

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ERNEST T. HARTMAN and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 139 PENSION FUND; JAMES F. COLLINS and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 325 PENSION FUND; JAMES F. COLLINS and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 325 ANNUITY FUND; JAMES F. COLLINS and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 325 JOINT TRUST FUND; MICHAEL TALARSKI and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 241 PENSION FUND; ELIZABETH F. CASSADA and JAMES A. WILLIAMS as Trustees of the IBEW LOCAL 910 ANNUITY FUND; ELIZABETH F. CASSADA and JAMES A. WILLIAMS as Trustees of the IBEW LOCAL 910 PENSION FUND; THOMAS R. LOSTRACCO as Trustee of the SEIU 1199 UPSTATE PENSION FUND; GEORGE KENNEDY as Trustee of the SERVICE EMPLOYEES PENSION FUND OF UPSTATE NEW YORK; RODNEY MALARCHIK and IRVING WOOD as Trustees of the UPSTATE NEW YORK BAKERY DRIVERS AND INDUSTRY PENSION FUND; JAMES ROUNDS and LYLE D. FASSETT as Trustees of the PLUMBERS AND PIPEFITTERS LOCAL 112 PENSION FUND; ROCKNE BURNS as Trustee of the ENGINEERS JOINT WELFARE FUND; and CARMEN A. SERRETT as Trustee of the LABORERS' LOCAL 103 PENSION FUND,

Plaintiffs,

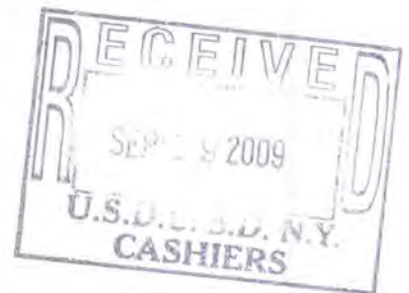
v.

IVY ASSET MANAGEMENT L.L.C.; BANK OF NEW YORK MELLON CORPORATION; J.P. JEANNERET ASSOCIATES, INC.; INCOME-PLUS INVESTMENT FUND; JOHN P. JEANNERET; PAUL PERRY; LAWRENCE SIMON; HOWARD WOHL; ADAM GEIGER; JEFFREY LINDENBAUM; JOHN ROGERS; SEAN SIMON; KEVIN BANNON; STEVEN PISARKIEWICZ; ROBERT MESCHI; SUSAN RABINOWITZ; MICHAEL SINGER; ALAN CHUANG; GREGORY VAN INWEGEN; SEAN CUMISKEY; STUART DAVIES; PETER ROSE; JOSEPH BURNS; MARK SANTERO; PETER NORIS; FARZINE HACHEMIAN; COLLEEN BALDWIN; GLENN CUMMINS; IVY MANAGER APPROVAL

Civil Action No.

09 CIV ECF Case 8278

COMPLAINT (ERISA)



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ERNEST T. HARTMAN and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 139 PENSION FUND; JAMES F. COLLINS and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 325 PENSION FUND; JAMES F. COLLINS and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 325 ANNUITY FUND; JAMES F. COLLINS and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 325 JOINT TRUST FUND; MICHAEL TALARSKI and KIMBERLY A. BAUTISTA as Trustees of the IBEW LOCAL 241 PENSION FUND; ELIZABETH F. CASSADA and JAMES A. WILLIAMS as Trustees of the IBEW LOCAL 910 ANNUITY FUND; ELIZABETH F. CASSADA and JAMES A. WILLIAMS as Trustees of the IBEW LOCAL 910 PENSION FUND; THOMAS R. LOSTRACCO as Trustee of the SEIU 1199 UPSTATE PENSION FUND; GEORGE KENNEDY as Trustee of the SERVICE EMPLOYEES PENSION FUND OF UPSTATE NEW YORK; RODNEY MALARCHIK and IRVING WOOD as Trustees of the UPSTATE NEW YORK BAKERY DRIVERS AND INDUSTRY PENSION FUND; JAMES ROUNDS and LYLE D. FASSETT as Trustees of the PLUMBERS AND PIPEFITTERS LOCAL 112 PENSION FUND; ROCKNE BURNS as Trustee of the ENGINEERS JOINT WELFARE FUND; and CARMEN A. SERRETT as Trustee of the LABORERS' LOCAL 103 PENSION FUND,

Plaintiffs,

v.

IVY ASSET MANAGEMENT L.L.C.; BANK OF NEW YORK MELLON CORPORATION; J.P. JEANNERET ASSOCIATES, INC.; INCOME-PLUS INVESTMENT FUND; JOHN P. JEANNERET; PAUL PERRY; LAWRENCE SIMON; HOWARD WOHL; ADAM GEIGER; JEFFREY LINDENBAUM; JOHN ROGERS; SEAN SIMON; KEVIN BANNON; STEVEN PISARKIEWICZ; ROBERT MESCHI; SUSAN RABINOWITZ; MICHAEL SINGER; ALAN CHUANG; GREGORY VAN INWEGEN; SEAN CUMISKEY; STUART DAVIES; PETER ROSE; JOSEPH BURNS; MARK SANTERO; PETER NORIS; FARZINE HACHEMIAN; COLLEEN BALDWIN; GLENN CUMMINS; IVY MANAGER APPROVAL

Civil Action No.

ECF Case

**COMPLAINT (ERISA)**

COMMITTEE; IVY INVESTMENT COMMITTEE;  
and IVY STRATEGIC OPERATING COMMITTEE,

Defendants.

Plaintiffs Ernest T. Hartman and Kimberly A. Bautista as trustees of the IBEW Local 139 Pension Fund; James F. Collins and Kimberly A. Bautista as trustees of the IBEW Local 325 Pension Fund, the IBEW Local 325 Annuity Fund, and the IBEW Local 325 Joint Trust Fund; Michael Talarski and Kimberly A. Bautista as trustees of the IBEW Local 241 Pension Fund; Elizabeth F. Cassada and James A. Williams as trustees of the IBEW Local 910 Annuity Fund; Elizabeth F. Cassada and James A. Williams as trustees of the IBEW Local 910 Pension Fund; Thomas R. Lostracco as trustee of the SEIU 1199 Upstate Pension Fund; George Kennedy as trustee of the Service Employees Pension Fund of Upstate New York, Rodney Malarchik and Irving Wood as trustees of the Upstate New York Bakery Drivers and Industry Pension Fund; James Rounds and Lyle D. Fassett as trustees of the Plumbers and Pipefitters Local 112 Pension Fund; Rockne Burns as trustee of the Engineers Joint Welfare Fund; and Carmen A. Serrett as trustee of the Laborers' Local 103 Pension Fund allege the following for their Complaint:

#### **I. NATURE OF CASE**

1. Plaintiffs are trustees of multiemployer pension and other employee benefit plans (“the Plans”) established for the benefit of union-represented employees and their families. Plaintiffs’ claims under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. (“ERISA”), arise out of the defendant fiduciaries’ violations of their statutory duties of loyalty, care, skill, prudence, and diligence. Plaintiffs bring this action to recover for the Plans the Plans’ losses resulting from Defendant fiduciaries’ breaches of their duties.

2. Through the actions of Defendants (both fiduciary and nonfiduciary), each of the Plans invested plan assets in entities associated with Bernard L. Madoff (“Madoff”) via one or both of the following methods: 1) through the Income-Plus Investment Fund (“Income-Plus”), a tax-exempt group trust which pooled employee pension and profit sharing plans assets for investment purposes; and 2) through Limited Volatility Equity, a purported investment fund run by Madoff. Defendants J. P. Jeanneret Associates, Inc. and its managers, including its founder, Dr. John P. Jeanneret, and Paul Perry, collectively “the Jeanneret Defendants,” served as investment managers and outside fiduciaries for the Plans with regard to the Plans’ investments in Income-Plus and Limited Volatility Equity.

3. Defendant Ivy Asset Management LLC (“Ivy”), a wholly-owned subsidiary of Defendant Bank of New York Mellon Corp., served as an investment adviser for Income-Plus and received fees or other compensation from Plan assets for its services as such. On information and belief, pursuant to an agreement with Jeanneret Associates, Ivy also provided investment advice with respect to the investment of the Plans’ assets in Limited Volatility Equity in exchange for fees. The Individual Ivy Defendants (listed below) and the Bank of New York Mellon Corp. determined the investment advice given by Ivy. Consequently, each of these Defendants (referred to collectively herein as “the Ivy Defendants”) was also a fiduciary with respect to the Plans.

4. By directing or advising the investment of the Plans’ assets in Madoff-related entities, the Ivy and Jeanneret Defendants breached their fiduciary duties, including but not limited to the duty to act solely in the interests of the Plans’ participants and beneficiaries and the duty to act with care, skill, prudence, and diligence.

5. Had Defendants acted prudently by engaging in the thorough and independent investigation and analysis required of fiduciaries by ERISA, they would have been alerted to numerous “red flags” that highlighted the imprudence of investing in Madoff-related entities. Some examples of these “red flags” include the following: 1) Madoff’s high returns were implausibly consistent; 2) such returns could not be replicated or simulated; 3) no firm operating a similar strategy had the same level of success; 4) the stock holdings that Bernard Madoff Investment Securities LLC (“BMIS”) reported to the SEC did not comport with the size of the fund Madoff purportedly managed for clients; 5) Madoff conducted his strategy in an unusually secretive and non-transparent manner; 6) Madoff lacked an independent prime broker or custodian; and 7) his complicated, multi-billion dollar strategy was audited by a 3-person company in a 13 x 18 foot office.

6. In dereliction of their fiduciary duties, Defendants failed to identify and act on these red flags and instead placed, maintained, recommended, and/or allowed the Plans’ assets to be invested in Madoff-related entities while receiving substantial fees. The Ivy Defendants and the Jeanneret Defendants calculated and received their fees according to falsely inflated dollar amounts reported by Madoff. By breaching their fiduciary duties, Defendants caused significant losses to the Plans.

7. This action seeks relief against Defendants pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), to make the Plans whole for the losses suffered as a result of Defendants’ breaches and to disgorge the profits and fees that the Defendants received based on the Plans’ investments in Madoff-related entities. Because the violations alleged herein caused losses to the Plans and because ERISA authorizes plan

fiduciaries to sue for plan-wide relief for breaches of fiduciary duty by other fiduciaries, Plaintiffs bring this action to recover losses to the Plans.

## **II. JURISDICTION**

8. Plaintiffs bring this action for declaratory, equitable, and monetary relief pursuant to ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3). This Court has subject matter jurisdiction over Plaintiffs' claims under ERISA § 502(e) and (f), 29 U.S.C. § 1132(e) and (f), and 28 U.S.C. § 1331.

## **III. VENUE**

9. Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because one or more of the Defendants resides or may be found in this District and some of the breaches alleged took place in this District.

## **IV. PARTIES**

### **A. Plaintiffs**

10. Plaintiffs Ernest T. Hartman and Kimberly A. Bautista are trustees of the International Brotherhood of Electrical Workers ("IBEW") 139 Pension Fund and are named fiduciaries of the IBEW Local 139 Pension Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local 139 Pension Fund has been invested in Income-Plus.

11. Plaintiffs Kimberly A. Bautista and Michael Talarski are trustees of the IBEW Local 241 Pension Fund and are named fiduciaries of the IBEW Local 241 Pension Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local 241 Pension Fund has been invested in Income-Plus.

12. Plaintiffs James F. Collins and Kimberly A. Bautista are trustees of the IBEW Local Union 325 Annuity Fund and are named fiduciaries of the IBEW Local Union 325

Annuity Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local Union 325 Annuity Fund has been invested in Income-Plus and/or in direct Madoff investments via Limited Volatility Equity.

13. Plaintiffs James F. Collins and Kimberly A. Bautista are trustees of the IBEW Local Union 325 Pension Fund and are named fiduciaries of the IBEW Local Union 325 Pension Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local Union 325 Pension Fund has been invested in Income-Plus.

14. Plaintiffs James F. Collins and Kimberly A. Bautista are trustees of the IBEW Local Union 325 Joint Trust Fund and are named fiduciaries of the IBEW Local Union 325 Joint Trust Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local Union 325 Joint Trust Fund has been invested in direct Madoff investments via Limited Volatility Equity.

15. Plaintiffs Elizabeth F. Cassada and James A. Williams are trustees of the IBEW Local 910 Annuity Fund and are named fiduciaries of the IBEW Local 910 Annuity Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local 910 Annuity Fund has been invested in Income-Plus.

16. Plaintiffs Elizabeth F. Cassada and James A. Williams are trustees of the IBEW Local 910 Pension Fund and are named fiduciaries of the IBEW Local 910 Pension Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the IBEW Local 910 Pension Fund has been invested in Income-Plus.

17. Plaintiff Thomas R. LoStracco is a trustee of the SEIU 1199 Upstate Pension Fund and is a named fiduciary of SEIU 1199 Upstate Pension Fund pursuant to ERISA

§ 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the SEIU 1199 Upstate Pension Fund has been invested in Income-Plus.

18. Plaintiff George Kennedy is a trustee of the Service Employees Pension Fund of Upstate New York and is a named fiduciary of is a named fiduciary of the Service Employees Pension Fund of Upstate New York pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the Service Employees Pension Fund of Upstate New York has been invested in Income-Plus.

19. Plaintiffs Rodney Malarchik and Irving Wood are trustees of the Upstate New York Bakery Drivers and Industry Pension Fund and are named fiduciaries of the Upstate New York Bakery Drivers and Industry Pension Fund pursuant ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the Upstate New York Bakery Drivers and Industry Pension Fund has been invested in Income-Plus.

20. Plaintiffs James Rounds and Lyle D. Fassett are a trustees of the Plumbers and Pipefitters Local 112 Pension Fund and are named fiduciaries of the Plumbers and Pipefitters Local 112 Pension Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the Plumbers and Pipefitters Local 112 Pension Fund has been invested in direct Madoff investments via Limited Volatility Equity.

21. Plaintiff Rockne Burns is a trustee of the Engineers Joint Welfare Fund and is a named fiduciary of the Engineers Joint Welfare Fund pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the Engineers Joint Welfare Fund has been invested in direct Madoff investments via Limited Volatility Equity.

22. Plaintiff Carmen A. Serrett is a trustee of the Laborers' Local 103 Pension Fund and is a named fiduciary of the Laborers' Local 103 Pension Fund pursuant to ERISA

§ 3(21)(A), 29 U.S.C. § 1002(21)(A). At all relevant times, a portion of the Laborers' Local 103 Pension Fund has been invested in Income-Plus.

23. At all relevant times, the Plans were “employee benefit plan[s]” within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3).

**B. Defendants**

24. Nominal Defendant Income-Plus Investment Fund (“Income-Plus”) pooled and commingled qualifying employee pension and profit sharing plans’ assets for investment purposes. On information and belief, Income-Plus is a tax-exempt group trust under Internal Revenue Code § 501(a) pursuant to the principles of Rev. Rul. 81-100, 1981-1, C.B. 326. At all relevant times, the assets of each of the Plans that were invested through Income-Plus retained their identities as “plan assets” pursuant to ERISA § 3(42), 29 U.S.C. § 1002(42). At all relevant times, Income-Plus invested plan assets directly or indirectly in Madoff-related investments. Income-Plus is named as a Defendant only so that the Court can award complete relief, including equitable relief.

25. Defendant J.P. Jeanneret Associates, Inc. (“Jeanneret Associates”) is a New York corporation with its principal place of business at 100 East Washington Street, Syracuse, New York 13202. Jeanneret Associates is a registered Investment Adviser under the Investment Advisers Act of 1940, and provides investment management and consulting services to employee benefit plans. As explained in more detail below, Jeanneret Associates agreed in writing to serve as an investment manager to each of the Plans within the meaning of ERISA § 3(38), 29 U.S.C. § 1002(38) and acknowledged and agreed in writing that it is a fiduciary with respect to the Plans. As such, Jeanneret Associates was a fiduciary of each of the Plans that invested its assets through Income-Plus and/or Limited Volatility Equity, as alleged below.

26. In addition, Plaintiffs are informed and believe, and based thereon allege, that Jeanneret Associates was at all relevant times a fiduciary of each of the Plans under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that it acknowledged and agreed in writing that it is a fiduciary with respect to the Plans and had and/or exercised the responsibility to make decisions as to the Plans' investments in Madoff-related investments and/or gave advice to the Plans to make such investments in return for compensation from the Plans. As a result, Jeanneret Associates exercised discretionary authority or discretionary control respecting management of the Plans; had and/or exercised authority or control respecting management or disposition of the Plans' assets; and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, or had authority or responsibility to do so; and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

27. Defendant John P. Jeanneret ("Dr. Jeanneret") is the founder, chief executive officer, and majority shareholder of Defendant J.P. Jeanneret Associates, Inc. As explained in more detail below, Dr. Jeanneret served as a fiduciary of each of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he directly and/or through Jeanneret Associates had and/or exercised the responsibility to make decisions as to the Plans' investments in Madoff-related investments and/or gave advice to the Plans to make such investments in return for compensation from the Plans. As a result, Dr. Jeanneret exercised discretionary authority or discretionary control respecting management of the Plans; had and/or exercised authority or control respecting management or disposition of the Plans' assets; and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other

property of each Plan, or had authority or responsibility to do so; and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

28. Defendant Paul Perry was at some or all relevant times a director, vice president, and minority shareholder of Jeanneret Associates. As explained in more detail below, Defendant Perry served as a fiduciary to the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he had and/or exercised the responsibility to make decisions as to the Plans' investments in Madoff-related investments and/or gave advice to the Plans to make such investments in return for compensation from the Plans. As a result, Defendant Perry exercised discretionary authority or discretionary control respecting management of the Plans; had and/or exercised authority or control respecting management or disposition of the Plans' assets; and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, or had authority or responsibility to do so; and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

29. Defendants Jeanneret Associates, Dr. Jeanneret, and Defendant Perry are collectively referred to as the "Jeanneret Defendants."

30. Each of the Jeanneret Defendants is a party in interest pursuant to ERISA § 3(14)(A), (B), and (H), 29 U.S.C. § 1002(14)(A), (B), and (H), because each was a fiduciary of the Plans and/or provided services to each of the Plans and/or was an employee, officer, or director of a person providing services to each of the Plans.

31. Defendant Ivy Asset Management LLC ("Ivy") is a Delaware limited liability company with its principal place of business at One Jericho Plaza, Jericho, New York 11753. Ivy is a registered Investment Adviser under the Investment Advisers Act of 1940. Until January

1, 2009, Ivy was a Delaware corporation under the name “Ivy Asset Management Corp.” As explained in more detail below, Ivy served as an investment adviser to each of the Plans because it gave advice to Jeanneret Associates with regard to the investment of Plan assets in Income-Plus and/or Limited Volatility Equity in exchange for a fee. As such, Defendant Ivy was at some or all relevant times a fiduciary of each of the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that it rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan. In addition, Plaintiffs are informed and believe, and based thereon allege, that Ivy exercised discretionary authority or discretionary control respecting management of the Plans, and/or exercised authority or control respecting management or disposition of the Plans’ assets, or had authority or responsibility to do so, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

32. Defendant The Bank of New York Mellon Corporation (“BNYM”) is a Delaware corporation headquartered at One Wall Street, New York, NY 10286. BNYM, formerly known as The Bank of New York Company, Inc. (“BNYCo.”), became Ivy’s parent company on October 3, 2000, when it acquired 100% of Ivy’s outstanding stock.

A. On information and belief, the structure of BNYM’s ownership of Ivy changed after Ivy’s reorganization as a limited liability company on January 1, 2009. After that date, BNYM indirectly owned Ivy via two entities: Alternative Holdings I, LLC, a Delaware limited liability company, and Alternative Holdings II, LLC, also a Delaware limited liability company. Under this structure, BNYM owns 100% of Alternative Holdings II, which owns 100% of Alternative Holdings I, which owns 100% of Ivy. BNYM thus indirectly owns 100% of Ivy.

B. Plaintiffs are informed and believe, and based thereon allege, that Defendant BNYM had the power to exercise, and did exercise, a controlling influence over Ivy's investment management policies and acted in concert with Ivy, through its ownership of Ivy and through the service of BNYM executives on Ivy's Board of Directors. Thus, BNYM was at some or all relevant times a fiduciary of the Plans within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), as it exercised discretionary authority or discretionary control respecting management of the Plans, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, or had authority or responsibility to do so and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

33. On information and belief, based on defendant Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, Defendant Ivy Manager Approval Committee, at some or all relevant times, approved all new investment managers. On information and belief, at some or all relevant times, Defendants Lawrence Simon, Howard Wohl, Adam Geiger, Sean Simon, Robert Meschi, Alan Chuang, Gregory van Inwegen, Sean Cumiskey, Stuart Davies, Peter Rose, Joseph Burns, and Mark Santero served on the Manager Approval Committee. The Manager Approval Committee and its members served as fiduciaries to the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other

property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans. As such, the Manager Approval Committee and its members were fiduciaries of each of the Plans as alleged below.

34. On information and belief, based on defendant Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, Defendant Ivy Investment Committee, at some or all relevant times, approved all new investment managers, reviewed the risk profile of approved managers, removed managers from the approved list, and set investment parameters for Ivy's portfolios, among other things. On information and belief, at some or all relevant times, Defendants Alan Chuang, Gregory van Inwegen, Sean Cumiskey, Stuart Davies, Joseph Burns, Farzine Hachemian, and Peter Noris served on the Investment Committee. Additionally, at some or all relevant times, Defendants Sean Simon and Michael Singer served as non-voting advisory members of the Investment Committee, who had veto power over the committee's decisions in circumstances where they deemed necessary. At some or all relevant times, the Ivy Investment Committee and its members served as fiduciaries of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans. As such, the Ivy Investment Committee and its members were fiduciaries of each of the Plans as alleged below.

35. On information and belief, based on defendant Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, at some or all relevant times defendant Ivy

Strategic Operating Committee managed the business operations of Defendant Ivy and was responsible for entering into investment advisory agreements, establishing investment advisory fees, and selecting investment managers. On information and belief, at some or all relevant times, Adam Geiger, Sean Simon, and Michael Singer served on the Strategic Operating Committee. At some or all relevant times, the Ivy Strategic Operating Committee and its members served as fiduciaries of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that they exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans. As such, the Ivy Strategic Operating Committee, and its members were fiduciaries of each of the Plans as alleged below.

36. Defendants Ivy Manager Approval Committee, Ivy Investment Committee, and Ivy Strategic Operating Committee are collectively referred to as the "Ivy Committee Defendants."

37. On information and belief, at some or all relevant times, defendants Colleen Baldwin, Glenn Cummins, Adam Geiger, Jeffrey Lindenbaum, John Rogers, Lawrence Simon, Sean Simon, and Howard Wohl served as Ivy Executives. On information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, the Ivy Executives were responsible for Ivy's day to day operations, which included entering into investment advisory agreements, establishing investment advisory fees, selecting investment managers, and developing new products and services.

38. On information and belief, defendant Lawrence Simon, at some or all relevant times, served as Ivy's Chief Executive Officer and as a member of Ivy's Board of Directors, the Office of the Chief Executive ("OCE"), the Manager Approval Committee, and as an Ivy Executive. At some or all relevant times, on information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Simon determined the investment advice Ivy gave to clients. As such, defendant Simon served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

39. On information and belief, defendant Howard Wohl, at some or all relevant times, served as Ivy's Chairman and Chief Investment Officer and as an Ivy Executive. On information and belief, at some or all relevant times, defendant Wohl was also a member of Ivy's Board of Directors, the OCE, and the Manager Approval Committee. On further information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Wohl determined the investment advice Ivy gave to clients. As such, defendant Wohl served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or

indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

40. On information and belief, defendant Adam Geiger, at some or all relevant times, served as Chief Investment Officer; Ivy's Managing Director, Investments; Director, Investments, and as an Ivy Executive. On information and belief, at some or all relevant times, defendant Geiger also served as a member of the Strategic Operating Committee and the Manager Approval Committee. On information and belief, at some or all relevant times, as Chief Investment Officer, defendant Geiger reviewed portfolios to make sure that they were consistent with investment objectives and guidelines, and/or consistent with the client's advisory contracts and instructions to Ivy. On information and belief, defendant Geiger also was responsible for manager research, due diligence and monitoring, portfolio construction and investment management, and quantitative research and risk management. On further information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Geiger determined the investment advice Ivy gave to clients. During his time at Ivy, defendant Geiger served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

41. On information and belief, defendant Jeffrey Lindenbaum, at some or all relevant times, served as Ivy's Managing Director, Client Development – Europe and Asia; Managing

Director, Products and Markets; Chief Financial Officer, and as an Ivy Executive. At some or all relevant times, on information and belief based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Lindenbaum determined the investment advice Ivy gave to clients. As such, defendant Lindenbaum served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

42. On information and belief, defendant John Rogers, at some or all relevant times, served as Ivy's Managing Director, Investments Products Group; Managing Director, Products and Markets; and Director, Products and Markets. At some or all relevant times, on information and belief based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Rogers determined the investment advice Ivy gave to clients. As such, defendant Rogers served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

43. On information and belief, defendant Sean Simon, at some or all relevant times, served as Ivy's Co-President with defendant Michael Singer. On information and belief, at some

or all relevant times, defendant Simon served on Ivy's Board of Directors, the Investment Committee, the Strategic Operating Committee, the Manager Approval Committee, and acted as co-Chair of the Ivy Executives Committee. On information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Simon determined the investment advice Ivy gave to clients. On information and belief, defendant Simon was named Ivy's Chief Executive Officer in January 2009. As such, defendant Simon served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

44. On information and belief, defendant Kevin Bannon, at some or all relevant times, served on Ivy's Board of Directors. On information and belief, at or about the same time, he also served as Bank of New York's Chief Investment Officer and as chairman of the Bank of New York's Investment Policy Committee. On information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Bannon determined the investment advice Ivy gave to clients. As such, defendant Bannon served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or

other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

45. On information and belief, defendant Steven Pisarkiewicz, at some or all relevant times, served as Chairman of Ivy's Board of Directors. On information and belief, at or about the same time, defendant Pisarkiewicz also served as Bank of New York's Executive Vice President. On information and belief based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Pisarkiewicz determined the investment advice Ivy gave to clients. As such, defendant Pisarkiewicz served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

46. On information and belief, defendant Robert Meschi, at some or all relevant times, served as Ivy's Director, Investments of the Advisor. On information and belief, defendant Meschi served as Ivy's Assistant Vice President, Manager of Research, and was a member of Ivy's Manager Approval Committee. On information and belief based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Meschi determined the investment advice Ivy gave to clients. As such, defendant Meschi served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans'

assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

47. On information and belief, defendant Susan Rabinowitz, at some or all relevant times, served as Vice President of Investments for Ivy. On information and belief, at some or all relevant times, defendant Rabinowitz researched Ivy's hedge fund managers. On further information and belief, based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Rabinowitz determined the investment advice Ivy gave to clients. As such, defendant Rabinowitz served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that she exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

48. On information and belief, defendant Michael Singer, at some or all relevant times, served as Ivy's Co-President with Defendant Sean Simon, as a member of Ivy's Board of Directors and Strategic Operating Committee, and as Managing Director and Chief Administrative Officer. On information and belief, at some or all relevant times, defendant Singer also served, along with Defendant Sean Simon, as a non-voting advisory member of the Investment Committee, and had veto power over the Committee's decisions. On information and belief, at some or all relevant times, defendant Singer had responsibilities in the following areas at Ivy: finance, legal and compliance, risk management, hedge fund manager operational

due diligence, and fund administration. On further information and belief based on Ivy's Part II, Form ADV filings with the Securities and Exchange Commission, defendant Singer determined the investment advice Ivy gave to clients. As such, defendant Singer served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

49. On information and belief, defendant Alan Chuang, at some or all relevant times, served as Ivy's Director, Investments; Head of Portfolio Management; and as a member of Ivy's Manager Approval Committee and the Investment Committee. As such, defendant Chuang served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

50. On information and belief, defendant Gregory van Inwegen, at some or all relevant times, served as Ivy's Managing Director and Chief Investment Risk Officer. On information and belief, at some or all relevant times, defendant van Inwegen also served on Ivy's Manager Approval Committee and Investment Committee, chaired the Investment Risk Management Committee, and led the Risk Management and Quantitative Research team. As

such, defendant van Inwegen served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

51. On information and belief, defendant Sean Cumiskey, at some or all relevant times, acted as Ivy's Managing Director, Investments; headed Ivy's Investment Strategies Group; and served as an Ivy Executive. On information and belief, at some or all relevant times, defendant Cumiskey served on Ivy's Manager Approval Committee, Investment Committee, and Investment Risk Management Committee. As such, defendant Cumiskey served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

52. On information and belief, defendant Stuart Davies, at some or all relevant times, served as Ivy's Managing Director, Investments and served as Global Head of Investments. On information and belief, at some or all relevant times defendant Davies managed the Global Investments Division, which was responsible for manager research, portfolio construction, and investment management. On further information and belief, defendant Davies was a member of

Ivy's Investment Risk Management Committee, Manager Approval Committee, and Investment Committee. As such, defendant Davies served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

53. On information and belief, defendant Peter Rose, at some or all relevant times, served as Ivy's Director of Investments and head of Investment research for Europe and Asia. On information and belief, and at some or all relevant times, defendant Rose was a member of Ivy's Manager Approval Committee. As such, defendant Rose served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

54. On information and belief, defendant Joseph Burns, at some or all relevant times, served as Ivy's Director of Investments and as the Strategy head of Long/Short Equity. On information and belief, at some or all relevant times, defendant Burns was also a member of Ivy's Manager Approval Committee and Investment Committee. As such, defendant Burns served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in

that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

55. On information and belief, defendant Mark Santero, at some or all relevant times, served as Ivy's Managing Director of Investments and was responsible for the management and coordination of Ivy's Research, Risk Management, and Portfolio Management investment departments. On information and belief, at some or all relevant times, defendant Santero was also a member of Ivy's Manager Approval Committee. As such, defendant Santero served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

56. On information and belief, defendant Peter Noris, at some or all relevant times, served as Ivy's Chief Investment Officer and as a member of Ivy's Investment Committee. On information and belief, at some or all relevant times, defendant Noris worked with the investment team and was a strategic adviser in four key areas, including research, portfolio management, risk management, and operational due diligence. As such, defendant Noris served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans'

funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

57. On information and belief, defendant Farzine Hachemian, at some or all relevant times, was a member of the Investment Risk Management Committee and the Investment Committee, and served as Director, Investments. As such, defendant Hachemian served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

58. On information and belief, defendant Colleen Baldwin, at some or all relevant times, served as Ivy's Chief Operating Officer and was an Ivy Executive. As such, defendant Baldwin served as a fiduciary of the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that she exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or disposition of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to moneys or other property of each Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

59. On information and belief, defendant Glenn Cummins, at some or all relevant times, served as Ivy's Managing Director, Finance and Chief Financial Officer, and was an Ivy

Executive. As such, defendant Cummins served as a fiduciary to the Plans pursuant to ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), in that he exercised discretionary authority or discretionary control respecting management of the Plans' funds, and/or exercised authority or control respecting management or distribution of the Plans' assets, and/or rendered investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such Plan, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

60. Defendants Lawrence Simon, Howard Wohl, Adam Geiger, Jeffrey Lindenbaum, John Rogers, Sean Simon, Kevin Bannon, Steven Pisarkiewicz, Robert Meschi, Susan Rabinowitz, Michael Singer, Alan Chuang, Gregory van Inwegen, Sean Cumiskey, Stuart Davies, Peter Rose, Joseph Burns, Mark Santero, Peter Noris, Farzine Hachemian, Colleen Baldwin, and Glenn Cummins are collectively referred to as the "Ivy Individual Defendants."

61. Ivy, the Ivy Individual Defendants, the Ivy Committee Defendants, and BNYM are collectively referred to as the "Ivy Defendants."

62. Each of the Ivy Defendants is a party in interest pursuant to ERISA § 3(14)(A), (B), and (H), 29 U.S.C. § 1002(14)(A), (B), and (H), because each was a fiduciary of the Plans and/or provided services to each of the Plans and/or was an employee, officer, or director of a person providing services to each of the Plans.

## **V. FACTUAL ALLEGATIONS**

### **A. The Investments in Madoff.**

63. The Jeanneret and Ivy Defendants directed the Plans' assets into Madoff-related investments through two investment vehicles, the Income-Plus Investment Fund and Limited Volatility Equity. The structure of each of these investment vehicles is described below.

**1. Indirect Investments in Madoff via the Income-Plus Investment Fund**

64. The IBEW Local 139 Pension Fund, IBEW Local 241 Pension Fund, IBEW Local Union 325 Annuity Fund, IBEW Local Union 325 Pension Fund, IBEW Local 910 Annuity Fund, IBEW Local 910 Pension Fund, Laborers' Local 103 Pension Fund, SEIU 1199 Upstate Pension Fund, Service Employees Pension Fund of Upstate New York, and Upstate New York Bakery Drivers and Industry Pension Fund invested assets into Income-Plus. Those Plaintiffs' Plans which invested in Income-Plus are referred to collectively as the "Income-Plus Plaintiffs" or "Income-Plus Plans."

65. On information and belief, based in part on offering memoranda for the Income-Plus Fund, Income-Plus was a tax-exempt group trust designed to pool and commingle assets of qualifying employee pension and profit sharing plans for investment purposes.

66. On information and belief, Jeanneret Associates solicited investments in Income-Plus via the private offering memoranda mentioned above. The initial Offering Memorandum for Income-Plus was executed on December 15, 1993 ("1993 Offering Memorandum"), and was later revised on November 1, 2003 ("2003 Offering Memorandum"). These private Offering Memoranda provided that an investor which met certain qualifications could purchase units in Income-Plus by executing an adoption agreement and information statement, delivering such documents to Jeanneret Associates, and paying the applicable purchase price for the units.

67. On information and belief, based on the 1993 and 2003 Offering Memoranda, units in Income-Plus could only be purchased by "Participating Entities," which were limited to 1) tax-exempt pension or profit sharing trusts which qualified under Internal Revenue Code ("Code") §§ 401(a) and 501(a), as amended; 2) plans or governmental units described in Code §§ 401(a)(24) and 818(a)(6); or 3) individual retirement accounts exempt under Code § 408(e).

68. On information and belief, based on the 1993 and 2003 Offering Memoranda, Income-Plus was limited to 100 Participating Entities at any time.

69. Each of the Income-Plus Plans became a “Participating Entity” within the meaning of the 1993 and 2003 Offering Memoranda by purchasing units in Income-Plus. Consequently, on information and belief based on the 1993 and 2003 Offering Memoranda, the Income-Plus Plans had “no right to take part in the conduct or control of the businesses of the Group Trust or Investment Fund [Income-Plus].”

70. On information and belief, Jeanneret Associates, together with Ivy, conducted the business of Income-Plus and operated the entity as a “fund of funds.” On further information and belief, based in part on the 2003 Offering Memorandum, a substantial portion of the assets of Income-Plus were invested with Managers recommended to Jeanneret Associates by Ivy.

71. On information and belief, based on the 1993 and 2003 Offering Memoranda, the stated overall objective of Income-Plus was to achieve returns higher than the risk-free rate of return (*i.e.*, Treasury Bills), while minimizing risk. In order to achieve these returns, the 1993 and 2003 Offering Memoranda indicate that Income-Plus engaged in hedging and arbitrage strategies that were represented as “thoroughly researched by the Investment Manager [Jeanneret Associates] and its Advisor, Ivy Asset Management Corp.”

72. In letters and communications with investors in Income-Plus, Jeanneret Associates frequently emphasized the “low risk” nature of Income-Plus. For example, Jeanneret Associates sent letters describing Income-Plus as a “substitute for traditional fixed income investments” and an “excellent alternative compared to traditional U.S. Bond Investments.”

73. As explained in more detail below, the Jeanneret Defendants and Ivy Defendants used Income-Plus to direct Income-Plus Plan assets into Madoff-related entities in dereliction of

their fiduciary duties and contrary to the representations that they made to the Income-Plus Plaintiffs.

**2. Direct Investment of Plaintiffs' Plans' Assets in Limited Volatility Equity**

74. The IBEW Local Union 325 Annuity Fund, IBEW Local Union 325 Joint Trust Fund, Plumbers and Pipefitters Local 112 Pension Fund, and the Engineers Joint Welfare Fund gained direct exposure to Madoff as a result of the Jeanneret Defendants' and Ivy Defendants' recommendations to invest in Limited Volatility Equity, an investment strategy run by Madoff and/or his investment firm, Bernard L. Madoff Investment Securities. Those of the Plans which invested directly in Madoff via Limited Volatility Equity are referred to collectively as the "Direct Investment Plans" or "Direct Investment Plaintiffs."

75. On information and belief, the operative documents for the Direct Investment Plans' investments with Madoff were as follows: Discretionary Investment Management Agreements with Jeanneret Associates; Services Agreements between the Direct Investment Plans and Bernard L. Madoff Investment Securities; and an agreement between Jeanneret Associates and Ivy to share fees in exchange for Ivy's performance of certain services. The provisions of these documents are explained in more detail in Section B below.

76. As more fully explained below, although Limited Volatility Equity was described in various ways, including as a split-strike conversion, market-neutral, hedged equity, or convertible arbitrage strategy, Madoff did not engage in any such strategies and actually operated a massive Ponzi scheme. After Madoff's fraud was disclosed, the Direct Investment Plans suffered 100% losses with respect to their Limited Volatility Equity investments.

**B. Facts Bearing on Defendants' Fiduciary Status**

77. ERISA treats as fiduciaries not only persons explicitly named as plan fiduciaries under § 402(a)(1), 29 U.S.C. § 1102(a)(1), but also any other persons who in fact perform

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

78. ERISA § 3(38), 29 U.S.C. § 1002(38), defines an investment manager as a fiduciary, as follows:

The term “investment manager” “means any fiduciary (other than a trustee or named fiduciary, as defined in section 1102(a)(2) of this title)--

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (i) is registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C. 80b-1 et seq.]; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act [15 U.S.C. 80b-3a(a)], is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary’s registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

## **B. Jeanneret Defendants’ Fiduciary Status**

79. At some or all relevant times, the Jeanneret Defendants served as fiduciaries of each of the Plans within the meaning of ERISA.

80. All of the Plans entered into Discretionary Investment Management Agreements with Jeanneret Associates. In those agreements, Jeanneret Associates certified that it was an “investment manager” as that term is defined in ERISA § 3(38) and that it would perform its

duties as an investment manager “with the care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and shall diversify the Investment Account Assets so as to minimize the risk of large losses . . . .”

81. In its Form ADV, Part II filings with the Securities and Exchange Commission, Jeanneret Associates also made representations regarding the investment management services and due diligence that the company would provide. For example, Jeanneret Associates stated:

A. Account statements “are reviewed to assure that investments are in compliance with client guidelines and that brokerage or custodial services are being adequately provided.”

B. Jeanneret Associates “seeks to maintain sufficient investment diversification so that potentially large losses from any single investment may be avoided.”

C. Jeanneret Associates’s goal with regard to selecting broker dealers and commission levels is “to obtain best execution for the client and maximum reliability from the financial institutions”

D. Jeanneret Associates’s “overriding concern” is “to achieve best execution for all investment-related transactions.”

82. In the 1993 and 2003 Offering Memoranda for Income-Plus, as well as attachments thereto, Jeanneret Associates reiterated its fiduciary status and duties. For example:

A. Jeanneret Associates acknowledged that the Income-Plus Group Trust’s assets constituted “plan assets” within the meaning of ERISA and regulations promulgated by the Department of Labor. By virtue of having assets governed by ERISA, the Offering Memoranda provided: “The Investment Manager [Jeanneret Associates] will therefore be

deemed a fiduciary with respect to each investing Plan and the general prudence and fiduciary responsibility provisions of ERISA will be applicable to it and to the operations of the Group Trust.”

B. Jeanneret Associates represented that it was an “investment manager” within the meaning of ERISA § 3(38).

C. In accordance with its fiduciary duties, Jeanneret Associates acknowledged that it “must discharge its responsibilities with respect to a Plan in a prudent manner and must consider several factors in determining whether to enter into an investment or engage in an investment course of action. . . Among the factors that should be considered are the diversification and liquidity of the Plan’s portfolio, the potential return on the proposed investment and the place the proposed investment would occupy in the Plan’s portfolio taken as a whole.”

83. While Jeanneret had authority to appoint sub-managers (“Designated Managers”) for the Income-Plus Fund and to delegate authority to manage all or a portion of Income-Plus’s assets to such Designated Managers, Jeanneret Associates retained its fiduciary duties. In the 1993 and 2003 Offering Memoranda, as well as attachments thereto, Jeanneret Associates made the following representations:

A. In the Adoption Agreement for the Income-Plus Fund (incorporated as an exhibit to the Offering Memoranda), Jeanneret Associates explicitly acknowledged that it was a “named fiduciary” within the meaning of ERISA § 402(a)(2) when delegating authority to Designated Managers.

B. Jeanneret Associates stated that its objective was “to allocate assets within the Investment Fund such that they are reasonably diversified among different Designated

Managers and investment strategies, in order to minimize the risk of one strategy adversely effecting [*sic*] the investment return.”

C. Jeanneret Associates stated it would engage in the following activities:

1. “*monitor* the activities of all Designated Managers selected by Investment Manager”;
2. retain “*a fiduciary responsibility* to review the performance of all selected Designated Managers”; and
3. “*exercise due diligence* in the selection and monitoring of such managers.” (Emphases added.)

84. Jeanneret Associates also emphasized its fiduciary status and due diligence in letters and other communications with Plaintiffs. For example, in letters the firm sent regarding Income-Plus, Jeanneret Associates represented that,

as your fiduciary and investment manager, [Jeanneret Associates] conducts research with regard to all managers in the [Income-Plus] Fund. We meet with managers on a regular basis to determine the latest developments for the various investment strategies, and to determine if there have been any material changes. These meetings include review of personnel employed by the various investment managers, including any changes in strategy and other factors which may impact investment results. We of course periodically make changes in some of the Fund’s investment managers, as required.

85. The governing documents related to direct investments in Madoff via Limited Volatility Equity also described Jeanneret Associates’ responsibilities as a fiduciary. For example, the Services Agreements with Bernard L. Madoff Investment Securities (“BMIS”) specified that Jeanneret Associates was appointed as “Investment Manager,” and that BMIS was “directed to accept instructions from the Investment Manager . . . .”

86. The Plans paid substantial fees to Jeanneret Associates in exchange for the investment management and fiduciary services that Jeanneret Associates was expected to render.

A. On information and belief, at some or all relevant times, Jeanneret Associates received a “Basic Fee” and a “Performance Fee” related to direct investments in Madoff via Limited Volatility Equity. On information and belief, at some or all relevant times, the Basic Fee and Performance Fee were capped at a total annual fee of 1.5% per year of the closing value of investment account assets.

B. On information and belief, based on the 1993 Offering Memorandum, Income-Plus initially paid Jeanneret a quarterly “Base Fee” of 0.1875% on Income-Plus’s net asset value at the end of each quarter. On further information and belief, in addition to the Base Fee, Jeanneret also received from Income-Plus an “Additional Fee” equal to “20% of the amount by which the percentage increase in the net asset value (as adjusted for additions and withdrawals of the funds) of the Investment Fund during each calendar year, before deduction of the Additional Fee, exceeded the sum of (a) 10% less (b) the Base Fee.” On information and belief, based in part on the 1993 Offering Memorandum, both the Base Fee and the Additional Fee were split equally with Ivy.

C. On information and belief, based in part on the 2003 Offering Memorandum for Income-Plus, Jeanneret Associates continued to receive fees and split them with Ivy. Under the 2003 Offering Memorandum, Jeanneret Associates received a “Management Fee” of 0.3125% of Income-Plus’s net asset value at the end of each quarter. On information and belief, Jeanneret Associates paid 42% of the Management Fee to Ivy until the calendar year ending December 31, 2005; after that date, Jeanneret Associates paid 40% of the fees to Ivy.

87. By reason of the foregoing, at all relevant times, Jeanneret Associates was a fiduciary of each of the Plans within the meaning of ERISA.

88. The Individual Jeanneret Defendants also qualify as fiduciaries under ERISA § 3(21)(A). Dr. Jeanneret, as founder, chief executive officer, and majority shareholder of Jeanneret Associates, and Defendant Perry, as Director, Vice President, and minority shareholder, personally controlled and dominated Jeanneret Associates. Defendants Dr. Jeanneret and Perry provided investment management and investment advice to the Plans and effectively exercised authority and control over the management and disposition of the Plans' assets. For example:

A. The website for J. P. Jeanneret Associates stated that defendants Dr. Jeanneret and Perry served as investment managers, and that they were directly responsible for investment management and consulting services.

B. Defendants Dr. Jeanneret and Perry corresponded with the Plans regarding investments in Income-Plus, attended meetings of the Boards of Trustees of the Plans, and signed key documents related to Jeanneret Associates' status as an investment manager, including Discretionary Investment Management Agreements, fee agreements for investment management services, and investment guidelines.

C. The Form ADV, Part II documents that Jeanneret Associates filed with the Securities and Exchange Commission stated that defendants Dr. Jeanneret and Perry were the "two individuals responsible for investment management and for giving investment advice."

89. By reason of the foregoing, at all relevant times, defendants Dr. Jeanneret and Paul Perry were fiduciaries of each of the Plans within the meaning of ERISA.

### **C. Ivy Defendants' Fiduciary Status**

90. On information and belief, Jeanneret Associates utilized Ivy's services in order to identify alternative investment strategies that were not typically known to the general investing

public, and to gain access to investment managers that were available through Ivy's network. In that regard, Jeanneret Associates gained access to Madoff and his purported "limited volatility equity" strategy through Ivy.

91. On information and belief, at all relevant times, Ivy provided the following services to Jeanneret: investment manager evaluations, investment manager recommendations, and performance monitoring. On further information and belief, at some or all relevant times, Jeanneret Associates compensated Ivy with 50% of all fees received by Jeanneret from any client invested with any managers, including Bernard L. Madoff, introduced by Ivy.

92. On information and belief, the above-described relationship between Ivy and Jeanneret Associates was established, at least in part, pursuant to an Agreement for Services made on May 15, 1991 ("Ivy-Jeanneret Services Agreement") wherein Ivy agreed to provide a number of services, including to:

- (a) "research, identify, monitor, evaluate and meet with potential investment managers;
- (b) recommend investment managers to [Jeanneret] Associates;
- (c) advise [Jeanneret] Associates as to the availability of opportunities to invest client funds with particular investment managers;
- (d) monitor, evaluate and meet with investment managers that are managing Client funds invested through [Jeanneret] Associates;
- (e) assess the performance of investment managers managing Client funds invested through [Jeanneret] Associates and make periodic recommendations with respect to such performance;
- (f) maintain such records as are mutually deemed appropriate by Ivy and [Jeanneret] Associates relating to the recommendation, retention, performance and services of investment managers recommended by Ivy and selected by [Jeanneret] Associates to manage the client funds invested through [Jeanneret] Associates; and
- (g) provide [Jeanneret] Associates with such documentation as it reasonably requires with respect to investments of Client funds with investment managers such that [Jeanneret]

Associates may maintain compliance with the record-keeping requirements of the Advisers Act.”

93. In exchange for Ivy’s provision of the fiduciary services specified in that agreement, Jeanneret Associates agreed to pay Ivy “fifty (50%) percent of those fees . . . received by [Jeanneret] Associates from any Client on the Client List with respect to funds invested with investment managers introduced to [Jeanneret] Associates by Ivy.”

94. On information and belief, based on the 1993 Offering Memorandum, Jeanneret Associates and Ivy amended the above-described Ivy-Jeanneret Services Agreement on December 1, 1992, to account for the organization of the Income-Plus Group Trust and Fund. Pursuant to the amended advisory agreement, Jeanneret Associates retained Ivy to serve as the investment adviser to Income-Plus and to provide investment advice. In exchange for such services, Jeanneret Associates agreed to pay Ivy 50% of the fees that it received from Income-Plus. As described in the 1993 Offering Memorandum:

Under the Engagement Agreement, Adviser [Ivy] has agreed, with respect to the Investment Manager’s management of the assets of the Investment Fund, to (i) research, evaluate and meet with potential investment managers of the assets of the Investment Fund, (ii) make recommendations to the Investment Manager that it invest assets of the Investment Fund with certain investment managers by investing in partnerships operated by such investment managers and/or by opening up directly-managed accounts with such investment managers, and (iii) monitor, evaluate and assess performance of investment managers that are managing assets of the Investment Fund and to make periodic recommendations to Investment Manager with respect to such performance. . . . For its services to Investment Manager in connection with the management of the assets of the Investment Fund, Advisor will initially receive 50% of the fees that Investment Manager receives from the Group Trust, including the Investment Fund.

95. On information and belief, based on the 2003 Offering Memorandum, Ivy continued to provide the same services described above, but the fee-sharing agreement with Ivy was revised. Pursuant to the revised fee-sharing agreement, Ivy received 42% of Jeanneret

Associates' fees until calendar year 2005, at which point Ivy's share of the fees decreased to 40%.

96. In addition to the fiduciary duties that Ivy undertook in the Ivy-Jeanneret Services Agreement and the 1993 Income-Plus Offering Memorandum, Ivy also marketed the due diligence, monitoring, and transparency that it would provide as an investment adviser. On its website, Ivy acknowledged that the hedge fund industry "requires constant due diligence" and that its key strengths include "continual manager monitoring" and "manager due diligence." Furthermore, Ivy highlighted its "commitment to ethical conduct and transparency," and noted that it is Ivy's responsibility to "continually educate our clients on global market issues, competitive forces and changing dynamics; share information on portfolio construction and our related activities; and most importantly, serve our clients' interests in advance of our own."

97. Letters and other communications that Jeanneret Associates sent to investors also emphasized Ivy's fiduciary role and the due diligence that Ivy performed. For example, a letter to Income-Plus investors from Jeanneret Associates stated: "J.P. Jeanneret Associates engages in extensive research, *together with our consultant Ivy Asset Management*, with regard to all Managers in the Fund. *We* regularly add assets or replace Managers depending upon their investment performance, risk, and other factors. Further, *we* meet regularly with Managers in the Fund to ascertain the latest developments for each investment strategy, and to determine if there have been any changes in the structure or key personnel of each manager." (Emphases added.)

98. By reason of the foregoing, at all relevant times, the Ivy Defendants were fiduciaries of each of the Plans within the meaning of ERISA.

99. On information and belief, BNYM, Ivy's 100% owner, participated in, influenced, and/or controlled Ivy's exercise of the functions that created Ivy's fiduciary status,

and/or BNYM directly or indirectly received compensation for the investment advice provided by Ivy. BNYM's participation in, influence over, and/or control of Ivy is illustrated by the following examples:

- A. At some or all relevant times, high-ranking BNYM executives served in management or policy-making positions at Ivy, including on Ivy's Board of Directors:
1. Defendant Kevin Bannon simultaneously served as Executive Vice President – Chief Investment Officer for The Bank of New York and a member of Ivy's Board of Directors.
  2. Defendant Steven Pisarkiewicz served as Executive Vice President of the Bank of New York while also serving as Chairman of Ivy's Board of Directors.
  3. Jonathan Little served simultaneously on BNYM's Executive Committee and Ivy's Board of Directors.
  4. Ronald O'Hanley served as Vice Chairman of BNYM as well as a member of the BNYM's Executive Committee. He simultaneously served on Ivy's Board of Directors.
- B. At some or all relevant times, BNYM participated in and influenced Ivy's decisions. For example, the Ivy Executives and the Ivy Strategic Operating Committee were responsible for meeting consistently with senior management at BNYM (formerly BNYCo.) to discuss strategies and synergies.
- C. On information and belief, BNYM exercised oversight over Ivy, was responsible, at least in part, for Ivy's corporate compliance, audit, and risk management, and subjected Ivy to multiple BNYM corporate compliance policies. For example, BNYM noted that “[a]s a subsidiary of BNYM, Ivy is subject to multiple corporate compliance policies and

benefits from corporate wide training around compliance and ethics matters.” In addition, in public investor relations filings, BNYM stated that in addition to Ivy’s management oversight and compliance infrastructure, “[a]ugmenting this are service functions shared with The Bank of New York Mellon Corporation (“BNYM”) such as Compliance, Internal Audit, IT Security and Risk Management.”

D. Ivy and BNYM marketed their close relationship.

1. BNYM’s website notes that it is able to provide “fund-of-hedge fund strategies through Ivy Asset Management, a wholly-owned subsidiary of The Bank of New York Mellon and well respected hedge fund manager worldwide.”

2. Ivy’s website notes that one of its “key strengths” is its “synergistic” relationship with BNYM, and that its ability to “deliver the best quality work and produce the highest quality products” was “enhanced by the relationship with our parent company, The Bank of New York Mellon Corporation.”

3. In a letter Ivy sent to its clients discussing its merger with BNYM, Ivy wrote that “BNY’s full array of services and capabilities will be made available to you.”

4. When BNYCo. acquired Ivy, it did so, in part, to promote itself as providing services to Taft-Hartley pension plans, which were among Ivy’s key clients.

5. After BNYCo. acquired Ivy, it continued to market Ivy as one of its asset managers with pension funds as clients.

6. BNYM publicized the critical role Ivy played in BNYM’s investment management services. As Defendant Pisarkiewicz stated in a January 6, 2006

press release, “Ivy is a critical component of our growing investment management business and is strategically important to The Bank of New York.”

E. Ivy and BNYM described their close relationship in communications with Plaintiffs and in the governing documents for Income-Plus.

1. In the 2003 Offering Memorandum, both Ivy and BNYM (in its previous capacity as BNYCo.) were described as the investment “Advisor” to Income-Plus. For example, the 2003 Offering Memorandum stated: “The Investment Manager [Jeanneret Associates] has retained Ivy Asset Management Corp., a wholly owned subsidiary of The Bank of New York Company, Inc. (‘Advisor’), to consult with regarding the identification of potential Managers, due diligence, Manager selection, portfolio allocation and re-balancing, and to provide certain administrative, back-office and other general support services.” The document then re-emphasized: “The Investment Manager [Jeanneret Associates] has engaged Ivy Asset Management Corp., a wholly-owned subsidiary of the Bank of New York Company, Inc. (the ‘Advisor’), to consult with the Investment Manager in selecting and monitoring the Managers and to provide certain administrative, back-office, and other general support.”

2. The 2003 Offering Memorandum touted the close relationship between Ivy and BNYM (in its previous capacity as BNYCo.) by stating: “The Bank of New York Company, Inc., a financial holding company (“BNYCo”), is the sole owner of the Advisor. The Bank of New York is the world’s largest custodian bank with \$7.8 trillion in assets under custody as of June 30, 2003.”

E. BNYM described itself as being responsible for investment management services, including by implication those services provided by Ivy to Taft-Hartley pension plans like Plaintiffs.

1. BNYM's website states that BNYM Asset Management is "The 'umbrella organization' for all of the company's affiliated investment management firms and is responsible for U.S. and non U.S. retail, intermediary and institutional distribution of investment management and related services."

2. BNYM identifies itself on its website as "bring[ing] together" the services provided to Taft-Hartley pension plans through its "specialty investment management firms," which includes Ivy.

3. BNYM states on its website that services to Taft-Hartley pension plans that are provided through its specialty investment management firms are "channel[ed] . . . through a single point of contact."

100. Upon information and belief, BNYCo. and BNYM were specifically aware of Ivy's relationships with Madoff and Jeanneret, and benefitted from those relationships, as shown by the following examples:

A. Plaintiffs are informed and believe, and based thereon allege, that Ivy divested its direct Madoff holdings in connection with its 2000 merger with BNYM. BNYM's 2008 10-K statement in the wake of Madoff's fraud indicates that, "[Ivy], a subsidiary that primarily manages funds-of-funds investments[,] has not had any funds-of-funds investments with Madoff since 2000." That 10-K statement also notes, "[s]everal investment managers contracted with Ivy as a sub-advisor and one pension fund contracted with Ivy as investment manager; a portion of these funds were invested with Madoff and likely suffered losses as a result of the Madoff

fraud.” Upon information and belief, BNYM, in conducting due diligence of Ivy in connection with the merger, and in its subsequent role as Ivy's corporate parent, gained constructive or actual knowledge of Ivy's relationship with Madoff and Jeanneret, and was aware and/or should have been aware of the numerous red flags surrounding Madoff.

B. BNYCo. and BNYM benefitted from the fees Ivy received as a result of its relationships with Madoff and Jeanneret, which were reported as part of BNYCo.'s total earnings in their financial statements. Furthermore, in its financial statements filed with the SEC, BNYCo. specifically referenced earnings from Ivy as an important contributing source to BNYCo.'s own earnings. For example:

1. In 2000, the Ivy acquisition is mentioned in BNYCo.'s “Summary of Results” in its 10-K filing. Among other references to Ivy, BNYCo. stated that its “[p]rivate client services and asset management fees were up 21% to \$296 million in 2000, led by strong business flows in the BNY Hamilton Funds, as well as by the *acquisitions of Ivy Asset Management Corp.* and Estabrook Capital Management, Inc.” (Emphasis added.)

2. In BNYCo.'s 10-Q for the period ended June 30, 2002, BNYCo. commented that “Fees were also favorably impacted by continued strong flows into alternative investment funds offered by the Company's Ivy Asset Management subsidiary and demand for the Company's retail investment products.”

3. In an 8-K filed with the SEC on July 17, 2003, BNYCo. attached a press release singling out Ivy as an important contributor to the rise in BNYCo.'s asset management fees, stating that “[t]he sequential quarter increase reflects the continued strong demand for alternative investments from Ivy Asset Management as well as higher fees from the private client services business. The increase from the second quarter of 2002 and on a year-to-date basis was

due to strong performance from Ivy Asset Management and acquisitions.” BNYCo.’s 10-Q for the period ended June 30, 2003 makes the same points.

4. BNYCo.’s 10-Q for the period ended September 30, 2003 also references that BNYCo.’s growth in private client services and asset management fees “reflect higher equity price levels as well as the continued strong demand for alternative investments from Ivy Asset Management and higher short-term money management fees, partially offset by higher seasonal tax-oriented fees in the second quarter.” Indeed, this 10-Q notes more than a three-fold increase of Ivy’s “grown assets under management from \$2.4 billion when it was acquired in 2000 to \$8 billion at September 30, 2003.”

5. In BNYCo.’s 10-K for 2003, Ivy was again singled out for mention as a contributor to the growth of private client services and asset management fees. Among other things, the 10-K stated that “Ivy, a fund of funds hedge fund manager, continues to attract new assets at a rapid pace. Ivy ended 2003 with \$9.1 billion of assets under management, up 42% for the year.”

6. BNYCo.’s 10-K for 2004 noted the significant contribution Ivy made to overall earnings. Specifically, the 10-K identified a 17% increase in private client services and asset management fees that was “primarily due to exceptional growth at the Company’s fund of funds manager, Ivy Asset Management.” The 10-K also recognized an increase in revenues from Europe reflected “increased revenue from [depository receipts] and Ivy” and an increase in revenues in Asia was “primarily due to the sale of Wing Hang and higher revenue from Ivy.”

7. BNYCo.’s 10-K for 2005 noted that a 9% increase in private client services and asset management fees from the previous year was “driven by another strong performance at Ivy and double-digit growth in fixed income asset management and separate

account services.” The 2005 Form 10-K also noted that the improvement in income before taxes in the Private Bank and BNY Asset Management Segment between 2003 and 2005, from \$175 million to \$199 million, “is primarily attributable to strong revenue growth at Ivy Asset Management.” In addition, an increase in assets under management during that same time period, from \$89 million at December 31, 2003 to \$105 million at December 31, 2005 was attributed to “growth in Ivy, institutional equity products, and liquid assets as well as a rise in equity market values.” Finally, the 2005 Form 10-K also noted that increased revenues in Asia reflected “strength in investor services, execution services and Ivy.”

8. BNYCo.’s 10-K for 2006 recognized that the increase in income before taxes in the Private Bank and BNY Asset Management Segment of \$30 million over the previous year was “primarily attributable to strong revenue growth at Ivy, the acquisitions of Alcentra and Urdang, and higher fee levels in Private Banking.”

9. BNYCo.’s Form 10-Q, filed on August 8, 2007, noted an increase in performance fees “reflecting organic growth and strong results at our alternative asset management subsidiaries, Ivy, Alcentra and Urdang.” The higher performance fees were also noted as one of the primary reasons for an increase in fees and other revenue during the first six months of 2007.

101. By reason of the foregoing, at all relevant times, BNYM was a fiduciary of the Plans within the meaning of ERISA.

102. At all relevant times, the Ivy Committee Defendants were fiduciaries of the Plans within the meaning of ERISA because they determined the investment advice to be given by defendant Ivy, and exercised de facto authority and control over Plan assets. The purposes of

several committees at Ivy illustrate the fiduciary nature of both the Individual Ivy Defendants' and Ivy Committee Defendants' responsibilities:

A. At some or all relevant times, defendants Colleen Baldwin, Glenn Cummins, Adam Geiger, Jeffrey Lindenbaum, John Rogers, Lawrence Simon, Sean Simon, and Howard Wohl ("the Ivy Executives") and defendant Strategic Operating Committee were responsible for entering into investment advisory agreements, establishing investment advisory fees, and selecting designated investment managers.

B. At some or all relevant times, defendant Manager Approval Committee was responsible for approving all new designated investment managers, reviewing the risk profile of approved managers, removing managers from the approved list, and setting investment parameters for Ivy's portfolios.

C. At some or all relevant times, defendant Investment Committee worked with research, portfolio management, operational due diligence, and risk management groups, as well as members of senior management, in carrying out its responsibilities. Ivy's Investment Committee had final accountability for all portfolio allocations.

103. By reason of their memberships on one or more of the Ivy Committees and/or by their actions outside of such committees, at some or all relevant times, all of the Individual Ivy Defendants were fiduciaries of the Plans within the meaning of ERISA because they determined the investment advice to be given by defendant Ivy, and thereby exercised de facto authority and control over Plan assets and/or received compensation in exchange for providing investment advice.

## **VI. FACTS BEARING ON FIDUCIARY BREACH**

104. Defendants failed to act in accordance with their fiduciary duties. The Jeanneret and Ivy Defendants breached such duties by at least the following acts and omissions: directing

the Plans' investments into Madoff-related entities without conducting a prudent investigation or analysis; failing to manage and monitor the Plans' investments and assets in a prudent manner; violating their duty of loyalty; failing to act in accordance with governing plan documents; and engaging in prohibited transactions. While engaging in such breaches of their fiduciary duties, the Jeanneret and Ivy Defendants collected substantial fees, including fees calculated as percentages of the inflated earnings and asset values reported by Madoff.

105. These breaches resulted from Defendants' failures to discover and/or heed numerous "red flags" which would have alerted them to the imprudence of investing the Plans' assets in Madoff, as described below.

**A. Madoff's Ponzi Scheme**

106. Madoff was the sole principal and owner of Bernard L. Madoff Investment Securities, LLC ("BMIS").

107. BMIS was a broker-dealer and investment adviser registered with the Securities and Exchange Commission. BMIS engaged in three operations: investment adviser services, market-making services, and proprietary trading. According to the January 2008 Form ADV that BMIS filed with the Securities and Exchange Commission, BMIS purported to have over \$17 billion in assets under management. Madoff purportedly used a "split-strike conversion," "collar," or "market-neutral" strategy to generate returns. Madoff claimed to conduct this strategy by investing in stocks listed on the S&P 100 index while placing call options and put options on a comparable number of shares. The call option would give Madoff the right to buy the shares at a fixed price on a future date, and the put option would enable him to sell the shares at a fixed price on a future date. The combination of these puts and calls purportedly placed a "collar, or "boundary," around the stock, which both limited the upside and protected against sharp declines in share prices.

108. By engaging in this purported strategy, BMIS reportedly achieved consistent, positive returns.

109. However, Madoff did not actually engage in this purported strategy. Instead, he engaged in a massive Ponzi scheme which began to unravel in December 2008 as BMIS struggled to obtain the liquidity necessary to meet client redemptions.

110. On December 10, 2008, Madoff reportedly informed his sons that he was “finished,” that he had “absolutely nothing,” and that it was “all just one big lie.” Madoff confessed that he had been running “a giant Ponzi scheme” which had been paying returns to investors out of the principal received from other investors. He admitted that the firm had been insolvent for years, and estimated that losses from the fraud would be at least \$50 billion.

111. On December 11, 2008, FBI agents arrested Madoff and charged him with criminal securities fraud.

112. On the same day, the Securities and Exchange Commission filed a complaint against Madoff and BMIS for securities fraud.

113. On December 12, 2008, the United States District Court for the Southern District of New York entered an Order freezing the assets of Madoff and BMIS. The Court appointed a trustee to liquidate BMIS and removed the proceeding to the United States Bankruptcy Court for the Southern District of New York.

114. On March 12, 2009, Madoff pled guilty to eleven counts of securities fraud, investment adviser fraud, mail fraud, wire fraud, money laundering, false statements, perjury, false filings with the SEC, and theft from an employee benefit plan.

115. On June 29, 2009, Madoff was sentenced to 150 years in prison for operating the massive Ponzi scheme.

**B. Defendants Caused Plaintiffs' Losses by Failing to Heed Red Flags Regarding Madoff**

116. The red flags that the Defendants either imprudently ignored or failed to identify in selecting and monitoring Madoff and Madoff-related entities included the following, among others:

- A. The fact that Madoff achieved consistently high and stable returns despite market conditions;
- B. The stock holdings that BMIS reported to the SEC did not comport with the size of the fund Madoff purportedly managed for clients;
- C. BMIS was audited by a three-person auditing firm that lacked the resources to review a complex, multi-billion dollar strategy such as Madoff's;
- D. BMIS lacked an independent custodian; and
- E. Madoff shrouded his practices and strategy in secrecy.

117. As early as 1992, publicly-available news reports raised questions about Madoff's unusual secrecy and his ability to generate excessive returns. On December 16, 1992, an article appeared in *The Wall Street Journal* describing the SEC's investigation of two Florida accountants for engaging in unregistered securities offerings in violation of federal securities laws. Randall Smith, *Wall Street Mystery Features a Big Board Rival*, WALL ST. J., Dec. 16, 1992. Investors were promised incredible returns of 13.5% to 20%, and the money was invested with an undisclosed broker dealer who, as it turned out, was Bernard Madoff. *Id.* Although Madoff claimed that he had no knowledge that the money was raised illegally, and a court-appointed trustee located all of the money, the article raised questions which should have triggered heightened diligence on the part of Defendants. *Id.* As stated in the article, "Perhaps

the biggest question is how the investment pools could promise to pay high interest rates on a steady annual basis, even though annual returns on stocks fluctuate drastically.” *Id.*

118. Financial industry news from 2001 echoed similar issues regarding Madoff’s secrecy and his impossibly consistent returns. These articles also should have alerted the Defendants to the imprudence of investing in Madoff. For example:

A. In May 2001, an article in a hedge fund industry newsletter, MAR/Hedge, raised questions about Madoff’s ability to generate “consistent, nonvolatile returns month after month and year after year.” Michael Ocrant, *Madoff Tops Charts; Skeptics Ask How*, MAR/HEDGE, May 2001. Mr. Ocrant interviewed more than a dozen current and former traders, money managers, consultants, analysts, and fund-of-fund executives. They all noted that people who employed the split-strike conversion strategy “had nowhere near the same degree of success” as Madoff, and wondered “why no one has been able to duplicate similar returns using the strategy. . .” As mentioned in the article, “[w]hat is striking to most observers is not so much the annual returns - which, though considered somewhat high for the strategy, could be attributed to the firm’s market making and trade execution capabilities - but the ability to provide such smooth returns with so little volatility.”

B. Similarly, a 2001 article in Barron’s questioned Madoff’s strategies. *What We Wrote About Madoff*, BARRON’S, Dec. 22, 2008 (excerpting a 2001 article by Erin Arvedlund).

1. The article noted that Madoff’s returns “have been so consistent that some on the Street have begun speculating that Madoff’s market-making operation subsidizes and smooths his hedge-fund returns.” One former Madoff investor told

Barron's, "Anybody who's a seasoned hedge-fund investor knows the split-strike conversion is not the whole story. To take it at face value is a bit naïve."

2. Another investment manager said, "What Madoff told us was, 'If you invest with me, you must never tell anyone that you're invested with me. It's no one's business what goes on here. . . .' When he couldn't explain how they were up or down in a particular month. . . . I pulled the money out."

119. Unlike the Defendants in this case, other industry professionals heeded the red flags and avoided investing in Madoff-related entities.

A. Harry Markopolos, a derivatives expert who worked at one of Madoff's rival firms, began analyzing Madoff's strategy in 2000. Ross Kerber, *The Whistleblower: Dogged Pursuer of Madoff Wary of Fame*, BOSTON GLOBE, Jan. 8, 2009. Markopolos was troubled by the fact that he was unable to simulate Madoff's returns based on information he gathered about Madoff's stocks and options. *Id.* He identified several red flags, including the fact that Madoff made money irrespective of market conditions and was unusually secretive. *Id.* Markopolos eventually concluded that Madoff was either running a Ponzi scheme or front-running stocks, and decided to alert the SEC. *Id.*

1. In a November 7, 2005 letter to the SEC, Markopolos outlined 29 red flags that made him suspicious of Madoff's scheme. Some of the red flags included the following:

a. Madoff prohibited third party hedge funds and funds of funds from naming him as the manager. "[A]sk yourself, why would the world's largest hedge fund manager be so secretive that he doesn't even want his investors to know that he was managing their money? Or is it that BM

*doesn't want the SEC and FSA to know that he exists?"* (Emphasis in original).

b. Madoff could not possibly *"know the market's direction to such a degree as to only post monthly losses once every couple of years. All of Wall Street's big wire houses experience trading losses on a more regular frequency that [sic] BM. Ask yourself how BM's trading experience could be so much better than all of the other firms on Wall Street. Either he's the best trading firm on the street and rarely ever has large losing months unlike other firms or he's a fraud."* (Emphasis in original.)

c. *"Madoff does not allow outside performance audits."* (Emphasis in original.)

d. Madoff misrepresented the performance for his strategies. *"My rule of thumb is that if the manager misstates his performance, you can't trust him. Yet somehow Madoff is now running the world's largest, most clandestine hedge fund so clearly investors aren't doing their due diligence."* (Emphasis in original.)

e. Madoff purportedly converted to 100% cash at year-end. *"Any unusual transfers or activity near a quarter-end or year-end is a red flag for fraud."* (Emphasis in original.)

f. *"Several equity derivatives professionals will all tell you that the split-strike conversion strategy that BM runs is an outright fraud and cannot possibly achieve 12% average annual returns with only 7 down months during a 14 ½ year time period."* (Emphasis in original.)

B. An advisory firm, Aksia, also identified red flags and told clients not to invest in Madoff. Alex Berenson, *Look at Wall St. Wizard Finds Magic Had Skeptics*, N.Y. TIMES, Dec. 13, 2008. In particular, Aksia was concerned that the stock holdings Madoff disclosed to the SEC were “too small to support the size of the fund he claimed.” *Id.* The firm was also troubled by the fact that BMIS’s auditor, Friebling & Horowitz, operated out of a 13 x 18 foot office and only had three employees. Gregory Zuckerman, *Fees, Even Returns & Auditor All Raised Flags*, WALL ST. J., Dec. 13, 2008. Aksia felt that the auditing firm was too small to audit a large and complicated trading strategy like BMIS. *Id.*

C. Acorn Partners, a firm which helps clients choose money managers, reviewed both the account statements of Madoff’s customers and the audited statements that BMIS filed with the SEC. The firm concluded that “the account statements were just pieces of paper that were generated in connection with some sort of fraudulent activity.” Alex Berenson, *Look at Wall St. Wizard Finds Magic Had Skeptics*, N.Y. TIMES, Dec. 13, 2008.

D. Société Générale, an investment bank, reviewed BMIS and “immediately put Bernard L. Madoff Investment Securities on its internal blacklist, forbidding its investment bank from doing business with him, and also strongly discouraging wealthy clients at its private bank from his investments.” Nelson Schwartz, *European Banks Tally Losses Linked to Fraud*, N.Y. TIMES (Dec. 17, 2008). The firm blacklisted Madoff because it could not replicate Madoff’s claimed results when it back-tested them, and was concerned that Madoff’s brother, Peter Madoff, served as the chief compliance officer. *Id.*

E. L JH Global Investments, a firm which invested billions of dollars in hedge funds and private equity, brought a 40-page list of due-diligence questions to Madoff and could not make it past the first page without hearing alarm bells. Tiernan Ray, *Living to Tell About Madoff: James Hedges Suspected There Was Something Wrong a Decade Ago*, BARRON'S, Dec. 22, 2008. The firm thought Madoff's strategy was "too good to be true because of its predictable consistency." *Id.* It was also concerned because Madoff had no global custodian or prime broker, and would not provide audited financials for the fund. *Id.* As the president of the firm stated, that was "an enormous red flag." *Id.*

F. Chris Addy, founder of Castle Hall Alternatives, which reviews hedge funds for clients, also avoided Madoff because the firm lacked an independent custodian. Gregory Zuckerman, *Fees, Even Returns and Auditor All Raised Red Flags*, WALL ST. J., Dec. 13, 2008. As he stated, "There's a clear and blatant conflict of interest with a manager using a related-party broker-dealer. Madoff is enormously unusual in that this is not a structure I've seen." *Id.*

**C. The Jeanneret and Ivy Defendants Failed to Identify and Act on the Red Flags and Thereby Breached Their Fiduciary Duties.**

120. Unlike the investment professionals listed above, the Jeanneret and Ivy Defendants ignored or failed to identify the red flags and invested Plaintiffs' Plans' assets in Madoff-related entities.

121. In addition, the Jeanneret and Ivy Defendants failed to follow the stated investment strategy in the Offering Memorandum, other fund documents, and communications with Plaintiffs. They did not, for example, abide by the 1993 and 2003 Offering Memoranda and "diversify the assets of the Group Trust" or act to "minimize the risk of one strategy adversely effecting [*sic*] the investment return." Rather, on information and belief, at some or all relevant

times these Defendants invested as much as 30-40% of Income-Plus's assets in Madoff-related entities. In addition, direct investments in Madoff via Limited Volatility Equity had 100% exposure to Madoff.

122. While engaging in this imprudent conduct, the Jeanneret and Ivy Defendants collected substantial fees and compensation from the Plans' assets. These fees and compensation were calculated according to misappropriated or entirely fictional assets and profits claimed by Madoff or BMIS. The Jeanneret and Ivy Defendants caused or allowed these fees to be paid and subsequently retained those fees from Plans' assets. Such actions also violated the documents governing Income-Plus and the management of the Plans' assets invested therein.

123. The Plans suffered losses as a result of Defendants' breaches of fiduciary duties.

## **VII. FIRST CLAIM FOR RELIEF**

### **Claim for Breach of Fiduciary Duty By All Plaintiffs Against the Jeanneret Defendants and Ivy Defendants – Breach of Duty of Loyalty [ERISA §§ 404(a)(1), 409, 502(a)(2), 29 U.S.C. §§ 1104(a)(1), 1109, 1132(a)(2)]**

124. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein.

125. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1), requires, among other things, that a plan fiduciary discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. This requirement of ERISA mandates that Plan fiduciaries act with “an eye single” to the interests of plan participants and beneficiaries.

126. The Jeanneret Defendants and Ivy Defendants owed Plaintiffs and the Plans the duty of loyalty in the selection, monitoring, and continuation of investments into Income-Plus and/or direct Madoff investments via Limited Volatility Equity. By reason of the Plans' initial and continuing investments of assets in Madoff-related investments, the Jeanneret Defendants

and the Ivy Defendants received substantial fees from Plan assets based on the inflated values of those assets reported by Madoff, thereby compromising their willingness and/or ability to act with an eye single to the interests of participants and beneficiaries of the Plans, in breach of their duty of loyalty.

127. ERISA § 409, 29 U.S.C. § 1109, provides, inter alia, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits the fiduciary made through use of the plan's assets. ERISA § 409 further provides that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

128. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring a suit for relief under ERISA § 409.

129. As a direct and proximate consequence of the Defendants' breaches of fiduciary duty, the Plans suffered losses of principal and investment returns, and the Jeanneret Defendants and Ivy Defendants, or some of them, profited from the use of the Plans' assets by receipt of management, advisory and/or consulting fees.

## **VIII. SECOND CLAIM FOR RELIEF**

### **Claim for Breach of Fiduciary Duty By All Plaintiffs Against the Jeanneret Defendants and Ivy Defendants – Imprudent Investment of Plan Assets [ERISA §§ 404(a)(1)(B), 409, 502(a)(2), 29 U.S.C. §§ 1104(a)(1), 1109, 1132(a)(2)]**

130. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein.

131. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1), requires, among other things, that a plan fiduciary discharge his or her duties with the care, skill, prudence, and diligence under the

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

132. The selection, monitoring, and continuation of investments into Income-Plus and/or Madoff-related investments were subject to the above-described fiduciary duties. By their acts and omissions in connection with the initial investments of Plans' assets in Madoff and BMIS entities and/or in continuing those investments, the Jeanneret Defendants and the Ivy Defendants, and each of them, breached each of these fiduciary duties by, *inter alia*, failing to identify and act upon the numerous red flags surrounding Madoff and/or BMIS, recommending Income-Plus or LVE as investments to the Plans, and failing to withdraw the Plans' assets or failing to advise that they be divested.

133. ERISA § 409, 29 U.S.C. § 1109, provides, *inter alia*, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits the fiduciary made through use of the plan's assets. ERISA § 409 further provides that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

134. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring a suit for relief under ERISA § 409.

135. As a direct and proximate consequence of the Defendants' breaches of fiduciary duty, the Plans suffered losses of principal and investment returns, and the Jeanneret Defendants and Ivy Defendants, and each of them, profited from the use of the Plans' assets by receipt of management, advisory and/or consulting fees.

## IX. THIRD CLAIM FOR RELIEF

### **Claim for Breach of Fiduciary Duty By Income-Plus Plaintiffs Against the Jeanneret Defendants and Ivy Defendants – Failure to Act in Accordance with Documents and Instruments Governing the Plan [ERISA §§ 404(a)(1)(D), 409, 502(a)(2), 29 U.S.C. §§ 1104(a)(1), 1109, 1132(a)(2)]**

136. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein.

137. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1), requires that a fiduciary with respect to an employee benefit plan act “in accordance with the documents and instruments governing the plan.”

138. ERISA § 409, 29 U.S.C. § 1109, provides, inter alia, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits the fiduciary made through use of the plan’s assets. ERISA § 409 further provides that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

139. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring a suit for relief under ERISA § 409.

140. The 1993 and 2003 Income-Plus Offering Memoranda and the Discretionary Investment Management Agreements are documents governing the employee benefit plans within the meaning of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1). The 1993 and 2003 Offering Memoranda and the Discretionary Investment Management Agreements required that the investment of the assets of those Plans that invested in Income-Plus be diversified. Due to the extent of the those Plans’ investments in Madoff through Income-Plus, the Jeanneret Defendants and the Ivy Defendants violated the terms of the documents governing the plans.

141. By failing to act in accordance with the governing Plan documents and instruments, the Jeanneret Defendants and Ivy Defendants, and each of them, breached their fiduciary duties.

142. As a direct and proximate consequence of Defendants' breaches of fiduciary duty, those of the Plans that invested in Madoff through Income-Plus suffered losses of principal and investment returns, and the Defendants, or some of them, profited from the use of the Plans' assets by receipt of management, advisory and/or consulting fees.

#### **X. FOURTH CLAIM FOR RELIEF**

##### **Claim for Violation of ERISA's Prohibited Transaction Provisions By All Plaintiffs Against the Jeanneret Defendants and Ivy Defendants [ERISA §§ 406(a), 409, 502(a)(2) 502(a)(3), 29 U.S.C. §§ 1106(a), 1109, 1132(a)(2), 1132(a)(3)]**

143. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein.

144. ERISA § 406(a), 29 U.S.C. § 1106(a), prohibits a plan fiduciary from directly or indirectly causing the "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. § 1106(a)(1)(D). Pursuant to ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2), a party in interest may receive payment from a plan for services rendered to the plan, so long as the party in interest receives no more than reasonable compensation.

145. The Jeanneret Defendants and Ivy Defendants received fees by reason of the Plans' investments in Madoff via Income-Plus and/or Limited Volatility Equity. Because such fees were based on percentages of falsely inflated asset values, those fees were not reasonable within the meaning of ERISA § 408(b)(2), and, therefore, the transfer of those fees violated ERISA § 406(a)(1)(D).

146. ERISA § 409, 29 U.S.C. § 1109, provides, inter alia, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or

duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits the fiduciary made through use of the plan's assets. ERISA § 409 further provides that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

147. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring an action for relief under ERISA § 409.

148. As a direct and proximate consequence of their violations of ERISA § 406(a), the Jeanneret Defendants and the Ivy Defendants, as fiduciaries of the plans, profited from the use of the Plans' assets.

## **XI. FIFTH CLAIM FOR RELIEF**

### **Claim for Co-Fiduciary Liability By All Plaintiffs Against the Jeanneret Defendants and Ivy Defendants [ERISA §§ 405(a), 409, 502(a)(2), 29 U.S.C. §§ 1105, 1109, 1132(a)(2)]**

149. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein

150. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1), imposes liability on a fiduciary if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach.

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

152. ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes liability on a fiduciary if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

153. Because the Jeanneret Defendants and Ivy Defendants knowingly participated in, or knowingly undertook to conceal, the breaches of fiduciary duty, knowing such act or omission was a breach, each violated ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1). In addition, the Jeanneret Defendants and Ivy Defendants each knew of the breaches by the other and failed to make reasonable efforts to correct the breaches under ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3).

154. By their failures to comply with their own fiduciary responsibilities, each of the Jeanneret Defendants and Ivy Defendants enabled one or more other fiduciaries to commit a fiduciary breach, and each is therefore liable for the breaches committed by each other fiduciary under ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2).

155. ERISA § 409, 29 U.S.C. § 1109, provides, inter alia, that any person who is a fiduciary with respect to a plan and who breaches any of the responsibilities, obligations, or duties imposed on fiduciaries by ERISA shall be personally liable to make good to the plan any losses to the plan resulting from each such breach and to restore to the plan any profits the fiduciary made through use of the plan's assets. ERISA § 409 further provides that such fiduciaries are subject to such other equitable or remedial relief as a court may deem appropriate.

156. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), permits a plan participant, beneficiary, or fiduciary to bring a suit for relief under ERISA § 409.

157. As a direct and proximate consequence of Defendants' breaches of their responsibilities as co-fiduciaries, the Plans lost principal and investment returns, and the Defendants, or some of them, profited from the use of the Plans' assets by receipt of management, advisory and/or consulting fees.

## **XII. SIXTH CLAIM FOR RELIEF**

### **Claim for Disgorgement of Profits By All Plaintiffs Against the Ivy Defendants [ERISA § 409, 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(3)]**

158. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein.

159. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant, beneficiary, or fiduciary to bring an action to redress violations and/or enforce provisions of Title I of ERISA.

160. In the event that the Ivy Defendants are not fiduciaries under ERISA §§ 3(21) with regard to any of the claims set forth above, each of the Ivy Defendants is jointly and severally liable under ERISA § 502(a)(3) for the ERISA violations set forth in those claims and, for restoration to the Plan of all profits received by those Defendants on account of the Plans' investments of assets in Madoff and Madoff-related investments because the Ivy Defendants had actual or constructive knowledge of the circumstances that rendered the transactions unlawful.

## **XIII. SEVENTH CLAIM FOR RELIEF**

### **Claim for Injunctive Relief by the Income-Plus Plaintiffs Against the Jeanneret Defendants [ERISA § 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(3)]**

161. Plaintiffs incorporate Paragraphs 1 through 123 above, as though fully set forth herein.

162. ERISA § 409, 29 U.S.C. § 1109 provides that fiduciaries are subject to equitable or remedial relief as a court may deem appropriate, including permanent injunctive relief.

163. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), permits a plan participant, beneficiary, or fiduciary to bring an action to redress violations and/or enforce provisions of Title I of ERISA.

164. The Jeanneret Defendants continue to manage the assets of the Income-Plus Plans despite the serious breaches of fiduciary duty alleged above. Accordingly, the Jeanneret Defendants should be removed from operating Income-Plus and making any decisions regarding Plan assets invested through Income-Plus.

#### **XIV. PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that the Court:

- A. Declare that the Defendants, and each of them, have breached their ERISA fiduciary duties to the Plans' participants and beneficiaries;
- B. Issue an order compelling the Defendants, and each of them, to make good to the Plans all losses to the Plans resulting from these breaches, including lost return on investments that would have resulted from prudent and diversified investment of the Plans' assets;
- C. Issue an order compelling Defendants, and each of them, to disgorge all profits, including but not limited to all fees, received by them by reason of the Plans' investments in Income Plus and Madoff investments;
- D. Issue a preliminary and permanent injunction removing the Jeanneret Defendants, and each of them, as fiduciaries of the Plans and/or barring the Jeanneret Defendants, and each of them, from serving Income-Plus in the future, and appointing independent fiduciaries to operate Income-Plus.
- E. Award Plaintiffs their attorneys' fees and costs pursuant to a common fund recovery or ERISA § 502(g), 29 U.S.C. § 1132(g); and

F. Award such other and further relief as the Court deems equitable and just.

Respectfully submitted,

KELLER ROHRBACK, L.L.P.

Dated: New York, NY  
September 29, 2009

By: 

David S. Preminger (DP 1057)  
770 Broadway, Second Floor  
New York, NY 10003  
Tel: (646) 495-6198  
Fax: (646) 495-6197  
dpreminger@kellerrohrback.com

KELLER ROHRBACK, L.L.P.  
Lynn Sarko  
Derek Loeser  
Amy Williams-Derry  
Havila Unrein  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Tel: (206) 623-1900  
Fax: (206) 623-3384  
lsarko@kellerrohrback.com  
dloeser@kellerrohrback.com  
awilliams-derry@kellerrohrback.com  
hunrein@kellerrohrback.com

LEWIS, FEINBERG,  
RENAKER & JACKSON, P.C.  
Jeffrey Lewis  
Catha Worthman  
Andrew Lah  
1330 Broadway, Suite 1800  
Oakland, CA 94612-2519  
Tel: (510) 839-6824  
Fax: (510) 839-7839  
jlewis@lewisfeinberg.com  
cworthman@lewisfeinberg.com  
alah@lewisfeinberg.com

*Attorneys for Plaintiffs*