IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

WILLIAM J. COHEN AND ELEANOR COHEN, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

FIRST TRUST CORPORATION, RETIREMENT ACCOUNTS, INC.,
FISERV TRUST COMPANY,
TRUST INDUSTRIAL BANK,
LINCOLN TRUST COMPANY,
NTC & CO., LLP,
TD AMERITRADE TRUST COMPANY,
TD AMERITRADE ONLINE HOLDING CORP.,
TD AMERITRADE HOLDING CORPORATION, and
ROBERT BERIAULT HOLDINGS, INC.,

Defendants.

PLAINTIFFS' CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiffs William J. Cohen and Eleanor Cohen ("Plaintiffs"), based upon the investigation of their counsel, allege as follows for their class action complaint:

SUMMARY OF ACTION

1. This class action arises out of a multi-billion dollar Ponzi scheme orchestrated by Bernard L. Madoff ("Madoff").

2. Plaintiffs file this class action, individually and on behalf of a class (the "Class," as more fully defined below) of all persons who, as of December 11, 2008, had self-directed individual retirement accounts ("IRA") at Fiserv, Inc., ("Fiserv"), for which

Fiserv or its subsidiaries or affiliates, including First Trust Corporation ("First Trust"), Retirement Accounts, Inc. ("RAI"), Fiserv Trust Company ("Fiserv Trust"), Trust Industrial Bank ("Trust Industrial"), Lincoln Trust Company ("Lincoln Trust"), or NTC & Co., LLP ("NTC") served as the IRA trustee or custodian, or their nominee, and which had funds invested by Madoff or Bernard Madoff Investment Securities, Inc. ("BMIS").

3. A self-directed IRA is an IRA that requires the account owner to make investment decisions and investments on behalf of the retirement plan. The Internal Revenue Code ("Code") and Internal Revenue Service ("IRS") regulations require that either a qualified trustee or custodian hold the IRA assets on behalf of the IRA owner. Generally, the trustee/custodian will maintain the assets and all transaction and other records pertaining to them, file required IRS reports, issue client statements, and perform other administrative duties on behalf of the self-directed IRA owner of the IRA account.

4. Fiserv is a Fortune 500 company that at relevant times provided trust, custodial, administrative and support services to self-directed IRAs through Fiserv's Investment Support Services ("Fiserv ISS") division. At various times, Fiserv, and its subsidiaries or affiliates, First Trust, RAI, Fiserv Trust, Trust Industrial, Lincoln Trust (collectively the "Trustee Defendants"), served as the trustee and/or custodian of IRAs held at BMIS (the "Madoff IRA Accounts") and provided administrative and support services for the Madoff IRA Accounts.

5. In their capacity as Trustee, Fiserv and/or the Trustee Defendants took title, custody, possession, and ownership of the funds in the Madoff IRA Account, which entrusted to them by each Plaintiff and Class member.

6. Fiserv and the Trustee Defendants allowed Madoff, through his Ponzi scheme, to convert, commingle and abscond with Plaintiffs' and Class members' retirement savings. Fiserv and the Trustee Defendants also sent out inaccurate account statements which reflected the purported value of their Madoff IRA Accounts, when in fact there were no assets in those accounts.

7. In breach of its contractual and fiduciary duties, Fiserv failed to take physical custody of the assets in the Madoff IRA Accounts, or to take any rudimentary steps to verify that the assets even existed. According to Irving Picard, the liquidating trustee of BMIS, Madoff did not purchase any securities for customers from as early as 1995. According to Picard: "We have found no evidence to indicate that securities were purchased for customers' accounts [for] perhaps as much as 13 years." It was "cash in and cash out," he said.

8. Fiserv and the Trustee Defendants violated their duties despite warnings by its own subadvisor, Rogercasey, Inc., "about the integrity of the Madoff structure," and many other "red flags" about Madoff's investment strategies and operations. At the time Madoff's scheme was revealed, Fiserv already knew that it had facilitated similar massive ponzi schemes in the past, yet did nothing to change its operational procedures to prevent another catastrophe.

9. Fiserv and the Trustee Defendants violated their fiduciary and contractual duties to Plaintiffs and the members of the Class under the standardized Plan and Trust Agreements and under Internal Revenue Code Section 408, which was incorporated therein.

10. As a direct and proximate result of Defendants' breaches and tortious conduct, Plaintiffs and the member of the Class suffered losses and damages and Defendants were unjustly enriched.

11. Plaintiffs bring this class action against Fiserv and the Trustee Defendants for breach of fiduciary duty, aiding and abetting such breach of duty, breach of contract, negligence and unjust enrichment.

12. Plaintiffs sue Defendants TD Ameritrade Trust Company, TD Ameritrade Online Holding Corp., TD Ameritrade Holding Corporation (collectively, the "Ameritrade Defendants") and Defendants Robert Beriault Holdings, Inc. ("Robert Beriault"), as legal successors by merger or otherwise, and/or as controlling persons of one of more of the Trustee Defendants.

JURISDICTION

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1332(a) and 1332(d)(2)(B), and has supplemental jurisdiction pursuant to 28 U.S.C. §1367.

14. Venue in this judicial district is proper pursuant to 28 U.S.C. §1391(a) because, as set forth above, Defendants conduct business in, and may be found in, this District.

PARTIES

15. Plaintiffs William and Eleanor Cohen are a married couple residing in Palm Beach County, Florida. Mr. Cohen had two Madoff IRA accounts with Fiserv, to which he contributed approximately $2.23 million in principal. As of November 30, 2008, the reported market value of Mr. Cohen's Madoff IRA accounts with Fiserv was approximately $7.42 million. Mrs. Cohen had one Madoff IRA account with Fiserv, to which she contributed approximately $373,000 in principal. As of November 30, 2008, the reported market value of Mrs. Cohen's Madoff IRA account with Fiserv was approximately $2 million. Neither William Cohen nor Eleanor Cohen ever withdrew any funds from their Madoff IRA Accounts, which are now worthless.

16. Defendant Fiserv, Inc. ("Fiserv") is a Wisconsin corporation with a principal place of business in Brookfield, Wisconsin. On September 13, 2004, Fiserv announced that four trust companies that had been part of the Fiserv family for a numbers of years but had operated individually – including Defendants First Trust, RAI and Lincoln Trust – would unite as one company under the name Fiserv Investment Support Services ("Fiserv ISS"), a division of Fiserv.

17. Defendant Retirement Accounts, Inc. ("RAI") is the trade name for Defendant First Trust Corporation ("First Trust"), a Colorado corporation with a principal place of business in Denver, Colorado. First Trust was acquired by Fiserv in October, 1985. Until at least September, 2004, First Trust and RAI served as IRA trustee and custodian of the Madoff IRA Accounts.

18. Defendant Fiserv Trust Company ("Fiserv Trust"), until 2008, was a Colorado corporation with a principal place of business in Denver, Colorado. At relevant times, Fiserv Trust was a Fiserv subsidiary, operating out of the same offices as Fiserv. Sometime in 2004 or 2005, Fiserv Trust became IRA trustee and custodian of the Madoff IRA Accounts. Fiserv Trust continued to serve as trustee and custodian of the Madoff IRA Accounts until in or around October, 2007.

19. Defendant TD Ameritrade Trust Company is a Maine Corporation with a principal place of business in Columbia, Maryland. In August, 2008, Defendant Fiserv Trust merged with Defendant TD Ameritrade Trust Company, which became the surviving corporation.

20. Defendant Trust Industrial Bank ("Trust Industrial") is a Colorado corporation with a principal place of business in Denver, Colorado. At relevant times, Trust Industrial was a Fiserv subsidiary, operating out of the same offices as Fiserv. In or around, October, 2007, Trust Industrial took over as custodian for the Madoff IRA Accounts, and remained the custodian when Madoff's fraud was revealed.

21. Defendant Lincoln Trust Company ("Lincoln Trust") is a Colorado corporation with its principal place of business in Denver, Colorado. At relevant times, Lincoln Trust was a subsidiary of Fiserv, operating out of the same offices as Fiserv. In November, 2008, Trust Industrial changed its name to Lincoln Trust and was positioned to become the custodian for Plaintiffs' and Class Members' IRAs when Madoff's fraud was revealed.

22. Defendant NTC & Co. LLP ("NTC") is a Colorado limited liability partnership with a principal place of business in Denver, Colorado. At relevant times, NTC served as Trust Industrial's nominee to register title to the Madoff IRA Accounts.

23. Defendant Robert Beriault Holdings, Inc. ("Robert Beriault") is a Colorado corporation with a principal place of business in Denver, Colorado. Robert Beriault is wholly-owned by Robert Beriault ("Beriault"), a Fiserv officer and president of Fiserv ISS, which operated Fiserv Trust. Robert Beriault operates from the same offices as Fiserv. In May, 2007, Beriault reached agreement with Fiserv to purchase Trust Industrial and his former division, which had custody of the Madoff IRA Accounts. However, Madoff's fraud was revealed before regulatory approval was obtained for Robert Beriault and Fiserv to complete the transaction. During the transition period, Robert Beriault had control over Trust Industrial and Lincoln Trust.

24. Defendant TD Ameritrade Online Holding Corp. ("TD Online") is a Delaware corporation with a principal place of business in Omaha, Nebraska. In February, 2008, TD Online purchased all outstanding stock of Fiserv Trust as well as its assets, with the exception of the Madoff IRA Accounts, and other self-directed IRAs. TD Online is successor-in-interest of Fiserv Trust and it is responsible for Fiserv Trust's liabilities.

25. Defendant TD Ameritrade Holding Corporation ("TD Holding") is a Delaware corporation with a principal place of business in Omaha, Nebraska. TD Holding wholly-owns TD Online and is responsible for its liabilities.

SUBSTANTIVE ALLEGATIONS

A. THE MADOFF PONZI SCHEME

26. Bernard Madoff is a former chairman of the Board of Directors of the Nasdaq stock market. Madoff controls the investment adviser services and finances at BMIS, and he was at all relevant times the sole or controlling owner of BMIS, a company which Madoff founded in the 1960s.

27. BMIS is a broker-dealer and investment adviser registered with the SEC. BMIS formally engaged in three operations, which include investment adviser services, market making services, and proprietary trading.

28. On or about December 10, 2008, two of Madoff's sons who were also senior employees of BMIS met with Madoff at his apartment in Manhattan. At that time, Madoff informed them that, in substance, his investment advisory business was a fraud. Madoff is reported to have stated that he was "finished," that he had "absolutely nothing," that "it's all just one big lie" and that the business was "basically, a giant Ponzi scheme." Madoff further admitted that the financial statements he provided to investors reflected fictitious earnings, and estimated the losses from this fraud to be approximately $50 billion dollars. (Subsequent reports estimate the losses to be as high as $65 billion dollars).

29. On December 11, 2008, the SEC issued a press release revealing that Madoff had admitted to the Ponzi scheme, in which returns paid to prior investors did not come from actual earnings, but rather from the principal investments of subsequent investors. The SEC's December 11, 2008 press release further revealed that, although

regulatory filings reflected that BMIS claimed to have billions of dollars in assets under management at the beginning of 2008, virtually all of those assets were missing as of December, 2008.

30. On February 20, 2009, Irving Picard, the trustee liquidating BMIS, reported that Madoff appeared not to have purchased any securities for his clients for “perhaps as much as 13 years.” It was “cash in and cash out,” Picard said. "It was all just made up," a lawyer working with Picard said. "You got somebody else's money."

31. On March 12, 2009, Madoff pled guilty to eleven counts of fraud – admitting that he had run a vast Ponzi scheme that robbed thousands of investors of their life savings. He is in custody pending sentencing.

B. FISERV SERVED AS MADOFF’S IRA CUSTODIAN OF CHOICE

32. Fiserv, in its previous iteration as First Trust d/b/a RAI, first began to act as IRA custodian for the Madoff accounts as early as 1992, if not before. RAI is a registered trade name of First Trust, and it acted as the trustee of self-directed retirement plans. As of September, 2004, First Trust and RAI administered nearly 170,000 retirement and custodial accounts valued at $20.8 billion.

33. In September, 2004, First Trust and RAI united with two other trust companies in the Fiserv family, as one company under the name Fiserv ISS, a division of Fiserv. The new name and convergence of the companies at one location represented the first of a three-phase consolidation campaign designed to create one cohesive organization that would continue to offer the “superior quality” products and services available through the individual companies, strengthened under the Fiserv

name. According to Fiserv: "These trust companies have been part of the Fiserv family for a number of years but have operated individually. By consolidating the trust entities, we can strengthen our position and our identity in the marketplace. Between the four companies, there are 110 years of experience in providing quality trust, custodial and back office services to the financial services industry."

34. Upon information and belief, Fiserv and the Trustee Defendants commissioned sales people to have securities firms, such as BMIS, direct investors to them. Potential investors were informed that, in order to invest IRA funds with Madoff/BMIS, they would have to open an account with Fiserv, and one of the Trustee Defendants would serve as trustee and custodian. Madoff initially enlisted First Trust and RAI to serve as his IRA "custodian of choice" for the Madoff IRA Accounts. Later, Fiserv Trust became Madoff's "custodian of choice." After Fiserv Trust was sold to TD Ameritrade in 2007, Trust Industrial became the "custodian of choice" for the Madoff IRA Accounts.

35. On information and belief, Fiserv and the Trustee Defendants accepted hundreds of millions of dollars in investor retirement funds, which funds were invested with Madoff and BMIS. According to the BMIS client roster, at the time Madoff's scheme was revealed, there were approximately 800 IRA accounts at BMIS, in the name of Trust Industrial's nominee, NTC.

C. DEFENDANTS' DUTIES AND RESPONSIBILITIES TO THE MADOFF IRA ACCOUNT HOLDERS

36. Fiserv and the Trustee Defendants entered into standardized Plan and Trust Agreements with each Plaintiff and each member of the Class, which effectively incorporated the requirements of Internal Revenue Code Section 408 as contractual duties. In exchange for annual account fees, administrative and other fees paid by investors, Fiserv and the Trustee Defendants undertook the responsibility of acting as a trustee and custodian of the Madoff IRA accounts, taking title, custody, possession, and ownership of the funds in the Madoff IRA Accounts. Fiserv and the Trustee Defendants breached the standardized Trust and Plan Agreement, and the IRS regulations incorporated therein, by permitting Madoff to commingle, convert and abscond with the trust assets of the Madoff IRA accounts.

37. The standardized Plan and Trust Agreement established a "Trust," for the exclusive benefit of the Plaintiffs and the members of the Class, for which the Trustee Defendants at various times served as "Trustee." The Trust was composed of "all property held or acquired" by the Trustee under the Plan.

38. The Trust was intended to qualify as an individual retirement account under Internal Revenue Code Section 408. Fiserv and the Trustee Defendants expressly agreed with Plaintiffs and the members of the Class that they would comply with IRS regulations. Any provision of the Plan and Trust Agreement (or the associated IRA Application or Terms and Conditions) was invalid "to the extent it is inconsistent, in whole or in part, with Code Section 408 and the regulations issued thereunder."

39. Although the Madoff IRA Accounts were self-directed IRAs, under the standardized Plan and Trust Agreement, Fiserv and the Trustee Defendants had the express right and discretion to reject an account owners' investment directions. Under standardized IRA forms, the Trustee Defendants, maintained an "operationally feasible" or "administratively feasible" investment policy, under which "basic guidelines for this policy are set by the IRS" and "other investment restrictions are set by [the Trustee Defendants] for administrative purposes." Under that investment policy, the Trustee Defendants "reserve[d] the right not to honor an Account Owner's investment authorization if adequate information has not been provided or if RAI cannot meet special administrative requirements of the investment."

40. Under the standardized Trust and Plan Agreement – as well as IRS regulations, the Trustee Defendants had the "power or duty … [to] hold any securities or other property in the Trust in the name of the Trustee or its nominee." Fiserv and the Trustee Defendants violated the agreement, as well as 26 C.F.R. §1.408-2(d) and 26 C.F.R. §1.408-2(e)(v)(4)(ii), by failing to take custody of the assets entrusted to it under the Plan, to verify the existence of the assets in the Madoff IRA Accounts, and to safely keep those assets.

41. Under the standardized Trust and Plan Agreement – as well as IRS regulations – Fiserv and the Trustee Defendants, "as trustee of assets entrusted to it under the Plan, shall not commingle the Trust with any other property it holds except in a common trust fund or a common investment fund." Fiserv and the Trustee Defendants violated the agreement, as well as 26 C.F.R. § 1.408-2(b)(5), by

commingling assets, as the moneys invested with BMIS were not held in the Madoff IRA accounts and BMIS never set up a common trust fund or a common investment fund.

42. Under the standardized Trust and Plan Agreement, Fiserv and the Trustee Defendants were required to provide Plaintiffs and the members of the Class with account statements that reflected the value of the IRA assets, which must be reported "as accurately as possible using the resources available to it." Fiserv provided Plaintiffs and the members of the class with quarterly account statements purportedly reflecting the value of their Madoff IRA Accounts, when in fact those accounts had nonexistent assets. Fiserv and the Trustee Defendants violated the agreement, as well as 26 C.F.R. § 1.408-2(e)(vii), by providing Plaintiffs and the members of the Class with inaccurate account statements and maintaining inaccurate fiduciary books and records.

43. Fiserv and the Trustee Defendants knew or should have known that the monthly account statements they received from BMIS were falsified and that the account statements Fiserv sent to the Plaintiffs and the Class, therefore, were inaccurate. As reported by the PBS series Frontline, an analysis of a small sample of the BMIS account statements found a number of red flags:

- Investor cash was often moved into a Fidelity Spartan U.S. Treasury money market account. That fund changed names in 2005 and was closed to new investors. In addition, Fidelity had no record of Bernard Madoff ever having an account with Fidelity.

- Madoff's stock-trading pattern was unusual. In one sample statement, Madoff sells the investor's entire portfolio of stocks on Sept. 17; those stocks had all been bought on the same day one month earlier. But some months he didn't do any trades at all -- for example, in the statements FRONTLINE examined, Madoff only traded in April, May, August and September of 2008.

- Madoff only traded S&P 100 index options, despite the fact that it is now much more common to trade S&P 500 index options. That market is approximately 20 times bigger than the S&P 100 index options market.

- Madoff also claimed to be trading all his options "over the counter" rather than through an exchange. (It has been separately reported that the volume of options trades to support Madoff's stated investment strategy generally exceeded the volume of reported options trades. Madoff could cover this obvious discrepancy by claiming to do his options trading "over the counter," a highly irregular practice in and of itself.)

- Madoff statements accounted for cash balances in an unusual way. Options accounts would have a cash surplus and securities accounts would carry a cash deficit. But Madoff didn't consolidate those accounts on a monthly basis, as is normal. Instead, he brought them together only at the end of the year.

- At year's end, Madoff moved investors' money entirely into Treasury bills. As whistleblower Harry Markopolos explained in his now famous memo, "any unusual transfers or activity near a quarter-end or year-end is a red flag for fraud."

44. In addition, Irving Picard's investigation disclosed that in many instances the monthly account statements sent by BMIS often reflected stock trades at prices "outside the daily range for such securities traded in the market on the days in question," a fact that should easily have been confirmed by Fiserv and the Trustee Defendants when they valued the securities, as it was required to do under its agreements with Plaintiffs and the members of the Class. For example, between 1998 and 2008, more than 280 purported trades reflected on the monthly BMIS customer account statements of Madoff feeder fund, Fairfield Sentry, were allegedly exercised at prices outside the daily range for such securities traded in the market on the days in question.

45. IRS regulations, incorporated into the standardized Trust and Plan Agreement, further required Fiserv and the Trustee Defendants to "demonstrate in detail [their] ability to act within the accepted rules of fiduciary conduct" and "assure the uninterrupted performance of [their] fiduciary duties." Under IRS regulations, IRA trustees "must have fiduciary experience or expertise sufficient to ensure that [they] will be able to perform [their] fiduciary duties," "must assure compliance with the rules of fiduciary conduct," must be "responsible for the proper exercise of fiduciary powers," including a demonstration of financial responsibility, capacity to account, fitness to handle money, and fiduciary responsibility. IRA trustees also must demonstrate that they will:

- take "custody of investments," which may not be "commingled with other assets," except for investments in a common investment fund or a common trust fund;
- "safely keep securities";
- cause "detailed audits of the fiduciary books and records to be made by a qualified public accountant [which] … will ascertain whether the fiduciary accounts have been administered in accordance with law, this paragraph, and sound fiduciary principles";
- "keep [their] fiduciary records separate and distinct from other records [which] … must contain full information relative to each account."

46. Fiserv and the Trustee Defendants breached their fiduciary duties and contractual obligations by failing to adhere to their mandated duties as an IRA custodian/trustee. Fiserv and the Trustee Defendants failed to fulfill their responsibilities as owner of the Madoff IRA Accounts in the investment and disposition of the property they held in a fiduciary capacity by, *inter alia*:

- failing to ensure that custody of the investments in the IRAs of Plaintiffs and Class members were secure and that such investments would "not be commingled with any other property;"
- failing to "safely keep securities" in the Madoff IRA Accounts;
- failing to keep a proper and accurate written record of the assets held in each account;
- failing to determine, not less than once during each three month period, the value of the assets in the IRAs; and
- failing to cause an adequate audit to be made of the Madoff IRA Accounts by a qualified public accountant.

47. Fiserv and the Trustee Defendants are not relieved of their fiduciary obligations by the exculpatory provisions set forth in the standardized Trust and Plan Agreement, and the terms and conditions set forth in the accompanying IRA Application. By reason of its inequitable and other unlawful conduct alleged herein, it is contrary to public policy to allow Fiserv to enforce this or any other exculpatory clause.

48. Fiserv and the Trustee Defendants do not qualify as a "passive trustee" pursuant to 26 C.F.R. § 1.408-2(e)(6)(1)(A), because Fiserv expressly retained discretion under the standardized Trust and Agreements (as set forth in paragraph 39 above) to direct the investment of the trust funds and other aspects of the business administration of the trust.

D. FISERV, WHICH HAD A HISTORY OF FACILITATING PONZI SCHEMES, IGNORED NUMEROUS RED FLAGS CONCERNING THE MADOFF FRAUD

49. At the time Madoff's scheme was revealed, Fiserv already knew that it had facilitated similar massive ponzi schemes in the past, and that unscrupulous promoters took advantage of lax trustees, such as Fiserv.

50. A firm named Qualified Pensions, Inc. ("QPI") was in the business of serving as an administrator and custodian of over 19,000 IRA's and other self-directed retirement accounts. QPI failed and a receiver was appointed in 1995 that took control of its custodial accounts. First Trust purchased many of those accounts from the receiver and became the new, substitute custodian for those accounts. At the time it became trustee for the QPI accounts, First Trust was aware that QPI had been notorious for its lax oversight of the investments it purchased for its IRA customers and had thus become a magnet for unscrupulous investment sponsors selling illusory investments. According to the Motion for Approval of Final Receiver's Report filed in that case (styled, *SEC v. Qualified Pensions, Inc.*, United States District Court for the District of Columbia, 95-1746-LFO):

> QPI had attracted business by accepting virtually any customer-directed investment. QPI's unusual degree of tolerance for holding unconventional

> investments was apparently known to a number of promoters of investments. As a result, many of QPI's customers had fallen prey to promoters of investments that ranged in quality from normal to dubious to fraudulent.

51. Following the QPI failure, Fiserv and First Trust permitted the same appalling behavior to occur when they were acting as the IRA trustee and custodian for a Ponzi scheme perpetrated by Daniel Heath. Heath's scheme, which was the subject of an enforcement proceeding brought by the SEC, raised more than $187 million from 1995 to 2004 from over 1,800 victims, mostly senior citizens. Heath was sentenced in September, 2008 to 127 years in prison and was ordered to pay a total of $117 million in restitution to the defrauded investors. First Trust was the custodian for the Heath IRA accounts, which enabled Heath to perpetrate his fraud.

52. Following the Heath scheme, Fiserv, First Trust and Fiserv Trust were implicated in another notorious ponzi scheme perpetrated by Richard Pearlman. Pearlman and related entities wholly owned by Pearlman such as Transcontinental Airlines, Inc., Trans Continental Travel Services Inc., Clean Systems Technology, Inc., and other related companies and entities (collectively, "Transcon"), offered and sold, and received proceeds from, unregistered securities identified either as the "Employee Investment Savings Accounts" ("EISA"), or as common or preferred stock in one or more of the Transcon companies. Unbeknownst to the investors, the Transcon companies were little more than shell companies designed to defraud investors. The scheme (which began in the early 1980s) unraveled in late 2006. At the time it came undone, no actual segregated EISA savings accounts were ever established for

investors, and companies issuing preferred stock had little or no income or assets other than deposits from the EISA program. The scheme robbed hundreds if not thousands of elderly and unsophisticated investors, out of more than $300 million. Fiserv, First Trust and Fiserv Trust served as IRA trustee and custodian for Perlman IRA Accounts, which enabled Pearlman to perpetrate his fraud.

53. In the Heath and the Pearlman schemes, as in the Madoff scheme, Fiserv, serving as custodian of choice, facilitated the frauds. Nevertheless, Fiserv failed to rectify its own internal practices and observe the warning signs with respect to the Madoff scheme. Fiserv had ample opportunity to learn from these prior experiences. However, instead of subjecting the Madoff IRA Accounts to the scrutiny required of a fiduciary under the Plan and Trust Agreement and IRS regulations incorporate therein, Fiserv once again engaged in lax oversight and looked the other way for profit.

54. The Madoff Ponzi Scheme persisted until December 2008. While the scheme was ongoing, Fiserv and the Trustee Defendants were in a unique position to notice the many "red flags" that were raised, and prevent its customers from being victimized by his fraud.

55. There were numerous red flags, in addition to those noted in the Frontline program cited above (at paragraph 43), with regard to Madoff's illicit use of investment funds, which should have put Defendants on notice of Madoff's scheme. Defendants either overlooked or simply ignored these red flags. Among them:

a. Madoff had consistently positive returns that bore no relationship to market movements or investment realities. Madoff's investment returns appeared to

outperform the market with a vengeance despite the fact that money managers rarely beat the market indexes by any substantial amount over time. Madoff's investment returns appeared to earn steady monthly increases of 1% or more, even when markets went bad.

b. The description of Madoff's "split strike synthetic conversion" options trading strategy, that consists of purchasing approximately 50 large-cap stocks that are hedged with equity index options, appeared to be inconsistent with consistently positive returns. No one was able to replicate Madoff's remarkable results with the strategies he claimed to be using; indeed, it was statistically impossible to do so.

c. Madoff's account statements revealed a pattern of purchases at or close to daily lows and sales at or close to daily highs, which is virtually impossible to achieve with the consistency reflected in the documents. In many instances, trades were reported on account statements that were outside the day's trading range. Monthly account statements sent to Fiserv did not itemize or otherwise support the returns they reported.

d. Madoff purportedly closed out all positions and went to 100% cash at quarter and year end, which allowed for cleaner financial statements. Any unusual transfers or activity near a quarter-end or year-end is a red flag for fraud.

e. In many instances, trading volumes reflected in accounts were vastly in excess of actually reported trading volumes. A report issued by Bloomberg

estimated that the strategy would have required at least ten times the S&P option contracts that trade on the U.S exchanges.

f. There was a clear lack of transparency as to how Madoff produced the returns that he reported. Madoff kept the records of his investment advisory business under lock and key, with little or no internal oversight of his activities.

g. Madoff traded through an affiliate rather than an independent broker, contrary to standard industry practice.

h. Madoff claimed to hold publicly traded investments in his own advisory firm, without using a reliable third-party custodian, namely a large, independent financial institution that distributes financial reports directly to investors, as was industry practice.

i. Madoff operated through managed accounts rather than setting up a hedge fund of his own, where his fees would have been higher than the brokerage commissions that he was charging. According to a December 19, 2008 Wall Street Journal article: "This is an unusual arrangement that raised suspicions among rival money managers, some of whom doubted that he could generate sufficient fee income." It also should have raised suspicions since hedge funds require annual audits but managed accounts do not.

j. Madoff was not using professional auditors commensurate with the billions of dollars that he claimed to have under management. According to news reports, the audit firm which performed the internal audit function was

Friehling & Horowitz, which had only three employees – a retired partner living in Florida, a secretary and one active accountant, which was clearly inadequate to audit an organization purportedly the size of BMIS.

56. Based upon those red-flags, Rogerscasey, Inc., a subadvisor to Fiserv's own funds which examined Madoff's operations, warned investors off Madoff. Rogerscasey had rated two of the Madoff feeder fund platforms, Fairfield Greenwich and Tremont, based on a number of meetings from 2002 to early 2004. Both feeder fund products were rated SELL based largely on concerns about the integrity of the Madoff structure. To quote some of the observations from Rogerscasey's meeting notes at the time:

- June 4, 2002 – We are exceedingly negative on Madoff as a hedge fund.
- November 21, 2002 – [Tremont's] largest exposure … is to Madoff … where Tremont receives limited independent third-party transparency. … The only third-party, independent transparency that Madoff provides to its investors is being 100% in cash at the end of each year, so that its auditor can verify with Madoff's banker … that the cash is real. Madoff has no prime broker and no plan administrator. It acts as a broker/dealer, self-clears, and sends its own trade confirms to its investors all of whom have "cash" accounts.
- February 27, 2003 – [Fairfield Greenwich] claims its due diligence is based on [employee name] at their firm checking the trade confirms that Madoff's broker dealer sends them. However, our point of view is that, since Madoff is self clearing, it could be making up its statements and tickets.

- February 26, 2004 – Although Tremont claims to receive access to Madoff's positions, the magnitude of the exposure and the truth of Tremont's transparency remain extremely disconcerting. … The Madoff exposure is a potential disaster. Even though some products would not be directly affected ... Tremont's products will still see their reputations vaporized when Madoff rolls over like a big ship.

57. Rogerscasey was not alone in having concerns about the integrity of the Madoff operation. Other hedge funds and financial advisors reached the same conclusion. For example:

a. In 2007, Akisa, LLC, an independent hedge fund research and advisory firm, advised its clients against investing with Madoff or any of his "feeder" funds, after discovering many of the red flags discussed above, including: the inability of Akisa's quantitative analysts to replicate Madoff's returns; the fact that BMIS initiated trades in the accounts, executed the trades, and custodied and administered the assets, without any third-party brokers or custodians; BMIS' obscure and ill-equipped auditor; the cashing out of open positions at quarter-end; and the high degree of secrecy surrounding the trading of these feeder fund accounts.

b. Similarly, Robert Rosenkranz of Acorn Partners, an investment advisor, conducted due diligence and found it highly likely that the BMIS account statements were generated as part of a fraudulent scheme. Mr. Rosenkranz reached that conclusion based upon the abnormally stable and high

investment returns claimed by Madoff as well as inconsistencies between customer account statements and the audited BMIS financial statements filed with the SEC.

c. Likewise, managers of the Fort Worth, Texas pension fund, who first invested with Tremont's Rye Funds in 2003, started to rethink their investment in early 2008 after hiring Albourne Partners, a London due diligence firm, to assess their hedge fund portfolio. Albourne's managing director, Simon Ruddick, said the firm, which had long-standing concerns about Madoff's stated trading strategy and purportedly consistent returns, had urged clients for nearly a decade to avoid Madoff affiliated funds. In July, 2008, the pension fund voted to divest itself from the Rye Funds.

58. Moreover, Fiserv had earlier entanglements with Madoff promoters, accountants Frank Avellino and Michael Bienes, when RAI served as trustee and custodian for IRA accounts set up by Avellino & Bienes, which in turn invested with Madoff. In 1992, the SEC filed a lawsuit against Avellino & Bienes, who sold $441 million in unregistered securities to 3,200 people beginning in 1962, promising them annual returns of up to 20%, and invested the money entirely with Madoff. As a result of the SEC investigation, Avellino & Bienes agreed to shut down their business and reimburse their clients. All accounts at RAI, which served as custodian for the Avellino & Bienes IRA accounts, were liquidated under the agreement with the SEC; many, however, were transferred directly to Madoff, with RAI continuing to serve as trustee and custodian.

59. In addition, from time to time, public reports raised questions about the business practices of Madoff and BMIS, which Fiserv also overlooked or ignored. For example, in May, 2001, *Barron's*, a leading financial publication, reported, in an article entitled "Don't Ask, Don't Tell: Bernie Madoff is so Secretive, He even Asks Investors to Keep Mum," that some "folks on Wall Street think there's more to how Madoff generates his enviable stream of investment returns than meets the eye." The article reported that certain options traders for major investment banks could not understand how BMIS and Madoff achieved the results that they claimed from using the split strike conversion strategy and were skeptical about how Madoff achieved his double digit returns using options alone. These options traders told Barron's they couldn't understand how "Madoff churns out such numbers using this strategy." *Barron's* reported that private accounts managed by Madoff "have produced compound average annual returns of 15% for more than a decade" and "[r]emarkably, some of the larger, billion-dollar Madoff-run funds have never had a down year." Madoff responded to *Barron's* questions regarding how he achieved such consistently high returns, stating that "[i]t's a proprietary strategy. I can't go into great detail." Madoff feeder fund managers contacted by *Barron's* were similarly illusive, stating "It's a private fund. And so our inclination has been not to discuss its returns."

60. Another May 2001 article entitled "Madoff Tops Charts; Skeptics Ask How," published in a hedge fund newsletter, reported that Madoff had positive returns for the past 11 years, but that current and former traders, other money managers, consultants, quantitative analysts and fund of hedge fund executives, many of whom

were familiar with the so-called split strike conversion strategy used by Madoff, questioned the consistency of the returns. These professionals noted that others using the strategy had nowhere near the same degree of success, and that one publicly traded mutual fund, which used the same strategy, had experienced far greater volatility and lower returns than Madoff.

61. Madoff whistle-blower, Harry Markopolos, has testified before Congress that it took him "five minutes to figure out that he was a fraud" because (a) the Split-Strike Conversion "strategy as described was not capable of beating the typical percent return on US Treasury bills less fees and expenses, [and] once fees and expenses were included the Split-Strike Conversion strategy … would have trouble beating a 0% return" and (b) Madoff's strategy "was always doing well under all market conditions, which is, of course, impossible." Mr. Markopolos further testified that Madoff's "math never made sense, his performance charts were clearly deceiving, and his return stream never resembled any known financial instrument or strategy…. [T]o believe in [Madoff] is to believe in the impossible." Markopolos further explained that Madoff's "returns only had a 6% correlation to the S&P 500 index [which] was so low as to signal 'FRAUD' in flashing red letters," and would be akin to a "major league baseball player batting .966 and no one suspecting that this player was cheating." In examining Madoff's performance charts, which went up "in nearly a perfectly rising 45 degree angle with no noticeable downturns," Markopolos rhetorically asked

> what the managers of these feeder funds were thinking as they performed due diligence or even if they were thinking when they performed due diligence. Yes, [Madoff] was a 'no brainer' investment, but only in the

> sense that you had to have no brains whatsoever to invest into such an unbelievable performance record that bears no resemblance to any other investment manager's track record throughout human history.

62. Fiserv and the Trustee Defendants were aware, or should have been aware, of the many red flags described above. They knew or should have known that Madoff's investment holdings and returns had not been properly verified. Nevertheless, Fiserv and the Trustee Defendants failed to take even minimal steps to verify that their clients' assets, in fact, even existed.

CLASS ACTION ALLEGATIONS

63. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), on behalf of a Class consisting of:

> All persons who, as of December 11, 2008, had self-directed IRAs at Fiserv for which Fiserv or its subsidiaries or affiliates, including First Trust, RAI, Fiserv Trust, Trust Industrial, Lincoln Trust, or NTC, served as the IRA trustee or custodian, or their nominee, and which had funds invested with Madoff or BMIS. Excluded from the Class are Defendants, their officers and directors, and members of their immediate families or their legal representatives, any entity in which any Defendant has or had a controlling interest, and any person, firm, trust, corporation, or other entity related to or affiliated with any of Defendants, BMIS, Madoff, or any other member of the Madoff family.

64. The members of the proposed Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that there are at least 800 members in the proposed Class. Members of the proposed Class may be identified from records maintained by the Defendants.

65. Plaintiffs' claims are typical of the claims of the members of the proposed Class as all members of the proposed Class are similarly affected by Defendants' wrongful conduct as alleged herein.

66. Plaintiffs will fairly and adequately protect the interests of the members of the proposed Class and have retained counsel competent and experienced in complex class litigation.

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

a. Whether Defendants breached their fiduciary duties to the Plaintiffs and the Class;

b. Whether Defendants breached their standardized contracts with the Plaintiffs and the Class;

c. Whether Defendants were negligent;

d. Whether Defendants were unjustly enriched;

e. Whether the Plaintiffs and the Class have sustained damages, and, if so, the proper measure of such damages.

68. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joining all members is impracticable, and this action will be manageable as a class action.

COUNT I

BREACH OF FIDUCIARY DUTY

69. Plaintiffs incorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

70. Fiserv's contracts indicate that as the custodian or trustee of the Class Members' IRA's, Fiserv and the Trustee Defendants are subject to the mandates of Internal Revenue Code § 408, and the corresponding IRS Regulations. Those rules required Fiserv and the Trustee Defendants to "act within accepted rules of fiduciary conduct" and "assure the uninterrupted performance of [their] fiduciary duties."

71. As IRA trustee and custodian, Fiserv and the Trustee Defendants had a fiduciary relationship with Plaintiffs and members of the Class, and owed Plaintiffs and the members of the Class a fiduciary duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal with them fairly and impartially. Fiserv's and the Trustee Defendants' conduct described in this Complaint constitutes a breach of their fiduciary duties.

72. As a fiduciary, Fiserv and the Trustee Defendants were at a minimum required to insure that the Class Members' money was safe, that the periodic statements of value issued by Fiserv accurately reflected the actual values of their accounts, and the Madoff investments were legitimate.

73. Fiserv and the Trustee Defendants violated their fiduciary duties by reason of the conduct alleged herein, and profited thereby, at the expense of the Plaintiffs and the members of the Class.

74. Plaintiffs and the members of the Class have suffered substantial financial injury as a result of the conduct alleged herein.

75. The Ameritrade Defendants and Robert Beriault are liable for Fiserv's and the Trustee Defendants' fiduciary breaches, as legal successors by merger or otherwise, and/or as controlling persons of one of more of the Trustee Defendants.

COUNT II

BREACH OF CONTRACT

76. Plaintiffs incorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

77. As set forth above, Fiserv and the Trustee Defendants, as custodial trustees, obligated themselves to certain contractual duties, including the duty to hold the securities in the Madoff IRA Accounts; to report customers' holdings and the accurate value thereof timely and accurately; to ensure that only qualified investments meeting IRS standards be placed into the Madoff IRA Accounts; not to commingle funds in the Madoff IRA Accounts; and to comply with Internal Revenue Code Section 408 and the regulations promulgated thereunder which were incorporated into the agreements.

78. Fiserv and the Trustee Defendants breached one or more of their contractual duties to Plaintiffs and the Class in connection with their total lack of oversight over the Madoff IRA Accounts.

79. Fiserv and the Trustee Defendants were required under their contracts with the Plaintiffs and Class Members to report truthfully and accurately to them the

account values and the assets held in the Madoff IRA Account, which they failed to do. The quarterly statements sent by Fiserv and the Trustee Defendants reflected assets that were not in the accounts.

80. Fiserv and the Trustee Defendants were required under their contracts to take custody of the securities, or at a minimum verify that the assets identified in the account statements were actually in the Madoff IRA accounts, which they failed to do. No securities were ever purchased and assets were in fact, never held in those accounts.

81. Plaintiffs and the Class Members have suffered substantial financial injury as a direct, foreseeable and proximate result of Fiserv's and the Trustee Defendants' contractual breaches, as alleged herein. In addition to the general damages flowing directly from these breaches, the Class members are entitled to recover consequential, incidental and special damages, lost profits, lost opportunities, and other economic damages.

82. The Ameritrade Defendants and Robert Beriault are liable for Fiserv's and the Trustee Defendants' breaches of contract, as legal successors by merger or otherwise, and/or as controlling persons of one of more of the Trustee Defendants.

COUNT III

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

83. Plaintiffs incorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

84. Madoff and BMIS owed fiduciary duties to the Plaintiffs and each member of the Class to manage prudently and not convert, commingle or dissipate the assets in the Madoff IRA Accounts of the Plaintiffs and the members of the Class.

85. Madoff and BMIS breached these fiduciary duties by not managing prudently and, instead, by converting, commingling and dissipating the assets in the Madoff IRA Accounts of the Plaintiffs and the members of the class.

86. Based upon the red flags alleged above, Fiserv and the Trustee Defendants knew or were reckless in not knowing that Madoff and BMIS had breached their fiduciary duties to the Plaintiffs and the members of the Class.

87. Fiserv and the Trustee Defendants aided and abetted Madoff and BMIS in breaching their fiduciary duties to the Plaintiffs and the members of the Class, and are liable therefor.

88. The Ameritrade Defendants and Robert Beriault are liable for Fiserv's and the Trustee Defendants' aiding and abetting fiduciary breaches, as legal successors by merger or otherwise, and/or as controlling persons of one of more of the Trustee Defendants.

COUNT IV

NEGLIGENCE, GROSS NEGLIGENCE AND RECKLESSNESS

89. Plaintiffs incorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

90. Fiserv and the Trustee Defendants, which had exclusive legal control over the Madoff IRA Account assets, failed to hold, safe-keep, or adequately review and

value the Madoff IRA Account assets, which the Plaintiffs and each Class member entrusted to them, in violation of their duty of care.

91. Fiserv and the Trustee Defendants knew, or absent negligence, gross negligence or recklessness should have known, that the procedures followed by Fiserv and other IRA custodians had allowed the widespread dissipations of the Madoff IRA Trust assets of thousands of their clients, including in the Health and the Pearlman schemes. Fiserv and the Trustee Defendants became aware of the Heath and the Pearlman schemes by no later than 2005 and 2006, respectively, and knew, or absent negligence, gross negligence or recklessness should have known that its standard procedures exposed its clients to substantial losses if Defendants did not investigate red flags and change their procedures. Upon learning of the Heath and Pearlman scheme, Fiserv and the Trustee Defendants should have heightened scrutiny of the Madoff IRA Accounts, which they failed to do. Despite their knowledge of the Heath and Pearlman schemes, Fiserv and the Trustee Defendants failed to modify their internal practices or otherwise hold, value, or investigate the Madoff IRA Account assets that they had been entrusted with and that Madoff was managing.

92. Fiserv and the Trustee Defendants knew or, absent negligence, gross negligence or recklessness, should have known, about the many red flags concerning the Madoff investments, as alleged herein, including the warning by Fiserv's own subadvisor, Rogerscasey about the integrity of the Madoff structure.

93. Fiserv and the Trustee Defendants knew or, absent negligence, gross negligence or recklessness, should have known that the account statements it received

from BMIS, were falsified, and did not accurately reflect the assets in the Madoff IRA Accounts.

94. Fiserv and the Trustee Defendants were negligent, grossly negligent and/or reckless in not modifying their procedures, not holding and taking custody of the assets, not verifying that the assets existed, and not properly valuing the assets in the Madoff IRA Account. Instead, Fiserv in breach of their duty of care, relied upon Madoff to hold the assets and do the valuation. Fiserv and the Trustee Defendants were negligent, grossly negligent and/or reckless in not investigating and confirming the accuracy of Madoff's valuation, and in otherwise allowing Madoff to convert, commingle, and abscond with the assets in the Madoff IRA Accounts, that the Plaintiffs and each Class member entrusted to Fiserv and the Trustee Defendants.

95. Plaintiffs and the members of the Class have been damaged as a foreseeable result of the negligence, gross negligence and/or recklessness of Fiserv and the Trustee Defendants.

96. The Ameritrade Defendants and Robert Beriault, are liable for Fiserv's and the Trustee Defendants' negligence, gross negligence and/or recklessness, as legal successors by merger or otherwise, and/or as controlling persons of one of more of the Trustee Defendants.

COUNT V

UNJUST ENRICHMENT

97. Plaintiffs incorporate by reference all prior paragraphs of this Complaint as though fully set forth herein.

98. As a result of the misconduct alleged herein, the Madoff IRA Accounts of the Plaintiffs and the members of the Class have been rendered worthless. Yet Defendants reaped substantial fees, and other benefits at the expense of Plaintiffs and other members of the Class.

99. By their wrongful acts and omissions, Fiserv and the Trustee Defendants were unjustly enriched at the expense of and to the detriment of Plaintiffs and the members of the Class. Equity and good conscience require that Fiserv and the Trustee Defendants pay to Plaintiffs and the members of Class all such unjust enrichment in an amount to be determined at trial.

100. By reason of the foregoing, Fiserv and the Trustee Defendants should be ordered by this Court to disgorge all profits, benefits and other compensation obtained by them from their wrongful conduct.

101. The Ameritrade Defendants and Robert Beriault, are liable for Fiserv's and the Trustee Defendants' unjust enrichment, as legal successors by merger or otherwise, and/or as controlling persons of one of more of the Trustee Defendants.

PRAYER FOR RELIEF

Wherefore, Plaintiffs on behalf of themselves and the other members of the Class demand judgment against Defendants as follows:

a. Declaring this action to be a proper class action maintainable pursuant to Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure and declaring Plaintiffs to be proper Class representatives;

b. Awarding damages suffered by Plaintiffs and the Class as a result of the wrongs complained of herein, together with appropriate interest;

c. Awarding Plaintiffs and the Class punitive damages, where appropriate, suffered as a result of the wrongs complained of herein;

d. Declaring that Defendants have been unjustly enriched and imposing a constructive trust to recoup any fees, unjust benefits, and other assets for the benefit of Plaintiffs and the Class;

e. Awarding equitable and/or injunctive relief as permitted by law, including but not limited to disgorgement;

f. Awarding Plaintiffs and the Class costs and disbursements and reasonable allowances for attorneys' fees and reimbursement of expenses; and

g. Granting such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiffs demand a jury trial with regard to any issues so triable.

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