon ("Bank of New York"), and its two senior officers, Simon and Wohl, committed egregious breaches of fiduciary duty and violations of New York's Martin Act and Executive Law with respect to advice they gave about investing in funds managed by Bernard L. Madoff ("Madoff"). As fiduciaries, Defendants were obligated to put their clients' interests first, but instead they put their own financial interests ahead of their clients. Among other things, after learning a series of disturbing facts about Madoff, Defendants determined that no investment in Madoff was

warranted. But rather than disclose this determination to their clients, Defendants hid the truth from their clients and misled them about Madoff.

2. New York families paid the price for Defendants' fraud. Seventy-six upstate New York union pension and welfare plans were victimized by the fraud, losing more than $150 million needed to fund pensioners' retirements. Defendants knew that they were providing advice for the benefit of pensioner assets and that their advice would directly impact the lives of those pensioners. In total, as a result of Ivy's, Simon's, and Wohl's fraud, investors suffered in excess of $227 million in losses, with additional losses to fund investors.

3. During the period that Defendants put pensioners' retirements in clear and present financial danger, Ivy made over $40 million in fraudulently obtained fees. In addition, Simon and Wohl used their Madoff advisory relationships to build the Ivy franchise, and each obtained more than $100 million for selling Ivy to the Bank of New York. In a 2001 e-mail, Simon reminded Wohl of the central role that advising a client to invest with Madoff had in Ivy's growth, saying "it helped to contribute towards building Ivy's AUM [assets under management] and credibility, despite our real concerns about BLM [Madoff]."

4. By December 16, 1998, Defendants had determined that, given what they had learned about Madoff, investor money should not be placed with Madoff. The day before, December 15, 1998, Simon and Ivy's Chief of Investment Management had met with Madoff and Madoff told them his third lie on a critical subject – how Madoff's purported trading could be occurring given Wohl's determination that there were insufficient available options in the marketplace to support Madoff's purported strategy. Madoff told Defendants that he traded a substantial portion of the OEX options he needed to trade to support his strategy over the

counter, something Defendants knew, or were reckless in not knowing, was false. Wohl testified that he has "never heard" of OEX options trading over the counter in such volume.

5. Prior to this blatant falsehood, Defendants had limited Madoff investments to 3 to 4% of the funds of funds they personally managed because of their specific concerns about Madoff. After the December 15, 1998 meeting, Wohl, who was the senior Ivy official responsible for analyzing investments, recommended that Ivy pull its own funds out of Madoff, stating: "It [investing with Madoff] remains a matter of faith based on great performance, this doesn't justify any investment, let alone 3%." Over time, Defendants' views about Madoff only worsened. No later than 2002, Defendants determined that Ivy was not "satisfied as a fiduciary to invest client assets [with Madoff]." They did not, however, tell this to their advisory clients whose relationships with Ivy were dependent on their Madoff investment.

6. On December 16, 1998, Simon replied to Wohl's e-mail that no investment in Madoff was warranted. Simon did not disagree. Instead, Simon focused on the financial implications of making accurate disclosures to Defendants' clients:

> Amount we now have with Bernie in Ivy's partnerships is probably less than $5 million. The bigger issue is the 190 mill or so that our relationships have with him which leads to two problems, we are on the legal hook in almost all of the relationships and the fees generated are estimated based on 17+% returns .... [to be] $1.275 Million.

Simon added:

> Are we prepared to take all the chips off the table, have assets decrease by over $300 million and our overall fees reduced by $1.6 million or more, and, one wonders if we ever "escape" the legal issue of being the asset allocator and introducer, even if we terminate all Madoff related relationships?

7. As the above e-mails demonstrate, Defendants had a clear choice – to put their clients first, on whose behalf thousands of workers' employee benefits depended, or to put their

own interests first and enrich themselves. They chose the latter. Despite their statutory and fiduciary obligations to do otherwise, Defendants abdicated their responsibility and left their clients in the dark about Ivy's Madoff concerns. Defendants did so for their own financial gain, because they knew that disclosure could result in loss to Ivy of at least 16% of its total revenue and reduce Ivy's assets under management by approximately 18%.

8. While Defendants misled certain advisory clients, other clients, whose relationship with Ivy was not dependent on Madoff, received much stronger warnings. At least three clients were affirmatively advised not to invest with Madoff.

9. Defendants also wanted to withdraw all Madoff investments from the Ivy funds of funds, but kept a small amount in Madoff to give their advisory clients a false sense of confidence. It is these investors that suffered when the Madoff fraud finally came to light in December 2008.

Ivy Learns Facts That Support Its Determination That As A Fiduciary One Should Not Invest With Madoff

10. Over time, and in particular between 1997 and 1998, Defendants learned a series of material facts that supported their determination that as fiduciaries, they should not be investing in Madoff. These facts were not disclosed to New York investors.

Lack of Sufficient Options to Support Purported Strategy

11. In 1997 and 1998, Defendants ascertained that Madoff was not investing funds in the manner he had been telling investors. Specifically, in the spring of 1997, Ivy noticed that there were insufficient Standard & Poor's 100 Index options ("OEX options") traded on the Chicago Board Options Exchange ("CBOE") to support the option trades Madoff purported to be

making for his clients. Because trading OEX options was a critical part of Madoff's strategy, the lack of sufficient exchange traded options to support his trades strongly suggested that the trades Madoff was reporting were not actually being made.

12. The gap between the volume of options traded on the CBOE and the number needed to support Madoff's strategy for the assets he had under management was significant: Ivy estimated that Madoff had more than $2 billion under management, and yet the volume traded on the CBOE was sufficient to support a split-strike strategy for only $1 billion. The lack of enough options to support Madoff's strategy became even more disconcerting to Defendants when Wohl observed that the volume of OEX options traded on the exchange would not even support a split-strike strategy for the assets Ivy and its clients had with Madoff, which Wohl estimated to be less than 10% of the total assets Madoff had under management.

13. Defendants' suspicions were confirmed over the next eighteen months when Madoff gave Ivy three different explanations for the apparent discrepancy, each of which Defendants knew, or were reckless in not knowing, to be false. Madoff told Defendants: (1) that it was "rare" for his option trades to exceed the volume traded on the CBOE, a statement contrary to Ivy's observation; (2) that he traded OEX options on other exchanges, an impossibility because OEX options are a proprietary product of the CBOE and do not trade on any other exchange; and (3) that he traded 30% to 50% of his options over the counter, also impossible because OEX options do not trade in any volume over the counter, a fact Wohl knew. Defendants did not disclose these troubling developments to their clients.

Madoff's Misappropriation of Client Assets

14. By early 1997 Ivy was internally considering another issue – the possibility that Madoff was misappropriating client funds to fund his market-making operation. Soon thereafter, a prominent hedge fund manager told Ivy that a Madoff employee had confirmed to him that Madoff was using client money as subordinated loans to his market-making business. In addition to raising the most serious concerns about Madoff's purported business, Madoff's misappropriation of client money through unauthorized loans to his market-making business would also mean that Madoff had lied to Ivy about yet another issue. Madoff had previously represented to Ivy that there was no relationship between his money management operation and his market-making business. Defendants did not disclose any of this information to their clients either.

Evidence of a "managed income stream" from Hedge Fund Madoff Investor

15. In May of 1997, Ivy's Chief of Investment Management learned additional troubling facts about Madoff from a hedge fund manager who had invested with Madoff. The Chief of Investment Management had contacted the manager in connection with Ivy's concerns about the insufficient number of OEX options to effectuate the split-strike strategy, only to learn that there was evidence that Madoff managed returns. Specifically, the manager told the Chief of Investment Management that an individual investor who lived in the manager's building had one long position hedged by one OEX put and call, "but strangely, her returns always seem very close to those of all the other Madoff accounts of which [the manager] is aware." The manager explained that "it points to a managed income stream." Defendants also failed to disclose this to their clients.

Madoff Records Reflecting Impossible Prices

16. Further evidence that Madoff was not making the trades he reported came from comparing the prices of Madoff's alleged trades with exchange prices. An internal Ivy memorandum notes that on May 7, 1997, Madoff's confirmations stated that he traded 917 OEX calls on a day that Bloomberg reported only 578 were traded, and that the price Madoff reported was well below the exchange trade prices reported by Bloomberg. In this memorandum, Ivy's Chief of Investment Management wrote: "[t]his is a clear example of our inability to make sense of Madoff's strategy, and one where his trades for our accounts are inconsistent with the independent information that is available to us." He later testified that it is "unusual for an account, a customer, to be able to trade at a price, you know, substantially outside what's reported as being the range of that security for that day." Defendants also failed to disclose these facts to their clients.

Defendants Conceal Negative Facts and Make Misrepresentations about Madoff

17. Defendants thus knew, but concealed from investors that they knew, that: (1) Madoff had provided false explanations for his trading and there were not sufficient OEX options to support Madoff's purported strategy; (2) they had received evidence that Madoff was misappropriating client money placed with him and was using those funds in his market-making business; (3) because of concerns about Madoff, Wohl and Ivy's Chief of Investment Management had recommended total withdrawal of Ivy's proprietary funds' small position with Madoff in 1998; (4) Defendants continued to maintain Ivy's Madoff position at that time to avoid alarming clients who had invested in Madoff and risk losing them as clients; (5) Ivy's view

was that its obligations as a fiduciary prevented it from investing client assets with Madoff; and (6) Madoff had told Defendants multiple lies about his operation.

18. Defendants not only concealed these facts, but in numerous letters to and meetings with clients affirmatively misled clients as to what they knew about Madoff and their view of him. In repeated letters, Defendants falsely stated that, "we have no reason to believe that there is anything improper in the Madoff operation." In fact, the precise opposite was true. Defendants also repeatedly listed their only concern about Madoff to be the large amount of assets he had under management. In fact, this was at most a minor concern dwarfed by numerous larger concerns which Defendants did not mention. In meetings Ivy sounded the same theme, falsely assuring clients that Madoff was "essentially legitimate" when Defendants at a minimum had serious doubts that he was legitimate, and falsely assuring clients that Ivy's due diligence had turned up no problems, when this was not the case.

19. The disclosures that Ivy made to heavily Madoff invested clients contrasted sharply with the disclosures Ivy made to prospective clients and other clients whose relationship with Ivy was not Madoff dependent, and with Defendants' own internal views. Ivy told at least one prospective client that its obligations as a fiduciary barred it from investing client assets with Madoff. An internal Ivy memorandum dated January 14, 2002 recorded Ivy's Director of Client Development telling a prospective client that Ivy could not overcome "qualitative issues" regarding Madoff and, therefore, "no matter how successful he continues to be, we are [not] satisfied as a fiduciary to invest client assets [with Madoff]." Similarly, Ivy advised other clients that Ivy did not recommend any investment in Madoff. When listing managers who should be recommended to a prospective client, Wohl wrote, "Madoff (NOT!)." Wohl also responded with a resounding, "NO" when an Ivy employee asked whether Ivy was interested in placing new

client assets with Madoff. The heavily Madoff invested clients did not receive these disclosures or Ivy's internal view of Madoff and kept their investments with Madoff.

20. This action seeks redress for Defendants' repeated and persistent fraud under New York's Martin Act, Executive Law § 63(12), and other applicable statutes and laws, as well as for Defendants' fraudulent breaches of fiduciary duty in Plaintiff's capacity as *parens patriae*. The action seeks compensatory and punitive damages, restitution, disgorgement, injunctive relief, and other equitable and legal remedies.

JURISDICTION AND VENUE

21. The Attorney General has an interest in the economic health and well-being of investors who reside or transact business within the State of New York. The State of New York also has an interest in upholding the rule of law, and Defendants' conduct has injured these interests. Accordingly, the State of New York brings this action in its sovereign and quasi-sovereign capacity pursuant to Executive Law §§ 63(1) and 63(12) and General Business Law §§ 352 *et seq*. (the "Martin Act"), and in its capacity as *parens patriae*.

22. Pursuant to Executive Law § 63(12), the Attorney General is authorized to bring an action for restitution, damages, and other relief in connection with repeated fraudulent or illegal acts or persistent fraud or illegality in the carrying on of any business.

23. Pursuant to the Martin Act, the Attorney General is authorized to bring an action for restitution, damages, and other relief in connection with any fraudulent practices in connection with the purchase, sale, promotion, exchange, negotiation or distribution within or from this state of securities.

24. Pursuant to its common law *parens patriae* authority to protect the public interest, the Attorney General seeks restitution, compensatory damages, punitive damages, costs, and equitable relief with respect to Defendants' fraudulent breaches of fiduciary duty, as well as their fraudulent and otherwise unlawful conduct.

25. Defendants' actions originated from New York, where Defendants reside and/or conduct business. Numerous New York investors, as well as the interests of the State of New York, were harmed by Defendants' conduct.

PARTIES

26. This action is brought by the Attorney General on behalf of the People of the State of New York pursuant to his authority under Executive Law §§ 63(1) and 63(12), General Business Law §§ 352 *et seq.*, and the common law of the State of New York.

27. Defendant Ivy Asset Management LLC is a Delaware Limited Liability Company with its principal office located at One Jericho Plaza, Jericho, New York. Ivy is a registered investment adviser under the Investment Advisers Act of 1940 and provides investment advice to institutional and individual clients. It also manages proprietary funds of funds which it markets to the public. Since 2000, Ivy has been a wholly owned subsidiary of, and controlled by, The Bank of New York Mellon Corporation (f/k/a The Bank of New York). As of March 25, 2010, Ivy had approximately $4 billion under management.

28. Defendant Lawrence Simon resides in Muttontown, New York. Simon co-founded Ivy in 1984 and served as President and Chief Executive Officer of Ivy from 1984 to 2005 and Vice Chairman from 2006 until 2008. Until 2000, when the Bank of New York purchased Simon's stock for $50 million with an earn-out provision that ultimately yielded Simon an additional $50 million, Simon owned 46.5% of the common stock of Ivy. From Ivy's founding until 2005, Simon co-managed Ivy with defendant Howard Wohl.

29. Defendant Howard Wohl resides in Mill Neck, New York. Wohl co-founded Ivy and served as Vice President and Chief Investment Officer of Ivy from 1984 to 2005 and Vice Chairman from 2006 until 2008. Until 2000, when the Bank of New York bought Wohl's stock for $50 million with an earn-out provision that ultimately yielded Wohl an additional $50 million, Wohl owned 46.5% of the common stock of Ivy. From Ivy's founding until 2005, Wohl co-managed Ivy with defendant Lawrence Simon.

FACTUAL ALLEGATIONS

I. BACKGROUND

30. Ivy was founded by Simon and Wohl in 1984. During its early years and at all times afterwards, Ivy offered three core services. First, it managed funds of funds, which it marketed to qualified investors in the form of limited partnerships. These funds of funds, which Ivy refers to as proprietary funds of funds ("Proprietary Funds"), included investments from Ivy, Ivy's principals, and certain qualified investors. Second, Ivy managed assets of high net worth individuals and institutional clients ("managed account clients"). For each of these clients, Ivy created an individual fund of funds. Ivy had discretion over manager selection, manager termination, and asset allocation for these accounts. Third, Ivy rendered investment advice to other investment advisers and asset managers ("advisory clients").

31. In the summer of 1987, an Ivy client introduced Simon and Wohl to Madoff. After a meeting during which Madoff purportedly explained his strategy, Ivy made an investment with Madoff for one of its Proprietary Funds in October of 1987. Defendants thereafter invested assets of several other of Ivy's Proprietary Funds with Madoff and maintained Proprietary Fund investments with him until they withdrew those assets in 2000.

32. Defendants facilitated the investment of large sums of advisory client money to Madoff and reaped millions in fees for doing so through advisory relationships with, among others, John P. Jeanneret ("Jeanneret") and entities Jeanneret controlled, Joel Danziger ("Danziger") and Harris Markhoff ("Markhoff") and entities Danziger and Markhoff controlled, and the Trustees of the Engineers Joint Pension Fund, Local Unions Nos. 17, 106, 410, 463, 545 and 832 of the International Union of Operating Engineers, AFL-CIO ("Engineer Trustees") (together, "Madoff Dependent Clients").

A. Ivy and John P. Jeanneret

33. Jeanneret was an asset manager for several upstate New York union pension and welfare funds through J.P. Jeanneret Associates Inc. ("JPJ"), a registered investment adviser and an investment management company he owned and of which he was president. Jeanneret also offered investment consulting services through JPJ, and it was in his role as investment consultant to the Engineer Trustees that Jeanneret met Ivy and first learned about Madoff. At a meeting that Jeanneret attended, Ivy recommended that the Engineer Trustees invest in Madoff, which it did. In 1990, Ivy introduced Jeanneret to Madoff and helped him gain access to Madoff. Thereafter, Ivy acted as an investment adviser to JPJ.

34. To invest with Madoff through Ivy, JPJ entered into an advisory agreement with Ivy in 1991. This agreement obligated JPJ to pay Ivy 50% of all fees JPJ earned from any of its clients whose assets were placed with Madoff or any other Ivy recommended manager. Ivy, in turn, researched and recommended managers to JPJ. Ivy also conducted due diligence, which entailed monitoring, evaluating, and assessing on a periodic basis any managers with whom JPJ placed client funds.

35. Over the next seventeen years, JPJ invested with Madoff approximately $71.2 million of assets it managed for sixteen pension and welfare fund clients which were net losers. During that time, JPJ withdrew approximately $15.4 million leaving a net investment of approximately $55 million with Madoff. As of November, 2008 the reported value of JPJ clients' Madoff accounts was over $371 million. Between 1998 and 2008, JPJ paid Ivy approximately $10.5 million in fees for these Madoff investments.

36. In 1992, Jeanneret formed Income Plus Investment Fund ("Income Plus"), a fund of funds managed by JPJ qualified to receive pension and welfare fund investments under applicable federal regulations. Jeanneret intended Madoff to be Income Plus' principal manager and to market Income Plus as a way for investors to invest in Madoff. Accordingly, JPJ executed an amendment to its 1991 agreement with Ivy which obligated JPJ to pay to Ivy 50% of all fees earned by JPJ as manager of Income Plus and a performance fee. Ivy, in turn, was obligated to advise JPJ with respect to investing Income Plus' assets and to conduct due diligence on managers with whom JPJ allocated Income Plus' assets.

37. Over the next 17 years, JPJ invested over $38.7 million of Income Plus' assets directly and indirectly with Madoff. During that time, JPJ withdrew approximately $8.8 million leaving a net investment of approximately $30 million of the fund's money with Madoff. Income Plus also suffered losses from its investment in another heavily Madoff invested fund managed by Danziger and Markhoff. As of November, 2008, Income Plus' Madoff investment was valued at over $103 million. New York pension and welfare fund assets accounted for at least 89% of Income Plus' value. Between 1998 and 2008, JPJ paid fees to Ivy totaling approximately $8.6 million.

B. Ivy and the Andover and Beacon Funds

38. In 1991 or 1992, Ivy was introduced to Danziger and Markhoff who managed two investment partnerships in addition to practicing law. Simon encouraged Danziger and Markhoff to form a new fund that would retain Ivy as investment consultant to the fund's manager, and they did so in 1993, forming Andover Associates L.P ("Andover"). Andover Associates Management Corporation ("AAMC"), a corporation owned by Danziger and Markhoff, was Andover's General Partner.

39. Prior to launching Andover, AAMC retained Ivy to provide investment consulting services to AAMC. The agreement between AAMC and Ivy obligated Ivy to research and recommend managers to AAMC, and once AAMC had invested with managers: (a) to "advise General Partner in writing as to the allocation of [Andover] funds among investment managers, including timing or retaining and terminating investment managers;" and (b) to "monitor, evaluate and meet with managers that are managing Partnership funds ...." For these services, AAMC agreed to pay Ivy 50% of all fees earned by AAMC, as manager of the fund. Thereafter, Ivy acted as an investment adviser to AAMC.

40. Andover invested with multiple managers recommended by Ivy, one of whom was Madoff. Over the course of the next fifteen years, AAMC invested $13 million of Andover's assets with Madoff. During that time, AAMC withdrew approximately $10 million leaving a net investment of at least $3 million of Andover's assets with Madoff. As of November, 2008, the reported value of the Andover fund's Madoff account was nearly $25 million. New York pension and welfare fund investments represented approximately 6% of the stated value of Andover. Between 1998 and 2008, AAMC paid Ivy approximately $2 million in fees.

41. In 1995, Danziger and Markhoff formed another fund, Beacon Associates LLC ("Beacon") with Ivy's "blessing and introduction." Beacon was designed to invest only with Madoff. They also formed Beacon Associates Management Corp. ("BAMC"), a company owned and run by them, to manage Beacon and caused BAMC to enter into a contract with Ivy obligating BAMC to pay Ivy 50% of all fees BAMC earned as Beacon's manager.

42. Thereafter Ivy acted as an investment adviser to BAMC with respect to investments. Ivy agreed to perform due diligence with respect to Madoff and other managers,

and recommended allocations among managers and additions and terminations of other managers. Ivy also held itself out as investment adviser to BAMC. Beacon's 2000 Offering Memorandum contained a section, approved by Ivy, that described the services that Ivy provided to BAMC. The Offering Memorandum stated:

> "The Company's assets are allocated and reallocated to and from the Managers pursuant to the Managing Member's allocation strategies, following consultation by the Managing Member with Ivy Asset Management Corp., the 'Investment Consultant.'
>
> ....
>
> Ivy Asset Management Corp., a Delaware corporation registered as an Investment Adviser, acts as an investment consultant to the Managing Member ("Investment Consultant").

43. From the inception of Beacon until 2000, BAMC invested 100% of Beacon's assets with Madoff. Thereafter, BAMC placed a small percentage of Beacon's assets with several additional managers, but at all times maintained at least 71% of the fund's assets with Madoff. In the period from 1995 to 2008, BAMC invested over $164 million of Beacon's investors' money with Madoff, and withdrew approximately $26 million, leaving a net investment of approximately $138 million of Beacon's assets with Madoff. As of November, 2008, the reported value of the Beacon fund's Madoff account was at least $358 million. New York pension and welfare funds accounted for approximately 42% of this reported value. Between 1998 and 2008, BAMC paid Ivy approximately $14.5 million in fees.

C. Ivy and the Engineers Joint Pension Fund

44. Prior to establishing a relationship with Jeanneret and Danziger and Markhoff, Defendants established a relationship with the Engineer Trustees. In the spring of 1989, Defendants were invited to make a presentation to the Engineer Trustees, who were looking for additional managers for the Engineers Joint Pension Fund, Local Unions Nos 17, 106, 410, 463,

545, and 832 of the International Union of Operating Engineers, AFL-CIO ("Engineers Pension Fund") assets. Defendants made the presentation, and recommended Madoff to the Engineer Trustees. Shortly thereafter, the Engineer Trustees invested $5,000,000 of the Engineers Pension Fund's assets with Madoff. In April of 1990, the Engineers Pension Fund and the Engineer Trustees entered into a discretionary asset management agreement ("DIMA") with Ivy which appointed Ivy the Engineer Trustees' attorney-in-fact with power to invest and allocate the Engineers Pension Fund's assets at Ivy's discretion. Under the agreement, Ivy acted as investment adviser to the Engineer Trustees for the Engineers Pension Fund's assets.

45. Pursuant to its authority as asset manager and fiduciary, Ivy, between 1991 and 1999 invested over $20 million of the Engineers Pension Fund's assets with Madoff. Over the seventeen years that Ivy managed the Engineers Pension Fund's assets, Ivy withdrew approximately $54 million of the Engineers Pension Fund assets from Madoff, and left the Engineers Pension Fund invested with Madoff through 2008. As of November, 2008, the Engineers Pension Fund's Madoff investment was valued in excess of $51 million. In the period from 1998 to 2008, the Engineers paid fees to Ivy totaling approximately $8.8 million.

D. Other Madoff Investors

46. In addition, Ivy recommended to a number of other managed account clients and advisory clients that they invest with Madoff. These clients included general partners of funds of funds, institutional investors, and high net worth individuals.

47. These clients allocated only a small portion of their assets to Madoff. As of December 11, 2008, only two of these clients still had investments with Madoff through Ivy.

48. As explained further below, because these clients allocated only a small portion of their assets to Madoff, and their relationship with Ivy was therefore not dependent on the access

Ivy provided to Madoff, Ivy disclosed more information about investing with Madoff to some of these clients. This was in stark contrast to the affirmative misrepresentations and misleading statements Defendants made to the Madoff Dependent Clients.

II. IVY'S FRAUD

49. The strategy Madoff purported to be utilizing to earn consistently high returns for investors was what is known as a split-strike strategy. That strategy allegedly involved: (a) buying a basket of stocks of selected corporations that were included in the blue-chip Standard & Poor's 100 Index (the "OEX") whose performance correlated highly with the OEX; and (b) simultaneously (i) buying OEX put options below the current stock price to protect against large declines in the OEX stocks purchased, and (ii) selling OEX call options above the current price to fund the purchase of the put options. As explained below, Defendants learned, among other things, that Madoff could not be performing his stated strategy and also suspected that Madoff was misappropriating assets, yet Defendants failed to disclose these facts to their Madoff Dependent Clients.

A. Defendants Learn That Madoff Misled Ivy and Other Facts Indicating Fraud

50. From at least 1991, Defendants knew of concerns over Madoff's operations. In approximately 1991, Simon told one prospective investor "that Madoff could be a Ponzi scheme, that they did not know how much he was running." Defendants did not report this rumor to Madoff Dependent Clients, and Simon minimized its importance to the prospective client he had told.

51. In early 1997, facts came to Defendants' attention that gave credence to the Ponzi scheme rumor. Specifically, Defendants noticed that the volume of OEX options traded on the

CBOE was insufficient to support a split-strike strategy for the amount of assets Defendants believed Madoff had under management.

52. An Ivy Inform note dated March 13, 1997 written by Wohl clearly identified this as a concern, stating: "[Ivy's Chief of Investment Management] and I have checked the outstanding OEX options for open interest and the max seems to support only about $1B of invested dollars. We think he is managing far more than that. We should explore this further!"[1] At the time, Ivy understood Madoff to be managing more than $2 billion, and, as Ivy's Chief of Investment Management testified, Defendants were "concerned that he [Madoff] may be managing a lot of money relative to the amount of so called open interest or the amount of activity...in the options and other instruments he was purportedly trading."

53. Ivy's discovery that there were insufficient OEX options traded on the CBOE to support Madoff's alleged strategy raised a serious question whether the option purchases and sales Madoff purported to be making were actually occurring, a concern that increased as Madoff's assets under management grew.

54. The lack of enough options to support Madoff's strategy became particularly disconcerting when Wohl observed that the volume of OEX options traded on the exchange would not even support a split-strike strategy for the assets Ivy and its clients had with Madoff, which Wohl estimated to be less than 10% of the total assets Madoff had under management.

55. On May 5, 1997, Ivy's Chief of Investment Management discussed Ivy's questions about Madoff's purported option trading with a fund manager ("Fund Manager") who had invested substantial sums with Madoff. The Chief of Investment Management testified that he reached out to Fund Manager because he was "interested in exploring this issue of the open

[1] The Inform system database, developed by Ivy, allowed Ivy employees to record, share, and access information, reports, and commentary on hedge fund managers and clients. Entries in this system were known to Ivy employees as Inform notes. Simon and Wohl generally accessed and reviewed the Inform notes in the database.

interest in the options and what size it might be relative to Madoff's capital under management." In an Ivy Inform note memorializing the call, he wrote:

> [Fund Manager] returned my call. I posed our Madoff question relating to the fact that the overall open interest in the put and call options in our accounts with Madoff seem to be way below any reasonable estimate of the number of contracts Madoff should have based on any reasonable guess as to capital under management. [Fund Manager] is aware of this problem.

56. In addition to the option volume concern, the Fund Manager raised another Madoff issue. The Fund Manager gave Ivy information that he said pointed to a "managed income stream." The note quotes the Fund Manager as stating:

> "Let me make it a little more interesting for you…" A woman in his building has $125k with Madoff. She showed [Fund Manager] her brokerage statements. Her account holds ONE long position, hedged with an OEX put and call. Yes, the tracking error is enormous, but strangely, her returns always seem very close to those of all the other Madoff accounts of which [Fund Manager] is aware. So what does this mean? "It points to a managed return stream" and "He must have an unbelievable computer system".

After describing Madoff's background and other information, the note concluded:

> [Fund Manager] said that understanding Madoff is like finding Pluto..you can't really see it..you do it through inference, its effect on other objects. . . . "[Ivy's Chief of Investment Management], as you said, he could just possibly be on the up and up."

None of this was disclosed to investors.

57. Defendants learned additional evidence that caused them to question Madoff's option trades. An internal Ivy memorandum distributed to Wohl dated May 16, 1997 noted that Madoff's confirmations stated that he traded 917 OEX calls on a day that Bloomberg reported that only 578 were traded, and that the price Madoff reported was well below the exchange trade prices reported by Bloomberg. In this memorandum, Ivy's Chief of Investment Management wrote: "This is a clear example of our inability to make sense of Madoff's strategy, and one

where his trades for our accounts are inconsistent with the independent information that is available to us." The Chief of Investment Management testified that it is "unusual for an account, a customer, to be able to trade at a price, you know, substantially outside what's reported as being the range of that security for that day."

58. As a result of these concerns, in June of 1997, while on a return flight from a meeting with the Engineer Trustees, Simon asked Madoff about the possibility of trading more OEX options than what the exchange reported. Madoff told Simon that it was "rare" and "not the norm" for his trades to exceed the volume traded on the CBOE. Simon reported Madoff's explanation in an internal e-mail dated June 19, 1997 sent to Wohl and others, which was also sent to Danziger, stating:

> We briefly discussed options and the possibility of trading in excess of what the exchanges report[]. Bernie claimed that's rare and to his memory hasn't been the norm. As to other exchanges, some OEX is traded on foreign exchanges, very small, and banks (Chase, Bankers Trust Citibank to name a few) have written contracts in excess of what is reported for clients including BLM, but very few times.

59. Defendants knew that Madoff's statement that he rarely traded options off-exchange could not be true given the large gap between the volume traded on the exchange and the volume he needed to support his strategy. Asked about Madoff's statement, Wohl testified as follows:

> Q: He is saying it happens rarely, to his memory it hasn't been the norm, right?
>
> A: That's correct.
>
> Q: That would be inconsistent with your observation of a large disparity between the amount available on the exchange and the volume he needed to support two billion or more of assets, right?
>
> A: I would suppose so.

60. Between March of 1997 and December of 1998, Madoff offered a second explanation regarding his option trades – this time stating that he traded options on domestic exchanges other than the CBOE to supplement his CBOE trading – which Ivy soon learned also could not be true. Simon testified that Ivy checked and found that there were instances of OEX option trading on other exchanges "like the Philadelphia [and] the Cincinnati Stock Exchange." However, such a check could only have informed Ivy of the opposite because, in fact, OEX options have never traded on any exchange other than the CBOE.

61. The Office of the New York Attorney General ("OAG") made the same inquiry Simon claims to have made and received the following response from the CBOE:

> OEX ® is a proprietary product of the CBOE, and has never been licensed to any other exchange for trading, and, since its inception, the OEX ® has never traded on any exchange, domestic or foreign, other than on the CBOE.

The OEX options have never traded on the Philadelphia or Cincinnati Exchanges either. The National Stock Exchange confirmed to the OAG that:

> options do not and never have traded on National Stock Exchange, Inc. or its predecessor entity National Stock Exchange (f/k/a Cincinnati Stock Exchange), including without limitation OEX 100 options.

The Philadelphia Stock Exchange similarly represented to this office that it did not list OEX options.

62. In the spring of 1997, Ivy had at least one other major concern. By May of 1997, Ivy was considering that Madoff's reported returns did not come from trades but instead were payments Madoff was making for his unauthorized use of client money to support his market-making business. As expressed in a May 20, 1997 Ivy internal memorandum written by the Chief of Investment Management and received by Simon and Wohl, Ivy's thought was that

Madoff was lending to his market-making business client funds that had been placed with him to be traded pursuant to a split-strike strategy, and then paying to the clients "compensation" for his unauthorized use of their money. The memorandum stated:

> In the meantime..can we pose to Bernie our thought that the managed accounts serve as a kind of subordinated lender to the business and that the returns earned in the accounts actually represent compensation for the use of the money, which is being employed to provide the equivalent of specialist capital?

63. If Madoff was doing what this Inform note suggested, then (a) he was misappropriating client funds for his own use, and (b) the reports of client activity he was sending to Ivy and Ivy's clients were false and fraudulent. It also meant that Madoff had previously lied to Simon and the Chief of Investment Management: in a meeting in March of 1996, Madoff had represented that there was no connection between his market-making business and his money management operation.

64. The Chief of Investment Management confirmed in his testimony that he wrote the memorandum regarding potential misappropriation, and Simon and Wohl confirmed that they were addressees and must have received it. Yet all three testified that they had no recollection of Ivy ever having discussed the matter with Madoff or of doing any other investigation – even after, as is more fully set forth in paragraph 95, *infra*, a prominent hedge fund manager reported that a Madoff employee had indicated that Madoff was in fact using investor funds to capitalize his market-making operation.

65. Defendants also were concerned that Madoff self-cleared and that his accountant was a tiny firm. The fact that Madoff self-cleared meant that there was no independent entity that had custody of the securities that Madoff purported to be purchasing and that Ivy could not check to see if the assets were really there. The fact that his auditor was a small unknown firm

meant that Ivy could not rely on the auditor's opinion. Wohl testified that Ivy did not know much about Madoff's auditor other than that it had less than five employees and had no reputation in the field. He further testified that he could not think of any broker-dealer of Madoff's size that was audited by a firm with less than five employees.

B. After Learning Facts About Madoff's Operations Suggesting Fraud, Defendants Limit the Amount of Money Ivy Proprietary Funds Can Invest In Madoff

66. As a result of their multiple concerns about Madoff, Defendants decided in 1998 to limit Ivy's Proprietary Funds' exposures to Madoff. Ivy had a general asset allocation rule at this time that no more than 6-7% of a Proprietary Fund's assets could be invested with any single manager. However, Ivy adopted a special rule for Madoff, limiting Proprietary Fund allocations to Madoff to 3% of the Fund's assets. Ivy's Chief of Investment Management explained that Defendants imposed this limitation because "we obviously had a number of issues that concerned [us] about Madoff."

67. Wohl's view at this time was that even 3% was too much – that Ivy should have zero funds with Madoff. But Defendants did not inform clients of this view. Instead, Ivy maintained a 3-4% investment in Madoff to foster the false impression for Ivy's Madoff Dependent Clients that Ivy had confidence in Madoff. As Ivy's Chief of Investment Management wrote in a December, 1998 e-mail to Simon and Wohl: "We have said that it is important to maintain at least some level of Ivy fund investments with Madoff in order to send a message to [our] advisor clients that we have confidence in BLM."

68. Not only did Defendants not disclose their Madoff concerns, but in July and August of 1998, Ivy sent false and misleading letters to Danziger and Jeanneret, signed by Simon and Wohl, commenting on Madoff and other managers that Ivy had recommended. The letters

falsely listed Ivy's only Madoff concern to be a question about his ability to continue to obtain outstanding results with such a big pool of assets to manage. The letters said:

> **<u>Bernard L. Madoff</u>** - Performance continues to be extremely strong. The account was up by ... in the first half of 1998.[2] We continue to question their ability to manage what must be an enormous pool of capital with such consistently outstanding results. They will not quantify the total amount that they manage, but we estimate it to be at least $3 billion, and likely more. One offshore fund alone had nearly $1 billion invested with Madoff at the end of 1997. As a result, we recommend a below median allocation.

69. Defendants' July and August 1998 letters were false and misleading in that they listed the size of Madoff's assets as Ivy's sole concern when it was not even Ivy's principal concern, and concealed and omitted Ivy's far more serious concerns that: (a) Madoff could not be making the option trades he reported he was making; (b) Ivy was concerned that the returns Madoff was reporting as trading returns did not reflect trades but rather represented payments by Madoff for his unauthorized loan of client funds to his market-making business; (c) the account activity reports that Madoff was sending to Ivy and its clients could be false and fraudulent; (d) Madoff had twice lied to Ivy about his option trading in an effort to explain how he was able to make the trades despite the insufficient volume of OEX option trading on the CBOE; and (e) Ivy had received additional evidence from Fund Manager that Madoff manipulated returns.

70. On December 15, 1998, Madoff offered yet a third explanation for his option trading during a key due diligence meeting with Simon and Ivy's Chief of Investment Management. This new explanation of his option trading differed materially from his prior explanations. Where he previously had said that he did little off-exchange trading, and then said that he traded on domestic exchanges other than the CBOE, Madoff now told Defendants that 30

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[2] Rates of return and the names of the Funds invested in Madoff are omitted because they differed for each letter recipient.

to 50% of his option trading was done off-exchange, with parties he identified only as major banks and institutions.

71. Madoff's explanation was disturbing to Defendants for at least two reasons. First, it was a reversal of what he previously had said. Second, his new explanation was as obviously false as his previous two. There is little or no off-exchange trading in OEX options, a fact Wohl acknowledged when he testified that he had never heard of OEX options being bought or sold off-exchange in large volume:

> Q. Did you ever hear of any options on the S&P 100 index being bought or sold in large volume off exchange?
>
> A. No.
>
> Q. Did his explanation concern you?
>
> A. Yes.

72. Notwithstanding the fact that Defendants had never heard of OEX options being bought or sold in large volume off-exchange, Defendants took no steps to determine if what Madoff was claiming was true. Wohl testified:

> Q: So you had nothing but [Madoff's] word for the fact that he was making trades in volume over the counter, right?
>
> A: Yes. That's why I told you that they [the purported off-exchange trades] concerned me greatly.

73. Defendants never disclosed to their Madoff Dependant Clients, among other material facts, the crucial fact that Wohl had never heard of OEX options being bought or sold in large volume off-exchange and that without such off-exchange volume trading Madoff could not be executing a split-strike strategy or making the option trades he was reporting. The lack of off-exchange trading in OEX options is not mentioned in the numerous letters Defendants sent to clients regarding Madoff, nor in the Inform notes and memoranda that reported in detail

numerous discussions they had with clients, or in Defendants' testimony about their conversations with clients about Madoff. Asked point blank whether he ever told clients that he had never heard of OEX options trading over the counter in volume, Wohl responded, "I can't recall."

74. Madoff's explanation during the December 15, 1998 meeting of why he was able to outperform other managers raised an additional concern at Ivy. Prior to this meeting, Ivy's Chief of Investment Management believed that market timing was a fundamental part of Madoff's strategy and success. He testified, "My presumption was that market timing had to be part of the method." During this meeting, however, Madoff denied he was an expert market timer and said his success was due to his ability to execute trades more efficiently than others – within 5 to 15 seconds of his buy or sell decision. Since Ivy had understood that market timing was an "elemental" part of Madoff's strategy, Ivy left the meeting with new unanswered questions as to how Madoff's stated returns could be coming from execution of his stated split-strike strategy. Ivy did not disclose this to its clients either.

C. Defendants Conclude That They Should Withdraw the Proprietary Funds' Investments in Madoff, but Decide Against it to Perpetuate a False Sense of Confidence in Madoff

75. On December 16, 1998, the day after the Madoff meeting, Wohl proposed to Simon and Ivy's Chief of Investment Management that Ivy withdraw all of its Proprietary Funds from Madoff. In an e-mail, Wohl wrote:

> I'm concerned that
>
> he [Madoff] now admits that he does not execute all of the index options on the exchange
>
> that there are 'unknown' counterparties
>
> that if these options are not paid off he'd lose less than 100%
>
> **It remains a matter of faith based on great performance – this doesn't justify any investment, let alone 3%.**

(original formatting) (emphasis supplied).

76. Simon's e-mail response voiced no disagreement with Wohl's analysis. Nonetheless, with only Defendants' financial interests in mind, Simon argued against terminating Madoff on the ground that doing so could lead the Madoff Dependent Clients to terminate Ivy. Simon wrote:

> Amount we now have with Bernie in Ivy's partnerships is probably less than $5 million. The bigger issue is the 190 mill or so that our relationships have with him which leads to two problems, we are on the legal hook in almost all of the relationships and the fees generated are estimated based on 17+% returns .... [to be] $1.275 Million.
>
> Are we prepared to take all the chips off the table, have assets decrease by over $300 million and our overall fees reduced by $1.6 million or more, and, one wonders if we ever "escape" the legal issue of being the asset allocator and introducer, even if we terminate all Madoff related relationships?

77. The fees and assets Simon feared losing were significant. Three hundred million dollars in assets represented approximately 18% of the total assets Ivy had under management and $1.6 million in fees represented over approximately 16% of Ivy's total revenue.[3] Such a drop in assets was a concern for Defendants not only because of the fees that would be lost but because a decrease in assets under management would hurt Ivy's ranking in the industry. As Simon testified, "asset management firms in the industry, as I mentioned last time, are ranked by asset[s] under management." Simon was concerned that if Ivy lost these assets, "[a]ll of a sudden we're going to show we're losing x millions and have to explain it away?"

78. Simon's fear of losing the Madoff Dependent Clients was well founded: BAMC had invested 100% of Beacon's assets with Madoff; JPJ had invested over 45% of Income Plus'

[3] Ivy refers to assets of the Proprietary Funds, the managed accounts, and the advisory clients as assets under management.

assets with Madoff and Jeanneret was marketing the fund to potential investors as a Madoff fund; JPJ had invested with Madoff 100% of the pension fund assets it invested with Ivy recommended managers; Ivy itself had invested 38% of the assets Ivy managed for the Engineers Pension Fund with Madoff; and the Engineer Trustees wanted to terminate three of the other six managers Ivy had recommended. Given this level of Madoff investment and the recent poor performance of the other Ivy recommended managers, Simon feared that it was likely that if Ivy withdrew its Proprietary Funds from Madoff and told its clients the Madoff concerns that had led Ivy to do so, the Madoff Dependent Clients would terminate their relationships with Ivy or at a minimum sharply reduce the assets they placed under Ivy's management. [4]

79. On December 17, 1998, in response to Simon's and Wohl's competing e-mails, Ivy's Chief of Investment Management recommended what he termed "a middle of the road approach" which would "enable[] [Ivy] to preserve the majority of the fees." In his response, he wrote:

> I think the time has come for Ivy to resolve this question and to set a policy we can all be comfortable with. Let me propose the following:
> Terminate all BLM investments for the Ivy Funds (the $5 mil or so)
> Write to the advisory clients telling them we have done so and the reasons why..
> Then leave the rest up to them.
>
> Here are my reasons:
> Legally, we will of course still have liability as investment advisor, particularly for the ERISA entities, but we will have insulated ourselves from liability as GP of our funds.
>
> I imagine that our letters to clients would serve to at least partially exculpate Ivy should the worst happen.

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[4] A lot was on the line for Ivy in 1998. The markets had turned sharply lower in the third quarter in the wake of Russia's default on its debt and the Long Term Credit crisis, and in the words of an Ivy firm history, investors "declared hedge fund investing was too dangerous for them." To make matters worse, Ivy's own flagship fund of funds, Rosewood Partners, lost 2% per month each month in the last three months of the year.

> We have said that it is important to maintain at least some level of Ivy fund investments with Madoff in order to send a message to the advisory clients that we have confidence in BLM (as well as in the other managers we recommend to them). However, in view of Howard's deep concerns (which I share, though not to the same extent), Ivy should perhaps no longer express the same vote of confidence in Madoff. Full withdrawals from the Ivy funds would send a very clear message to the clients regarding Ivy's concerns about this investment.
>
> If some clients decide to withdraw based on Ivy's withdrawals from our own funds, we would have to be prepared to accept that. Would the Engineers, Jeanneret and others walk away from Madoff if Ivy withdraws its money? I'm not sure, but I doubt it. Based on the amounts of capital they have invested with BLM, my perception is that they are quite satisfied with Madoff and would not want to leave. In the case of Jeanneret, he hardly listens to our advice at all, and our pleas to the Engineers for more diversification have for the most part fallen on deaf ears.
>
> It's somewhat of a middle of the road approach, but I think it enables us to preserve the majority of the fees while reducing our legal risk.
>
> Comments?

In his testimony, Ivy's Chief of Investment Management explained that what he meant by "should the worst happen" was that Madoff was a fraud.

80. Ivy's Chief of Investment Management's suggestion was not adopted. Ivy did not withdraw its Proprietary Fund investments from Madoff. And it did not disclose to clients Wohl's recommendation or Simon's and Ivy's Chief of Investment Management's responses.

D. Defendants' Ten Year Deception of Ivy's Clients

1. Defendants Mislead and Conceal Negative Facts About Madoff From Madoff Dependent Clients

81. Defendants had a duty to Madoff Dependent Clients to not mislead them about Madoff and to fully disclose and not conceal from them the negative facts that Defendants knew about Madoff. As of December, 1998, these included at least the following: (1) there was

insufficient OEX option trading to support Madoff's strategy; (2) Madoff might be misappropriating client funds to fund his market-making business, and if Madoff was doing this, the returns he reported as trade results were actually payments by him for his unauthorized use of client funds; (3) Madoff had just told Ivy a third obviously false story about how he traded his options that was at odds with what Madoff previously had said; (4) Madoff's previous two explanations regarding his option trading were also obvious falsehoods; (5) Ivy had earlier in 1998 instituted a special 3% limitation on the Proprietary Funds' investments with Madoff because of Defendants' concerns about Madoff; (6) both Wohl and Ivy's Chief of Investment Management had recommended that Ivy withdraw all of the Proprietary Funds' investments from Madoff because of their concerns about Madoff; (7) Despite this, Ivy had not withdrawn its Proprietary Funds because Simon believed withdrawal might cause Madoff Dependent Clients to terminate their relationship with Ivy, which would reduce Ivy's revenues and assets under management; and (8) it was rumored that Madoff's operation was a Ponzi scheme.

82. Defendants did not disclose the above facts to their Madoff Dependent Clients. Instead, as set forth below, Ivy, Simon, and Wohl embarked on a ten year program of concealment and misrepresentation of facts to keep the Madoff Dependent Clients as fee paying Ivy clients.

83. On December 30, 1998, two weeks after the e-mail exchange described above, Simon and Wohl met with the Engineer Trustees and Jeanneret, to whom they owed a fiduciary duty. The Engineer Trustees stated that they wished to eliminate three of the six managers Ivy had recommended and shift the $82 million invested with these managers to Madoff. At the time, the Engineers Pension Fund investment in Madoff already far exceeded the 3% Madoff limit Ivy had imposed on its Proprietary Funds. But Simon's response, on behalf of Defendants,

did not recommend that the Engineer Trustees withdraw or even reduce their Madoff investment, or consider doing so. Instead, he recommended that the Engineer Trustees increase the Madoff investment by a smaller amount than the Engineer Trustees had proposed on the ground that the large increase the Engineer Trustees wanted would result in undue concentration.

84. Simon did mention some uncertainties about Madoff, but these were uncertainties that the Engineer Trustees already knew – Madoff's age, the fact that no other entity had been able to replicate his results, and the fact that he had custody of the securities and his accountant was not a substantial accounting firm so one could not assess risk. Simon carefully avoided mentioning: (a) the options issue and lack of sufficient options both on and off-exchange to support the split-strike strategy Madoff reported he was executing; (b) that Madoff might be misappropriating the funds the Engineer Trustees had placed with him and was using them in his market-making operation, and that the returns Madoff was reporting as coming from trades were actually "compensation" he was paying for these unauthorized takings; (c) the multiple inconsistent lies Madoff had told Ivy about his trading; (d) Fund Manager's report that Madoff was managing returns; (e) Wohl's and Ivy's Chief of Investment Management's recommendation two weeks previously that Ivy totally withdraw its Proprietary Funds' assets from Madoff; and (f) Simon's opposition to doing so because he feared it would lose Ivy the assets and fees of the Engineer Trustees and other Madoff Dependent Clients.

85. That Defendants were intent on saying whatever was necessary to keep the Engineers Pension Fund invested in Madoff is apparent from an exchange that occurred midway through the meeting. Simon's mild and incomplete list of uncertainties had prompted one of the Engineer Trustees to ask Ivy whether, if there were reasons to be suspect of Madoff, the Engineers Pension Fund should have any money at all with Madoff. Rather than disclose what

he knew, Simon quickly reassured him and the other Engineer Trustees that what he had said was not a reason to withdraw funds, but only to limit the amount of the increase the Engineer Trustees were contemplating.

86. Simon's statement was false and fraudulent: while the mild reservations he had expressed in the meeting might not be a reason to withdraw funds, the facts he had not disclosed in the meeting – regarding the lack of sufficient options to support the trading Madoff was reporting, Madoff's possible misappropriation of funds, Madoff's lies, and the other matters set forth in paragraphs 50, 55 – 56, 57, 66, 70, 71, 73 – 80, *supra*, – most certainly were reasons to withdraw funds. Indeed, Wohl and Ivy's Chief of Investment Management had recommended precisely that course of action for Ivy's Proprietary Funds two weeks earlier. In this instance, the Defendants made no such recommendation and put their own lucrative fees ahead of the interests of their advisory clients.

87. Simon made numerous other false and fraudulent statements in the meeting as well. As Jeanneret's contemporaneous notes of the meeting show, Simon fraudulently stated that: (a) Ivy's due diligence "shows no problem for Madoff," a blatantly false statement; (b) Ivy "tend[s] not to have more than 5-7% with any one mgr," a false statement because it omitted to disclose the fact that Ivy had imposed a lower 3% limit for Madoff because of Defendants' concerns about Madoff; and (c) "Madoff accountant is ok but small," a false statement because of Ivy's internal concern about Madoff's accountant and its complete lack of any basis on which to say that the accountant was ok.

88. Defendants continued their deception in a letter Ivy sent to the Engineer Trustees, copied to Jeanneret, dated January 12, 1999. In the letter, which was drafted by Wohl and signed by Simon, Ivy undertook to "clarify and expand" on the points made in the meeting. After

noting that Ivy had reviewed, analyzed, and performed due diligence on Madoff for more than eleven years, the letter fraudulently stated that, "We have no reason to believe that the Madoff account is anything other than what Ivy's experience has shown and what the record demonstrates."

89. Contrary to the above false statement, Defendants had multiple reasons to believe that Madoff's account was other than it appeared. These included the fact that because of the limited number of OEX options available both on and off-exchange Defendants believed Madoff could not and was not making the trades he reported, the multiple lies Madoff had told about his trading, and the other matters set forth in paragraphs 50, 55 – 56, 57, 66, 70, 71, 73 – 80, *supra*. In his testimony, Ivy's Chief of Investment Management acknowledged that at the time Ivy sent the January 12th letter to the Engineer Trustees, Ivy had concerns there might be something "improper" in the Madoff account.

90. In a further effort to misleadingly allay any doubts the Engineer Trustees might have about remaining invested with Madoff, Simon's letter also assured them that Ivy's answer at the meeting to the Trustee who had asked whether the Engineers Pension Fund should have any money invested with Madoff was merely that, "[d]ue to a lack of external corroborative evidence, we cannot 'close the loop' in a manner that gives us total comfort."

91. Defendants' concern about Madoff was much more than a lack of corroboration sufficient to "close the loop in a manner that gives [Ivy] total comfort." As noted above, Defendants: (a) knew that Madoff had told Ivy multiple lies about his option trading; (b) knew that there were insufficient OEX options traded on or off-exchange to enable Madoff to make the option trades he claimed to be making; (c) had been told that Madoff was "managing" returns; and (d) had the thought that Madoff might be misappropriating the funds clients placed with him

for use in his market-making operation and that the returns Madoff was reporting as trade profits were not trade profits but rather amounts Madoff chose to debit to client accounts as payment for his unauthorized use of client money. Defendants also knew that Madoff did not follow the usual practice of using a separate custodian for the securities he traded which, Ivy's Chief of Investment Management said, "raise[d] the possibility he is making it up."

92. These concerns were serious enough that they had led Wohl to characterize an investment in Madoff as nothing more than "a matter of faith based on great performance" which "doesn't justify any investment – much less 3%." To characterize Ivy's Madoff concerns as amounting to no more than an inability "to close the loop in a manner that gives us total comfort" was a blatantly fraudulent understatement of Ivy's concern.

93. The statement that Ivy could not "close the loop" was also false and misleading because the Defendants did not try to close the loop on critical issues.

94. Moreover, Defendants knew that limiting their disclosure to an "inability to 'close the loop'" was problematic based on the information they had. In May of 1997, Ivy's Chief of Investment Management had questioned whether such a disclosure was sufficient when Wohl had suggested that Ivy should continue telling clients that Ivy had an inability to close the loop. In an internal Ivy memorandum, Ivy's Chief of Investment Management wrote, "I just question whether this goes far enough in view of our misgivings…" He then suggested that Ivy get its counsel's opinion as to whether the disclosure was adequate. Defendants did not do so. Instead, Defendants simply continued providing the same inadequate and misleading "unable to close the loop" disclosure to clients despite knowledge of a growing number of facts that indicated that Madoff could not be and was not executing his purported strategy.

95. During this time, the question whether Madoff was misappropriating client assets that had been raised in May of 1997 remained unanswered. As Wohl explained, "we were puzzled and didn't know what it was that he was doing." That changed on January 21, 1999, however, when Defendants received corroboration of their suspicion that Madoff was misappropriating client funds by making unauthorized subordinated loans of client money to his market-making operation. A prominent hedge fund manager ("Hedge Fund Manager") told Ivy's Chief of Investment Management that he had talked to a long time acquaintance who worked for Madoff and that the individual had not denied that this was what Madoff was doing. Ivy's Chief of Investment Management reported the conversation in an internal e-mail to Simon, Wohl and other Ivy personnel which stated in relevant part:

> [Hedge Fund Manager] met last night with someone he has known for a long time who works for Bernie.
> [Hedge Fund Manager] said, 'lets talk reality here'.
> [Hedge Fund Manager] advanced the subordinated lending theory about what the strategy really is.
> His contact gave it a nod – 'you can think of it that way'.

96. In addition to indicating that Madoff was misappropriating client assets, the Hedge Fund Manager's report contradicted a representation that Madoff had made to Defendants in 1996 that there was no relationship between his money management operation and his market-making business. Jeanneret's notes from a 1996 meeting with Madoff, Simon, and Ivy's Chief of Investment Management reflect that Madoff represented that:

> Composition of portfolio is not due to order flow.
> ...Must not have direct relationship between order book and money management. Order flows and money mgt. are not related.

97. Asked about the receipt of this troubling information from the Hedge Fund Manager, Wohl testified that what "it did was make us, as we already were at this point,

concerned about having money with Madoff." However, Defendants took no steps to advise their advisory clients about their concern or their conversation with the Hedge Fund Manager. When Wohl was asked if Ivy should have disclosed its concerns about the prospect, raised by the Hedge Fund Manager discussion, that Madoff was in fact misappropriating client funds, Wohl made the fantastic statement that, "I don't think it was germane to the overall question. No."

98. For his part, Simon attempted to justify Ivy's failure to disclose by saying that he believed that no disclosure was necessary unless and until Ivy knew for certain that Madoff was misappropriating funds: "I think it could only be disclosed to the clients if it had been addressed, satisfied and determined that indeed he was a subordinated lender." However, Simon then admitted that after learning about the troubling facts about Madoff misappropriating client assets, Ivy stopped looking into the issue. When asked, Simon could not defend Ivy's decision.

> Q. Why didn't you? Why did not Ivy pursue whether, in fact, this was what Madoff was doing, first, when it was Ivy's or some members' of it thought, and second, after [The Hedge Fund Manager's] report of his conversation with somebody at Madoff, why didn't Ivy pursue the matter further?
>
> A. I can't tell you.

99. Notwithstanding this additional knowledge, Defendants continued to defraud Madoff Dependent Clients in letters they sent to Danziger and Jeanneret in January and July of 1999. Both the January letter, which was signed by Simon and Wohl, and the July letter, which was signed by Simon alone but whose statements regarding Madoff were reviewed by Wohl, falsely stated that "we have no reason to believe there is anything improper in the Madoff operation" – a blatant untruth. Each letter also falsely listed Ivy's only concern regarding Madoff as the large amount of assets Madoff had under management. The letters stated:

> **<u>Bernard L. Madoff</u>-** Performance continues to be extremely strong. The account was up by .... <u>As we have stated many times,</u>

> while we have no reason to believe there is anything improper in the Madoff operation, we continue to question their ability to manage what must be an enormous pool of capital with such consistently outstanding results. They will not quantify the total amount that they manage, but we estimate it to be at least $5 billion, and likely more. As a result, we recommend a below median allocation. [5]

(emphasis supplied).

100. While Defendants were falsely stating to Madoff Dependent Clients that they had "no reason to believe there is anything improper in the Madoff operation," Defendants were saying just the opposite to some investors whose relationship with Ivy was not Madoff dependent. An Ivy note memorializing a September, 1999 meeting with a prospective business partner states, in relevant part, that the prospective business partner "appeared to be taken aback by the suggestion that the explanation of how it [Madoff] works could be that something improper is being done."

101. Sometime in 1999, Madoff indicated that he would not take any additional investments from Income Plus, and Simon suggested to Jeanneret that he could circumvent the limitation by investing in Beacon, which was 100% invested in Madoff. In making this recommendation, Simon fraudulently did not disclose the fact that Wohl and Ivy's Chief of Investment Management had recommended that Ivy completely withdraw the Proprietary Funds' investments from Madoff, or any of the other facts set forth in paragraphs 50, 52 – 63, 66, 70 – 71, 76, 95, *supra.*

102. At a meeting with Jeanneret on April 4, 2000, Simon and Ivy took their deception one step further by specifically vouching for Madoff's legitimacy. Ivy's notes of the meeting state that in answer to a Jeanneret question asking whether Madoff was essentially legitimate, Ivy's Director of Research responded that Madoff was essentially legitimate. The notes state:

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[5] A similar fraudulent letter, dated February 9, 1999, was sent to the Engineers.

> In addition, John asked, "is he [Madoff] essentially legitimate?" [Ivy's Director of Research] responded, "essentially legitimate" and went on to say that we had not been able to fully close the loop on him and therefore Madoff is limited to no more than 4% in the Ivy funds.

Simon, who was present, did not contradict or qualify Ivy's Director of Research's statement.

103. Ivy's assurance to Jeanneret that Madoff was essentially legitimate was fraudulent in that Ivy not only had no basis for stating that Madoff was legitimate, but the facts it knew indicated that he was not. These included that: (a) Madoff was misappropriating client funds for his market-making operation; (b) there was insufficient OEX option trading either on or off-exchange to support Madoff's purported OEX option trades; (c) Madoff had told Defendants multiple lies about his option trading; (d) Fund Manager had informed Ivy of evidence that Madoff was "managing returns;" and (e) the other facts set forth in paragraphs 58 – 61, 65, *supra*.

104. In the fall of 2000, Ivy withdrew from Madoff all of the Proprietary Funds' investments with Madoff. Simon testified that he told both Jeanneret and Danziger that the reason for the withdrawal was that Madoff had demanded it, and that he told Jeanneret that Madoff's reason was an objection to Bank of New York's soon to be consummated acquisition of Ivy and concern that the acquisition would create a potential conflict of interest if Madoff continued to invest Ivy funds.

105. This testimony is contradicted by Simon's son, Sean Simon, who testified that he was listening on speaker phone to the entire conversation in which Madoff purportedly demanded that Ivy withdraw its Proprietary Funds. In his testimony, Sean Simon notably did not remember any demand by Madoff that Ivy withdraw its funds. Additionally he stated on at least

two other occasions that Ivy had elected to withdraw from Madoff. An internal Ivy memorandum dated August 20, 2001 quotes him as telling a prospective client who asked whether Ivy had investments with Madoff that, "Ivy had chosen not to invest with Madoff in its proprietary funds but had exposure through Beacon and one customized account." In an e-mail to the Bank of New York in 2008 he put it more succinctly, writing: "[W]e fired him in 2000." (emphasis supplied).

106. Sean Simon was not the only Ivy employee to say that Ivy for its own reasons had elected to terminate Madoff. Ivy's Director of Client Development explained in an e-mail:

> We used to use Madoff in our funds but elected to get out when we figured it was just too risky since we couldn't get our arms around how he does what he does. It isn't that the strategy is complex. It is just that a number of questions that raise doubts. We have known Madoff for a long time and have only the kindest things to say about him. However, from a business standpoint, we thought we couldn't continue to take the risk.

(emphasis supplied). Wohl concurred. Although Wohl first testified that Simon had told him that Madoff had kicked out Ivy, he subsequently testified that in "the accounts that we ha[d] control over, where we were the money manager, the decision-maker, we chose to terminate our relationship with Madoff."

107. While Defendants told Madoff Dependent Clients that Madoff kicked them out, they told some prospective clients and other select Madoff investors that Ivy elected to withdraw from Madoff. In January of 2001, Simon told one of Ivy's clients that had made a small investment with Madoff that Ivy had withdrawn the Proprietary Funds' assets from Madoff. Simon followed by recommending that the client withdraw its money from Madoff, an investment it had made only nineteen months before. Based on Simon's recommendation, the

client decided to divest itself from Madoff immediately and sent its redemption notice the next day.

108. Eight months later, in an internal Ivy memorandum dated August 20, 2001 summarizing a meeting with another client, Wohl stated:

> I mentioned that we no longer have funds with Madoff in our Proprietary Funds. He said we can take [client]'s money out whenever we wanted- "without hesitation." <u>If it's not good enough for us, then it should be out of [client].</u>

(emphasis supplied).

109. Additionally, according to an internal Ivy memorandum memorializing a meeting that occurred in September of 2001, Ivy told a prospective client that it no longer invested in Madoff because of red flags raised by its research and its overall policy toward risk. The memorandum states that in the meeting Simon "noted that we have exposure remaining through mandate of individual clients but no current investment within our proprietary funds. Madoff provided a good example of some red flags raised by research and overall process of Ivy in regards to risk/reward."

110. The Madoff Dependent Clients never received such candid statements and advice from Defendants, who as fiduciaries were obligated to give this information to all of their clients.

2. Defendants Continue to Mislead Madoff Dependent Clients and Conceal Negative Facts About Madoff After Bank of New York Purchases Ivy

111. In February of 2001, Defendants sent out another round of fraudulent client letters to Danziger and Jeanneret. The letters, which were approved by Wohl and signed by Simon, again fraudulently listed the growth of Madoff's assets under management as Ivy's only Madoff concern and omitted to mention any of the concerns and facts about Madoff set forth in paragraphs 50, 52 – 63, 66, 70, 71, 75, 76, 79, 80, 95, 104, *supra*. Simon wrote:

> **Bernard L Madoff** - During 2000, Madoff returned....
> These returns, while outperforming the broader markets, are lower than those of previous years. Due to our ongoing concerns regarding Madoff's growth in assets under management, Ivy has decided to continue to seek additional managers in order to decrease manager specific risk.

112. Ivy sent other letters to Danziger and Jeanneret in August of 2001 and 2002, which in addition to only listing Madoff's assets under management as Ivy's concern, contained an additional false statement. In these letters, Ivy wrote that it was unable "to perform [its] usual and customary due diligence due to limitations set by Madoff." But, there was no such limitation. The limitation on making due diligence visits to which Ivy referred was self-imposed. Simon admitted this in his testimony when he testified that Madoff had not barred Ivy from visiting, but Ivy had elected to make no further visits because Ivy had withdrawn its proprietary funds and he therefore had decided that Ivy was no longer welcome. Defendants did not disclose this to Danziger or Jeanneret.

113. Wohl highlighted his continued concern about Madoff's legitimacy in correspondence with Ivy personnel. In an e-mail dated June 29, 2001, he wrote, "Madoff can personally bankrupt the Jewish community if he is not 'real.'" In an e-mail dated April 1, 2002, he responded to a subordinate's attempt to analyze Madoff's consistent success by writing, "Ah, Madoff. You omitted one other possibility - he's a fraud!"

114. In 2002, Ivy told at least one prospective client that its obligations as a fiduciary barred it from investing client assets with Madoff. An internal Ivy memorandum dated January 14, 2002 records Ivy telling a prospective client that Ivy could not overcome "qualitative issues" regarding Madoff and therefore, "no matter how successful he continue[d] to be, we are [not] satisfied as a fiduciary to invest client assets [with Madoff]." But Defendants never disclosed this to the Madoff Dependent Clients.

115. Ivy's Director of Investment Research firmly rejected an opportunity to invest in Madoff that was offered to Ivy in March of 2002, e-mailing a subordinate: "Let's not spend another second on it." Wohl was equally adamant in a December 2002 e-mail in which he responded with one word, "NO," when asked by a subordinate whether Ivy might be interested in Madoff for managed accounts. He again made his position clear in a January 2003 e-mail in which he specifically listed Madoff as a manager who should not be recommended to a prospective client, stating, "Madoff (NOT!)."

116. Ivy also counseled others not to invest with Madoff. When an Ivy advisory client independently became interested in investing in Madoff, he approached Simon for advice and information on Madoff. Simon said to the client that he did not recommend an investment in Madoff. Additionally, Ivy informed another client who had money invested with Madoff that Ivy did not think that the client should have any money with Madoff. Like the Madoff Dependent Clients, this client received letters summarizing manager performance and making recommendations on asset allocation. Remarkably, unlike the letters received by the Madoff Dependent Clients, however, this client was informed in a letter sent by Ivy, and signed by Wohl, that "we [Ivy] have not recommended allocations to this manager."

117. Thus by 2002, although Ivy: (a) adamantly rejected investing the Proprietary Funds' assets in Madoff; (b) was not recommending Madoff to potential new clients; (c) believed that its obligations as a fiduciary prevented it from investing client assets with Madoff; and (d) had told others to withdraw investments from Madoff, Defendants did not disclose any of this to the Madoff Dependent Clients and instead continued to mislead them. The reason was simple and set out in a 2001 e-mail from Simon to Wohl. Responding to a suggestion from Wohl that

Ivy exclude the Engineers' Madoff investment from Ivy's responsibility and try to make up the lost fees elsewhere, Simon wrote:

> You may be spending too much time in the sun! If we give up Madoff, John [Jeanneret] has opportunity to move in. In addition, they [the Engineer Trustees] would negotiate an even lower fee arrangement knowing their mentality.

118. It is clear why Simon did not want to lose the Engineer Pension Fund's assets. Simon testified that Ivy, as an investment adviser and asset management firm, is ranked by its assets under management and did not want to have to explain away losing millions of dollars of assets under management. Also, the Engineers Pension Fund's assets had played a particularly important role as a catalyst for the growth of Ivy's assets under management. In an e-mail sent in June, 2001, Simon reminded Wohl of the importance of the Engineer Pension Fund assets in Ivy's success. He wrote:

> ...([W]ho would have thought that the $5 mill would lead to $145 mill and [Jeanneret's] funds) ... it helped to contribute towards building Ivy's AUM and credibility, despite our real concerns about BLM [Madoff].

119. The e-mail dated March 21, 2001 from Simon to Wohl in which he rejected Wohl's suggestion that Ivy exclude the Engineers' Madoff investement from Ivy's responsibilities also referred to a fear Simon had that Ivy's conduct with respect to the Engineer Pension Fund's investments in Madoff exposed it to legal liability. After rejecting Wohl's suggestion, Simon wrote: "Legal question: Now that BNY owns Ivy, who has the ultimate liability??"

120. Despite their internal views of Madoff, Defendants continued to mislead the Madoff Dependent Clients in letters signed by Simon in February of 2002. As with the previous letters, Simon's 2002 letters fraudulently listed the growing amount of assets Madoff had under

management as Ivy's only concern about Madoff's operation, and omitted to mention the concerns and facts set forth in paragraphs 50, 52 – 63, 66, 70 – 71, 75 – 76, 79 – 80, 95, 114 – 116, *supra*; as well as Ivy's policy to not recommend Madoff to new clients or itself invest in Madoff. The letters said:

> **Bernard L. Madoff** - During 2001, Madoff returned .... Madoff posted strong absolute returns in 2001, although lower than those of previous years. Due to our ongoing concerns regarding Madoff's growth in assets under management, Ivy continues to seek additional managers in order to decrease manager specific risk.

121. Simon signed similarly fraudulent letters to Danziger and the Engineer Trustees in 2003 and 2004. The 2003 and 2004 letters continued to fraudulently list Madoff's large amount of assets under management as Ivy's only concern with Madoff's operation and fraudulently omitted to mention the concerns and facts about Madoff and Ivy set forth in paragraphs, 52 – 63, 66, 70 – 71, 75 – 76, 79 – 80, 95, 114 – 116, *supra.*

122. In 2005, Ivy, now under Bank of New York's control, formed an internal Global Risk Management Committee to assess and address Ivy business risks. In 2005 and 2007, the Committee made lists of what it considered Ivy's ten largest risks. Both lists rated Madoff as one of Ivy's top ten business risks. The 2005 list, which also ranked the risks in order of danger to Ivy, ranked Madoff as Ivy's fourth highest risk.

123. Although Defendants sent no written reports to the Madoff Dependent Clients after 2004, Defendants continued to conceal material information regarding Madoff in meetings and telephone conversations in which investments were discussed. In none of these discussions did Defendants disclose that Ivy's Global Risk Management Committee considered Madoff one of Ivy's top ten risks or any of the other facts and concerns about Madoff and the actions and

policies of Ivy set forth in paragraphs , 52 – 63, 66, 70, 71, 75 – 76, 79 – 80, 95, 114 – 116, *supra.*

124. On January 1, 2006, Ivy executed a new agreement with Beacon that specifically excluded Madoff from the managers who Ivy was obligated to research, monitor, evaluate and meet with. Nearly two years later, on December 1, 2007, Ivy amended its agreement with JPJ to similarly exclude Madoff from its obligations to JPJ.

125. Defendants' decade long fraud misled Danziger, Markhoff, BAMC, AAMC, Jeanneret, JPJ, and the Engineer Trustees about Madoff, and caused them to invest, reinvest, and maintain with Madoff at least $227 million of Andover, Beacon, Income Plus, and individual pension plan assets, all of which was lost when the fact of Madoff's fraud finally came to light in December, 2008. During the same period, Ivy received at least $40 million in fees from the parties Defendants defrauded.

III. DEFENDANTS' FAILURE TO DISCLOSE MATERIAL INFORMATION ABOUT MADOFF

126. Defendants were fiduciaries to AAMC, BAMC, JPJ, and other clients.

127. As fiduciaries, Defendants had an affirmative duty of utmost good faith and full and fair disclosure of all material facts as well as an affirmative obligation to employ reasonable care to avoid misleading clients.

128. Defendants breached their fiduciary duties to fully and fairly disclose all material facts known to them about Madoff and Ivy's internal views of Madoff by intentionally not disclosing the facts set forth in paragraphs , 52 – 63, 66, 70, 71, 75, 76, 79, 80, 95, 114 – 116, 122, *supra.*

129. Defendants did not disclose the above facts with an intent to defraud their clients.

CLAIMS

FIRST CAUSE OF ACTION
(Securities Fraud – General Business Law §§ 352 and 353)

130. The Attorney General repeats and re-alleges paragraphs 1 through 129 herein.

131. The acts and practices of Defendants alleged herein violated Article 23-A of the General Business Law, in that they constituted fraudulent practices as defined in General Business Law § 352.

SECOND CAUSE OF ACTION
(Securities Fraud – General Business Law § 352-c (1)(a))

132. The Attorney General repeats and re-alleges paragraphs 1 through 129 herein.

133. The acts and practices of Defendants alleged herein violated Article 23-A of the General Business Law, in that they involved the use or employment of a fraud, deception, concealment, suppression, or false pretense, where said uses or employments were engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of securities.

THIRD CAUSE OF ACTION
(Securities Fraud – General Business Law § 352-c (1)(c))

134. The Attorney General repeats and re-alleges paragraphs 1 through 129 herein.

135. The acts and practices of Defendants alleged herein violated Article 23-A of the General Business Law, in that Defendants made, or caused to be made, representations or statements which were false, where (i) they knew the truth, or (ii) with reasonable efforts could have known the truth, or (iii) made no reasonable effort to ascertain the truth, or (iv) did not have knowledge concerning the representations or statements made, where said representations or

statements were engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation, or purchase within or from this state of any securities.

FOURTH CAUSE OF ACTION
(Persistent Fraud and Illegality – Executive Law § 63(12))

136. The Attorney General repeats and re-alleges paragraphs 1 through 129 herein.

137. The acts and practices alleged herein constitute conduct proscribed by § 63(12) of the Executive Law, in that Defendants (a) engaged in repeated fraudulent acts or otherwise demonstrated persistent fraud and (b) repeatedly violated the Martin Act and the Investment Advisers Act of 1940 in the carrying on, conducting or transaction of business within the meaning and intent of Executive Law § 63(12).

FIFTH CAUSE OF ACTION
(Fiduciary Fraud)

138. The Attorney General repeats and re-alleges paragraphs 1 through 129 herein.

139. As fiduciaries, Defendants owed a duty of undivided and undiluted loyalty to those whose interests they were to protect and an affirmative obligation to employ reasonable care to avoid misleading clients.

140. Defendants, Ivy, Simon, and Wohl, with intent to defraud, failed to fully and fairly disclose to AAMC, BAMC, and JPJ all material facts known to them about Madoff and Ivy's internal views about Madoff.

141. By reason of the foregoing Defendants committed fraud under New York law, and are liable to AAMC, BAMC, and JPJ for disgorgement of fees and profits and compensatory and punitive damages.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

A. Enjoining and restraining Defendants, their affiliates, assignees, subsidiaries, successors and transferees, their officers, directors, partners, agents and employees, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct, conspiracy, contract, or agreement, and from adopting or following any practice, plan, program, scheme, artifice or device similar to, or having a purpose and effect similar to, the conduct complained of above;

B. For an accounting of all fees or other compensation received by Defendants, directly or indirectly, from AAMC, BAMC, Andover, Beacon, JPJ, Jeanneret, Engineer Trustees and the Engineers Pension Fund, or any of the investors therein from January 1, 1997 to present;

C. Directing that Defendants, pursuant to Article 23-A of the General Business Law, § 63(12) of the Executive Law, and New York common law, pay all restitution, disgorgement and damages caused, directly or indirectly, by the fraudulent and deceptive acts and repeated fraudulent acts and persistent illegality complained of herein plus applicable pre-judgment interest;

D. Directing that Defendants pay punitive damages;

E. Directing that Defendants pay Plaintiff's costs, including attorneys' fees as provided by law;

F. Enjoining Simon and Wohl from any employment, consultation, or unpaid service as investment managers or advisers, and enjoining Simon and Wohl from serving as general partners, managing partners, officers, or directors of any investment fund, or otherwise managing the investments of others;

G. Directing such other equitable relief as may be necessary to redress Defendants' violations of New York law; and

H. Granting such other and further relief as may be just and proper.

Dated: May 11, 2010
New York, New York

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