UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BEACON SECURITIES LITIGATION	) Master File No. 09-CV-0777 (LBS)
This Document Relates To:	)
ALL ACTIONS	)

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MEMORANDA IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS CLAIMS ASSERTED AGAINST THE IVY DEFENDANTS, BANK OF NEW YORK, THE BEACON DEFENDANTS, THE JEANNERET DEFENDANTS AND FRIEDBERG SMITH

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation
Plan Benefits Security Division

STEPHEN SILVERMAN
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax

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STATEMENT OF THE ISSUE

The brief of the Secretary of Labor addresses the following issue:

Whether the plaintiffs, participants in numerous ERISA plans whose assets were invested in Bernard Madoff's fraudulent schemes, state a plausible claim that Defendant Ivy Asset Management LLC ("Ivy"), a company which allegedly provided for the selection of and access to hedge fund and unregulated investment managers, such as Madoff, not available to the general public, provided investment advice for a fee, and thus was an ERISA fiduciary under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(21)(A)(ii), and the Secretary of Labor's regulation, 29 C.F.R. § 2510.3-21(c)(1).

INTEREST OF THE SECRETARY

The Secretary of Labor ("Secretary") has primary enforcement and interpretive authority for Title I of ERISA. See 29 U.S.C. §§ 1134, 1135. Accordingly, the Secretary has a strong interest in the proper construction of ERISA's fiduciary provisions, which were enacted to ensure the prudent management of plan assets and to safeguard the security of retirement benefits. See 29 U.S.C. §§ 1002(13), 1136(b); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 687-691 (7th Cir. 1986) (en banc).

This case concerns, in part, ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), and its accompanying Department of Labor regulation, 29 C.F.R. § 2510.3-21(c)(1), which together delineate when a person who renders investment advice with regard to plan assets acquires fiduciary status. The Secretary interprets her regulation and the statute to provide that a person who recommends particular investment managers to plan fiduciaries and who receives fees related to those recommendations, as Ivy is alleged to have done in this case, has provided investment advice in the relevant

sense. The Secretary has a strong interest in ensuring that the ability of private plaintiffs, as well as her own ability to bring suit to enforce ERISA's fiduciary duty provisions, are not inhibited by an unduly narrow construction of her own regulation. This latter interest is especially implicated in this case because the Secretary is currently investigating many of the same individuals and entities who are defendants in this case.

STATEMENT OF THE CASE

This case was brought by a class of ERISA plan participants to recover millions of dollars in plan losses from a number of entities and individuals who, through carelessness, greed and misfeasance, are alleged to have caused or allowed the plans' assets to be invested in Bernard Madoff's fraudulent pyramid schemes. As most relevant to this brief, Ivy is a Delaware company that provides investment services to individuals and institutions. Second Amended Complaint (SAC) ¶ 75. Beacon Associates Management Corp. ("BAMC") is the investment manager for the Beacon Fund, a pooled investment vehicle. Id. ¶¶ 16, 81. At all relevant times, the Beacon Fund's assets consisted of at least 25% employee benefit plan assets subject to ERISA, meaning that BAMC – with authority and control over the management of those assets – was a fiduciary with respect to the Beacon Fund's ERISA investors. Id. ¶¶ 85, 304-05. Defendant J.P. Jeanerret Associates, Inc. ("JPJA") is engaged in the business of rendering investment advice to ERISA covered employee benefit plans. Id. ¶ 87. JPJA entered into agreements with a number of plans that are part of this class action in which it certified that it was an ERISA section 3(38) "investment manager" – and therefore ERISA fiduciary – to those plans. Id. ¶ 301.

The plaintiffs allege, among other things, that Ivy acquired fiduciary status pursuant to ERISA section 3(21)(A)(ii) through the provision of investment advice for a fee to BAMC and JPJA as plan fiduciaries. SAC ¶¶ 332-357. Pursuant to an agreement between JPJA and Ivy, JPJA "used Ivy's services to identify alternative investment managers and strategies that were not typically known or available to the general investing public and to gain access to investment managers that were available through Ivy's network." Id. ¶ 320. In that regard, the plaintiffs allege that Ivy's advice to BAMC and JPJA was instrumental in causing BAMC and JPJA to invest ERISA plan assets with Bernard Madoff and his firm, Bernard L. Madoff Investment Securities LLC (jointly "Madoff"). Id. In consideration for Ivy's consultative and administrative services, including the access to and advice about Madoff that Ivy provided, BAMC paid Ivy 50% of the fees that BAMC received from Beacon Fund investors. Id. ¶¶ 176, 233. Similarly, JPJA paid Ivy 50% of the fees that it received from its ERISA plan clients who invested in the Beacon Fund pursuant to Ivy's recommendation. Id. ¶¶ 273, 195, 281. Based on these allegations and others, the plaintiffs contend that Ivy was a 3(21)(A)(ii) fiduciary at all times relevant to this complaint, id. ¶¶ 332-357, and that Ivy and the other fiduciaries breached their duties of loyalty and care to the plans, resulting in millions of dollars in plan losses.

ARGUMENT

I. THE PLAINTIFFS STATE A PLAUSIBLE CLAIM THAT DEFENDANT IVY PROVIDED INVESTMENT ADVICE FOR A FEE AND THUS WAS AN ERISA FIDUCIARY UNDER ERISA SECTION 3(21)(A)(ii) AND THE SECRETARY OF LABOR'S REGULATION, 29 C.F.R. § 2510.3-21(c)(1)

Because ERISA is a remedial statute designed to protect plan assets by imposing strict fiduciary duties on those who have or exercise various kinds of control over plans

and their assets, ERISA's fiduciary provisions are intended "to be broadly construed." LoPresti v. Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997). One of those fiduciary provisions provides that "a person is a fiduciary with respect to a plan to the extent" that "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of [a] plan." ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii); Bouboulis v. Transport Workers Union of America, 442 F.3d 55, 63 (2d Cir. 2006). As a matter of plain language, the statutory definition covers Ivy's advisory work for BAMC and JPJA because the Act broadly provides that anyone who gives investment advice concerning plan assets for any kind of fee or compensation, whatever the source, is a fiduciary. By regulation, however, the Department has issued a regulation interpreting the statutory term. The only real question here is whether Ivy meets the five-factor regulatory test set out in a Department of Labor regulation.

This regulation further defines "render[ing] investment advice for a fee" within the meaning of ERISA. In relevant part, the regulation states:

> (c) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of [29 U.S.C. § 1002(21)(A)(ii)] only if:
>
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) Such person either directly or indirectly. . . .
>
> (B) Renders any advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan . . . that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21(c)(1).

This regulation imposes a five-part test for determining whether a person is rendering investment advice as an ERISA fiduciary. For the advice to constitute investment advice, an advisor who does not have discretionary authority or control with respect to the purchase or sale of securities for the plan must – (1) render advice as to the value of securities or property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement or understanding with the plan or a plan fiduciary, that; (4) the advice will serve as a primary basis for investment decisions with respect to plan assets; and that (5) the advice will be individualized based on the particular needs of the plan. See 40 Fed. Reg. 50842 (Oct. 31, 1975); Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1117 (9th Cir. 1994). The Secretary of Labor is entitled to controlling deference in interpreting what this regulation and its five factors require. See Auer v. Robbins, 519 U.S. 452, 461-62 (1997).

The plaintiffs allege that Ivy is a fiduciary because it received fees from BAMC and JPJA as plan fiduciaries for the investment recommendations that it made to both BAMC and JPJA that those entities invest their plan assets in Madoff investments. Ivy does not dispute that the plaintiffs have adequately plead the second and third factors (regular basis and mutual agreement), but contends that the plaintiffs have failed to adequately plead facts establishing the other three factors (advice regarding purchase or sale of securities, primary basis and individualized). As discussed below, the Secretary

of Labor disagrees, and believes that Ivy misreads the Secretary's investment advice regulation in a number of important respects.[1]

A. Plaintiffs plausibly allege that Ivy rendered investment advice under the regulation

1. The plaintiffs plausibly allege that Ivy provided advice within the meaning of the statute and regulation by alleging that Ivy was paid to identify, monitor and recommend investment managers to BAMC and JPJA, as fiduciaries to ERISA plans

The plaintiffs allege that "the access to Madoff's services as an investment manager granted to JPJA and BAMC was at all relevant times entirely subject to the control of Ivy." SAC ¶ 321. Moreover, they further contend that "the Beacon and Jeanneret Defendants were entirely reliant on Ivy not only for access to Madoff, but for the selection of and access to hedge fund and unregulated managers not available to the general public." Id. Thus, according to the plaintiffs, Ivy's owner "acknowledged that Ivy was the 'asset allocator and introducer' [] for its advisory clients such as BAMC and JPJA." Id. ¶ 336.

Ivy's alleged recommendations concerning the selection of and asset allocation among investment managers used by BAMC and JPJA, including its recommendations to use Madoff as an investment manager for plan assets constitute the provision of "investment advice" pursuant to ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii). Department of Labor regulations explain that a person renders "investment advice" if, among other things, "either directly or indirectly . . . [s]uch person

[1] On a motion to dismiss, the court must "construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the Plaintiffs' favor." Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC, 568 F.3d 374, 381 (2d Cir. 2009).

renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property." 29 C.F.R. § 2510.3-21(c)(1).

Ivy argues that the advice it provided to BAMC and JPJA was to those entities and not to the ERISA plans whose assets were invested. Defs.' Jt. Mem. in Supp. of Mot. to Dismiss, at 39. This argument makes little sense given the statutory definition, which simply provides that the advice must be "with respect to any moneys or other property of [a] plan." 29 U.S.C. § 1002(21)(A)(ii). The regulation is not to the contrary. Instead, providing investment advice "to the plan" within the meaning of the regulation requires communicating with individuals who are charged with acting on behalf of the plan or who control or handle plan assets. As an ERISA section 3(38) investment manager and fiduciary to numerous plans, JPJA acted as a fiduciary to those plans for the purpose of "manag[ing], acquir[ing], or dispos[ing] of any asset of a plan." 29 U.S.C. § 1002(38)(A). Ivy's recommendations to BAMC – also a plan fiduciary – as to the investment of plan assets carried similar implications, because BAMC used Ivy's investment advice to invest plan assets.[2] Therefore, the investment manager

[2] In Interpretative Bulletin 96-1, the Department indicated that a person may acquire fiduciary status by rendering "investment advice" to an individual participant in a defined contribution plan. 29 CFR § 2509.96-1; see also 74 Fed. Reg. 3822, 3824 ("it is the view of the Department that the recommending of investment managers to participants and beneficiaries may constitute the provision of investment advice" under section 3(21)(A)(ii)). Individual plan participants are akin to BAMC in that they are not "the plan" or plan trustees, but they do handle and control plan assets; thus, Ivy's advice to BAMC is a type of communication contemplated by 3(21)(A)(ii). As the defendants acknowledge, these Interpretative Bulletins are "due 'particular deference' as 'an agency interpretation of 'longstanding duration,' recognizing that 'well-reasoned views' of an expert administrator rest on 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Defs.' Jt. Mem. in Supp. of Mot. to Dismiss, at n. 15 (citing Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487

recommendations that Ivy made to JPJA and BAMC, as plan fiduciaries, are investment recommendations "to the plan" in the relevant sense.

Likewise, Ivy misses the mark in arguing that recommending investment managers with respect to plan assets is not "investment advice" under the regulation. As Ivy notes, the regulation provides that investment advice must "be as to the value of securities or other property," or consist of "recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property." 29 C.F.R. § 2510.3-21(c)(1)(i). However, as the Secretary recently noted in a regulatory preamble, "[i]t has long been the view of the Department that the act of making individualized recommendations of particular investment managers to plan fiduciaries may constitute the provision of investment advice within the meaning" of the statute and the regulation. 74 Fed. Reg. 3822, 3824. Although this rulemaking was subsequently withdrawn, and the Secretary has since issued a new proposed rule, it remains the Secretary's view that making recommendations that a plan employ particular investment managers is tantamount to making recommendations as to the advisability of particular investments.[3]

The Secretary's interpretation of her own regulation is entitled to controlling deference because it is neither unreasonable nor does it contradict the regulatory language, which is broad enough to include indirect advice as the advisability of

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(2004)) ("Labor Department's interpretations, which are entirely consistent with the language of ERISA, certainly add substantial weight" to the statute's meaning.).

[3] This has been the position of the Secretary since at least 1984, when the Secretary concluded in an advisory opinion that an entity whose services include evaluating and recommending investment managers is "a fiduciary with respect to plans to which it renders consulting services." DOL Adv.Op. 84-04A, 1984 WL 23419, *1-3 (Jan. 4, 1984).

"investing in, purchasing or selling" securities through advice as the advisability of using specific investment managers to accomplish these transactions. See Auer, 519 U.S. at 461-62. Indeed, this interpretation is the most consonant with ERISA's purposes and overall structure, which places stringent trust-based fiduciary duties at the heart of the statutory scheme. See 29 U.S.C. § 1001(b), 1104. Under this scheme, fiduciaries are defined functionally based on the discretionary authority they are granted and the control they exercise over the plan and its assets. See 29 U.S.C. § 1002(21). Thus, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to the respective actor's power to control and prevent the misdeeds." Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993). In accordance with these principles, the statute imposes fiduciary liability on investment advisors to plans in receipt of fees to ensure that their influence over a plan's investments is in the best interest of the plan. These concerns are equally present when an advisor is paid to recommend the use of and allocation of plan assets to particular investment managers. Indeed, such concerns are especially paramount in a case like this, given the serious allegations of deceptive and self-dealing behavior by Ivy in its advisory role.

Furthermore, the plaintiffs here allege that, "[w]hile the advice nominally addressed the selection of managers and the allocation of assets among them, advice to place assets with advisors such as Madoff who purported to follow a well defined strategy such as the split-strike conversion strategy, effectively amounted to advice to purchase particular securities at certain market prices." SAC ¶ 353. Thus, the plaintiffs allege that, under the facts of this case, Ivy was, in essence, making recommendations to BAMC and JPJA to purchase and invest in securities, as the regulation provides. This

allegation alone distinguishes this case from Cohrs v. Salomon Smith Barney, 2004 WL 2104535 (D. Or., Aug. 31, 2005), a case that Ivy cites because, unlike Ivy's alleged recommendation of a particular investment manager (Madoff) with an established investment strategy of specified securities, the Cohrs defendants merely recommended that the trustees initiate a search for an investment manager. Thus, the plaintiffs have plausibly alleged that Ivy gave the kind of advice covered by the regulation.

2. Plaintiffs plausibly allege that, under the agreements between JPJA and BAMC and Ivy, the advice was intended to serve as the primary basis for selecting these investment managers

The plaintiffs plausibly allege that "it was agreed, arranged or understood that the advice provided by the Ivy Defendants to the Plans whose participants are members of the Jeanneret ERISA subclass (by providing advice to JPJA) would be the primary basis for investment decisions with respect to these ERISA covered plan assets managed by JPJA." SAC ¶ 336. According to the Complaint, Ivy and JPJA entered into a service agreement under which Ivy agreed, among other things, to "(a) research, identify, monitor, evaluate and meet with potential investment managers; (b) recommend investment managers to [JPJA]; (c) advise [JPJA] 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 [JPJA]; [and] (e) assess the performance of investment managers managing Client funds invested through [JPJA] and make periodic recommendations with respect to such performance." Id. ¶ 273. Moreover, the plaintiffs allege that Ivy represented on its website and elsewhere that it would undertake due diligence and continual monitoring of the hedge fund industry and education of its clients, and touted its expertise in the field of niche

investing. Id. ¶ 343. The logical implication is that, given Ivy's supposed expertise in this complicated area, JPJA would defer to and rely on Ivy's recommendations with regard to use of and asset allocations to the investment managers selected by Ivy. Id. ¶¶ 321, 336-37, 343.

The plaintiffs also plausibly allege, based on this same evidence concerning Ivy's touted expertise and niche services as an advisor, that Ivy's advice was intended to (and did) serve as the primary basis for investment manager decisions by BAMC. Moreover, that this advice was intended to be the primary basis for the investment manager decision is underscored by the allegations that Ivy was aware that the Beacon Defendants did not themselves have any expertise and were indeed part-time novice investors. Id. ¶ 354.

3. Plaintiffs plausibly allege that the agreements between JPJA and BAMC and Ivy provided for individualized advice regarding investment managers for the plans' assets

According to the Complaint, the agreement between Ivy and JPJA recited that Ivy's investment recommendations were for Jeanneret's investment advisory clients, and required Jeanneret to provide Ivy with a list of those clients. Id. ¶ 337. Moreover, the plaintiffs allege that Ivy was given copies of all the investment advisory contracts between the ERISA plans and JPJA. Id. These allegations plausibly support, as plaintiffs assert, that Ivy and JPJA "agreed, arranged or understood between them that investment advice the Ivy Defendants were to provide to the Plans whose participants were members of the Jeanneret ERISA subclass by providing such advise to JPJA would be individualized investment advice to these Plans based on the particular needs of these plans regarding such matters as, among other things, investment policies or strategies, portfolio composition, or diversification of investments." Id. ¶ 338.

The Complaint similarly plausibly alleges that Ivy agreed to provide individualized advice to BAMC. Id. ¶¶ 347, 350-55. The plaintiffs offer as factual support for this understanding between Ivy and BAMC, the Beacon offering memoranda that explained that Ivy had been engaged to "provide advice to the Managing Member with respect to Manager selection and allocation of the Company's assets among Managers and Investment Pools," and touted Ivy's expertise in "niche styles and sophisticated strategies of investing." Id. ¶¶ 347.

Ivy argues that because it allegedly gave the same bad advice about Madoff investment to numerous clients, its advice was not, in fact, individualized. Defs.' Suppl. Reply Mem. at 27. And, Ivy argues, the plaintiffs have not established that the advice actually took into account the individual needs of the various plans. Id. at 27-29. But nothing in the regulation requires that the advice given was actually unique or that it appropriately took into account the actual needs of the plans. All that the regulation requires is that the advisory services be undertaken "pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan . . . that such person will render individualized investment advice to the plan based on the particular needs of the plan." 29 C.F.R. § 2510.3-21(c)(1)(ii)(B). The plaintiffs here plausibly allege that, as understood by the parties, the agreement or understanding was that Ivy would provide BAMC and JPJA with individualized advice about unique investment manager opportunities suited to their needs.

Furthermore, because, under the regulation, the agreement or understanding between the parties need not be written, Ivy's reliance on the fact that there was no written agreement requiring individualized advice as the primary basis for Beacon's

decisions is entirely misplaced. Here, the plaintiffs have plausibly alleged that there were such unwritten agreements and understandings that Ivy would provide individualized recommendations on which BAMC would (and did) rely, which most likely can only be established or disproved based on the testimony of the parties involved, as well as other supporting evidence. SAC ¶ 354. For instance, the plaintiffs correctly rely on warning letters that Ivy eventually sent recommending that BAMC reduce its Madoff exposure. Id. ¶¶ 202, 212, 216, 348, 364. Even if the plaintiffs are correct in viewing the letters as too little, too late, their existence certainly supports that the parties understood that Ivy would provide such monitoring and recommendation services. This is more than sufficient to support the plausibility of an unwritten understanding between Beacon and Ivy that Ivy would provide the type of individualized advice encompassed by the regulation.

B. The money that BAMC and JPJC paid to Ivy for its services constitutes "fees or other compensation" under ERISA section 3(21)(A)

As explained above, ERISA section 3(21)(A)(ii) expressly provides that the "fee or other compensation," that the investment advisor receives may be either "direct or indirect." 29 U.S.C. § 1002(21)(A)(ii). Contrary to Ivy's argument, Defs.' Suppl. Reply Mem. at 23-37, Ivy's receipt of fees from BAMC and JPJA, themselves plan fiduciaries, as a result of recommending Madoff as an investment manager for plan assets, is just the type of "indirect" fee that the statutory provision contemplates. This Court recently concluded in F.W. Webb Co. v. State Street Bank & Trust Co., 2010 WL 3219285, *11 (S.D.N.Y. Aug. 12, 2010), that a plaintiff adequately alleged that the defendants provided investment advice for a fee under ERISA section 3(21)(A)(ii). Significantly, with respect to whether a "fee" was received, this Court reasoned that:

> Though defendants were compensated for the services listed in the [Agreement] and also received commissions when the Plan invested in State Street funds, they contend the claim fails because the Complaint does not allege that plaintiffs paid them any fees designated specifically for investment advice. The statute, however, requires only that the investment advisor receive "a fee or other compensation, direct or indirect" in exchange for investment advice; it does not require that the investment advice be compensated directly. Given this loose statutory language, the allegations that defendants' advice produced commissions and fell within a broader, remunerated service relationship satisfy the "fee" element at the pleading stage.

Id. (citations omitted). So too, the plaintiffs' allegations here sufficiently plead the "fee" element.

Consistent with the broad statutory language that encompasses both "direct" and "indirect" fees, the preamble to the investment advice regulation specifies that a fee "should be deemed to include all fees or other compensation incident to the transaction in which the investment advice has been or will be rendered." 40 Fed. Reg. 50842 (naming brokerage commissions, mutual fund sales commissions, and insurance sales commissions as examples). Nearly identical language is provided in Interpretive Bulletin 96-1, where the Department "expressed the view that, for the purposes of section 3(21)(A)(ii), such fees or other compensation need not come from the plan and should be deemed to include all fees or other compensation incident to the transaction in which the investment advise [sic] has been or will be rendered." 29 CFR § 2509.96-1, n.3 (citations omitted). Additionally, a 1983 Department of Labor Advisory Opinion provided that "fees" include "all fees or other compensation incident to the transaction," and further explained that "it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to [a] broker-dealer would represent compensation for the provision of such investment advice." DOL Adv.

Op. 83-60A, 1983 WL 22542, *2 (Nov. 21, 1983). As described above, supra at 9-10 & n.2, such interpretations are entitled to substantial deference, particularly when consistent with the plain language of the statutory provision, which broadly encompasses both "direct and indirect" fees. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984) (controlling weight given to agency's interpretation of statute that is consistent with statutory language).

CONCLUSION

For the foregoing reasons, this Court should hold that that the plaintiffs have adequately alleged that Ivy is an investment advisor for a fee and thus a fiduciary under ERISA section 3(21)(A)(ii), 29 U.S.C. § 1102(A)(ii), and its accompanying regulation.

Respectfully Submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation
Plan Benefits Security Division

/s/ Stephen Silverman
Stephen Silverman
Trial Attorney
Plan Benefits Security Division
U.S. Department of Labor
Room N-4611
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5623 – Phone
(202) 693-5610 – Fax

CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5.2, I hereby certify that on October 1, 2010, a copy of the foregoing Brief of the Secretary of Labor as Amicus Curiae, was served upon the parties listed below by electronic means in accordance with procedures promulgated by this Court.

Lewis J. Liman
Jeffrey A. Rosenthal
Cleary, Gottlieb, Steen & Hamilton, LLP
One Liberty Plaza
New York, NY 10006

Cohen, Milstein, Sellers & Toll, PLLC:

Marc I. Machiz
255 S. 17th Street, Suite 1307
Deborah Rogozinski
Philadelphia, PA 19103

Liza M. Mezzetti
Michelle C. Yau
1100 New York Ave., NW,
Suite 500 West
Washington, DC 20005

Catherine A. Torell
150 East 52nd Street, 30th Floor
New York, NY 10022

Daniel W. Krasner
Gregory M. Nespole
Demet Basar
Stacey Kelly
Wolf, Haldenstein, Adler, Freeman & Herz, LLP
270 Madison Ave
New York, NY 10016

Barbara Hart
Thomas M. Skelton
Todd Garber
Deborah Rogozinski
Lowey, Dannenberg, Cohen & Hart, P.C.
White Plains Plaza, 5th Floor
White Plains, NY 10601
New York, NY 10022

Dated: October 1, 2010

/s/ Stephen Silverman