UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE J.P. JEANNERET ASSOCIATES., INC., *et al.*	Master File No. 09-CV-3907 (CM)
This Document Relates To:	
ERISA ACTIONS	ECF Case

BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS CLAIMS ASSERTED AGAINST IVY ASSET MANAGEMENT LLC, THE BANK OF NEW YORK MELLON CORPORATION, AND CERTAIN AFFILIATED INDIVIDUALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

INTEREST OF THE SECRETARY 1

STATEMENT OF THE CASE 2

ARGUMENT 4

I. The Plaintiffs State A Plausible Claim That Defendant Ivy Was An Investment Advisor For A Fee, And Thus 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) 4

A. Plaintiffs plausibly allege that Ivy rendered investment advice under the regulation 7

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 JPJA, as fiduciaries to ERISA plans 7

2. Plaintiffs plausibly allege that, under the agreements between JPJA and Ivy, the advice was intended to serve as the primary basis for selecting these investment managers 12

3. Plaintiffs plausibly allege that the agreements between JPJA and Ivy provided for individualized advice regarding investment managers for the plans assets 13

B. The money that JPJC paid to Ivy for its services constitute "fees or other compensation" under ERISA section 3(21)(A) 16

CONCLUSION 17

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases: .... Page Number

Alaska Dep't of Envtl. Conservation v. E.P.A.,
540 U.S. 461 (2004).. 9 n.2, 10

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009).. 6

Auer v. Robbins,
519 U.S. 452 (1997).. 6, 10

Bouboulis v. Transport Workers Union of America,
442 F.3d 55 (2d Cir. 2006).. 4

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984).. 17

Cohrs v. Salomon Smith Barney,
2004 WL 2104535 (D. Or. Aug. 31, 2005).. 12

F.W. Webb Co. v. State Street Bank & Trust Co.,
2010 WL 3219284 (S.D.N.Y. Aug. 12, 2010)... 16

In re Beacon Securities Litigation, No. 09-CV-0777,
2010 WL 3895582 (S.D.N.Y. Oct. 5, 2010).. passim

LoPresti v. Terwilliger,
26 F.3d 34 (2d Cir. 1997) 4

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993).. 11

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Sec., LLC,
568 F.3d 374 (2d Cir. 2009).. 6

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) (en banc) 1

Slupinski v. First Unum Life Ins. Co.,
554 F.3d 38 (2d Cir. 2009).. 4

Thomas, Head & Greisen Employees Trust v. Buster,
24 F.3d 1114 (9th Cir. 1994) 6

Federal Statutes: .... Page Number

Employment Retirement Security Act of 1974,
as amended, 29 U.S.C. 1001 et seq:

Section 2(b), 29 U.S.C. § 1001(b) 11

Section 3(13), 29 U.S.C. § 1002(13) 1

Section 3(21), 29 U.S.C. § 1002(21) 11

Section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii).. passim

Section 3(38)(A), 29 U.S.C. § 1002(38)(A) 9

Section 404, 29 U.S.C. § 1104 11

Section 504, 29 U.S.C. § 1134 1

Section 505, 29 U.S.C. § 1135 1

Section 506(b), 29 U.S.C. § 1136(b) 1

Federal Regulations:

29 CFR § 2509.96-1 .... 9 n.2, 17

29 C.F.R. § 2510.3-21(c)(1) 1, 4, 5, 8

29 C.F.R. § 2510.3-21(c)(1)(i) 9

29 C.F.R. § 2510.3-21(c)(1)(ii)(B) 14

Miscellaneous:

U.S. Department of Labor Opinions and
Information Letters:

Opinion Letter 83-60A,
1983 WL 22542 (Nov. 21, 1983) 17

Opinion Letter 84-04A,
1984 WL 23419 (Jan. 4, 1984) 10 n.3

Miscellaneous: (continued) .... Page Number

40 Fed. Reg. 50842 (Oct.31, 1975) 6, 17

74 Fed. Reg. 3822 (Jan. 21, 2009) 9, 9 n.2, 10

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, including 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 for the fiduciary status of 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. 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.

The Secretary moved to file an amicus brief addressing ERISA section 3(21)(A)(ii), 29 U.S.C. § 1002(21)(A)(ii), and its accompanying regulation in the related matter of In re Beacon Securities Litigation also pending in the Southern District of New York before Judge Sand. While the Secretary's motion was pending, the Beacon court issued an opinion finding that the plaintiffs adequately pleaded that Ivy was an investment advisor for a fee under nearly identical facts and circumstances of this case. In re Beacon Securities Litigation, No. 09-CV-0777, 2010 WL 3895582 (S.D.N.Y. Oct. 5, 2010) (order granting in part, denying in part defendants' motion to dismiss).

STATEMENT OF THE CASE

This case was brought by a class of ERISA plans 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.[1] The allegations in this case significantly mirror those in the Beacon litigation, because the cases arise out of the same facts and circumstances. As most relevant to this brief, Defendant J.P. Jeanerret Associates, Inc.

[1] The plans are multiemployer pension, health and/or welfare benefit plans established for the benefit of union-represented laborers and their families. First Amended Consolidated Class Action Complaint (FAC) ¶ 7.

("JPJA") is a New York corporation that serves as an Investment Manager for the ERISA covered employee benefit plans that are plaintiffs in this case. First Amended Consolidated Class Action Complaint (FAC) ¶ 22. JPJA entered into Discretionary Investment Management Agreements ("Investment Agreements") with each of the plaintiffs, numerous ERISA pension and welfare plans, for the purpose of managing their plan assets. Id. ¶ 78-79. The Investment Agreements expressly provided that JPJA was an ERISA section 3(38) "investment manager" – and therefore ERISA fiduciary – to those plans. Id. ¶ 79. Defendant Ivy, a Delaware company that provides investment services to individuals and institutions, served as an investment advisor to JPJA and recommended that JPJA invest with Madoff. Id. ¶¶ 25, 49, 84-85. In 1993, JPJA established the Income Plus Fund, a hedge fund of pooled ERISA plan assets to which JPJA served as an ERISA fiduciary through its investment management services. Id. ¶ 91. JPJA invested with Madoff both directly and indirectly as a result of investment advice received from Ivy to JPJA and Income Plus. Id. ¶¶ 85-103, 185-91.

The plaintiffs allege, among other things, that Ivy acquired fiduciary status pursuant to ERISA section 3(21)(A)(ii) through its provision of investment advice for a fee to JPJA as plan fiduciaries. Id. ¶ 185. Pursuant to an agreement between JPJA and Ivy, JPJA "retained Ivy Asset Management to serve as investment advisor for its clients" and the Income Plus Fund. Id. ¶ 86, 94. In that regard, the plaintiffs allege that Ivy's advice to JPJA was instrumental in causing JPJA to convince unions to hire the JPJA to invest assets with Madoff, id. ¶ 88, and was the primary basis for the Income Plus Fund's investment allocations, including those with Madoff. Id. ¶¶ 96, 189. In consideration for Ivy's consultative and administrative services, including the access to and advice about

Madoff that Ivy provided, JPJA paid Ivy 40-50% of the fees that it received from its ERISA plan clients who invested in Madoff pursuant to Ivy's recommendations. Id. ¶¶ 86, 95. Based on these allegations and others, the plaintiffs contend that Ivy was a section 3(21)(A)(ii) fiduciary at all times relevant to this complaint, id. ¶¶ 185, 202, 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. Id. ¶¶ 209-237.

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); Slupinski v. First Unum Life Ins. Co., 554 F.3d 38, 47 (2d Cir. 2009) (ERISA's primary purpose is to "protect beneficiaries of employee benefit plans"). 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." 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 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. The Department, however, has

promulgated an interpretative regulation construing the statutory term; the only real question here is whether Ivy meets the five-factor test set out in the regulation.

In relevant part, the regulation defines "render[ing] investment advice for a fee" within the meaning of ERISA as follows:

> (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' complaint alleges that Ivy is a fiduciary because it received fees from JPJA as a plan fiduciary for the investment recommendations that it made for JPJA to invest its plan assets in Madoff investments. 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). The complaint will survive a motion to dismiss if those factual allegations "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 1949.

The plaintiffs' allegations, accepted as true, state a plausible claim that Ivy is an ERISA fiduciary as a result of its provision of investment advice for a fee. When faced with nearly identical allegations in the Beacon case, this Court determined that the "Plaintiffs successfully plead Ivy's fiduciary status under ERISA." In re Beacon, 2010 WL 3895582, at *31. Contrary to the Beacon decision, Ivy contends that the plaintiffs have failed to adequately plead facts establishing the first (advice as to value of securities), fourth (primary basis), and fifth (individualized advice) factors listed above. Defs.' Mem. in Supp. of Mot. to Dismiss, at 53-58. The Secretary of Labor disagrees. As

the Beacon decision holds, Ivy is a fiduciary under the Secretary's investment advisor regulation for the reasons stated below.

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 JPJA, as fiduciaries to ERISA plans

The plaintiffs allege that, pursuant to the Income Plus Fund's Offering Memorandum, Ivy's "role was to: (a) research, evaluate and meet with potential investment managers of the fund's assets; (b) make recommendations to Jeanneret Associates that it invest assets of the fund with certain investment managers; and (c) monitor, evaluate and assess the performance of investment mangers [sic] that are managing assets of the fund and to make periodic recommendations to Jeanneret Associates with respect to such performance." FAC ¶ 188. Moreover, according to the plaintiffs' complaint, Ivy and JPJA entered into a service agreement pursuant to which: "(a) Jeanneret Associates agreed to provide Ivy Asset Management with a list of its clients whose assets would be placed with investment managers recommended by Ivy Asset Management; (b) Ivy Asset Management agreed to research, evaluate, recommend and monitor investment managers; (c) Ivy Asset Management would receive 50 percent of Jeanneret Associates' management fees; (d) Jeanneret Associates agreed to maintain at least two clients that invest with investment managers introduced to them by Ivy Asset Management; (e) Jeanneret Associates agreed to provide Ivy Asset Management with copies of the investment agreements it executed with its clients; and (f) Ivy Asset

Management disclaimed liability to Jeanneret Associates for the acts and omissions of the investment managers it recommended." Id. ¶ 86.

Ivy's alleged recommendations concerning the selection of and asset allocation among investment managers used by 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 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 in its reply brief that the advice it provided to JPJA was not advice provided to the ERISA plans whose assets were invested. Defs.' Reply in Supp. of Mot. to Dismiss, at 69-71. 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. The Beacon court likewise found Ivy's argument "unpersuasive in light of the language of 29 C.F.R. § 2510.3-21(c)(1)." In re Beacon, 2010 WL 3895582, at *29. Ivy's advice "was rendered pursuant to an agreement 'between such person and the plan or a fiduciary with respect to the plan. . . .' Namely, Ivy's advice was rendered pursuant to agreements with . . . JPJA," and JPJA was

an ERISA fiduciary. Id. 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).[2] Therefore, the investment manager recommendations that Ivy made to JPJA, as a plan fiduciary, 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. Def.'s Mot. to Dismiss at 53-54. 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 provided 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 (Jan. 21, 2009). Although this rulemaking was subsequently withdrawn, and the Secretary has since issued a new

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[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 JPJA in that they are not "the plan" or plan trustees, but they do handle and control plan assets; similarly, Ivy's advice to JPJA is a type of communication contemplated by 3(21)(A)(ii). These Interpretative Bulletins are due "particular deference" as "an agency interpretation of longstanding duration, [because] 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." Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487 (2004).

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 Beacon court agreed, finding that Ivy's advice qualified as "investment advice" for the purpose of ERISA section 3(21)(A)(ii), because "the Department of Labor (DOL) has interpreted" advice "about investment advisors rather than individual investments . . . to fall under the definition of 'investment advice' provided by the statute and regulations." In re Beacon, 2010 WL 3895582, at *28 (citing 74 Fed. Reg. at 3824). "[T]he DOL's longstanding position [is] persuasive because it rests on a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" Id. (quoting Alaska Dep't of Envtl. Conservation v. E.P.A., 540 U.S. 461, 487 (2004)).

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 "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

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[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).

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 "Madoff and his firm managed billions of dollars for investors using a purported specialized investment strategy known as 'split-strike or conversion' strategy" in which "Madoff purportedly took large positions in a basket of large cap stocks that approximated the S&P 100 Index, then sold call options and purchased put options against the long stock positions." FAC ¶ 65. Plaintiffs plausibly allege that Ivy's 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. Pls.' Opp. at 16 ("[B]ecause the Ivy Defendants knew (as alleged) that Madoff invested only in his own securities, any manufactured distinction between advice concerning investment managers and advice concerning specific securities has no applicability to the

allegations in this case.") Thus, the plaintiffs allege that, under the facts of this case, Ivy was, in essence, making recommendations to 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. This Court in Beacon agreed, finding Cohrs inapplicable because (a) the Cohrs court neither considered the DOL's longstanding views on the scope of "investment advice," nor cited any authority on point; (b) the Ninth Circuit did not adopt the Cohrs' reasoning on appeal; and (c) there is a materially closer connection between Ivy's recommendation of Madoff's investment strategy and Madoff's execution of that strategy than what occurred in Cohrs. In re Beacon, 2010 WL 3895582, at *28 n.27. 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 Ivy, the advice was intended to serve as the primary basis for selecting these investment managers

The plaintiffs plausibly allege that Ivy "performed its duties with the understanding that its investment advice would serve as the primary basis for the manner in which the assets of the Income Plus Fund were invested." FAC ¶ 189. The complaint, as we have noted, describes agreements between Ivy and JPJA under which, among other things: "(a) Jeanneret Associates agreed to provide Ivy Asset Management with a list of its clients whose assets would be placed with investment managers recommended by Ivy

Asset Management; (b) Ivy Asset Management agreed to research, evaluate, recommend and monitor investment managers; (c) Ivy Asset Management would receive 50 percent of Jeanneret Associates' management fees; (d) Jeanneret Associates agreed to maintain at least two clients that invest with investment managers introduced to them by Ivy Asset Management; [and] (e) Jeanneret Associates agreed to provide Ivy Asset Management with copies of the investment agreements it executed with its clients." Id. ¶ 86. Moreover, the plaintiffs allege that Ivy "touts its focus on 'investing with highly skilled managers, creating diversified portfolios and carefully monitoring performance.'" Id. ¶ 89. "Regarding due diligence," the plaintiffs cite Ivy materials that assure their clients that "'[b]ecause the hedge fund industry is a global, 24/7 business, it requires constant due diligence and an unrelenting commitment from our employees,'" id., materials that were consistent with its specific agreements with Jeanneret to monitor its recommended investment managers. Id. ¶ 86.

The logical implication is that, given Ivy's supposed expertise in this complicated area, JPJA deferred to and relied on Ivy's recommendations with regard to use of and asset allocations to the investment managers selected by Ivy. In other words, according to the plaintiffs, JPJA relied on Ivy's expertise in making investment decisions regarding the plans' assets. See id. ¶ 189; In re Beacon, 2010 WL 3895582, at *30 ("'[T]he regulation does not require that a [fiduciary's] advice be 'the' primary basis for investment decisions, . . . but merely 'a' primary basis. Plaintiffs persuasively allege that Ivy's advice as to Madoff was a primary basis for investment decisions.'") (citation omitted).

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

According to the Complaint, the investment consulting 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. FAC ¶ 86. Moreover, the plaintiffs allege that Ivy was given copies of all the investment advisory contracts between the ERISA plans and JPJA, as the Ivy/JPJA agreements required. Id. ¶ 87. Ivy and JPJA then "accepted millions of dollars in investment advisor fees in connection with the capital they invested on behalf of the ERISA plans." Id. ¶ 12. In exchange, Ivy was "obligated to vet suitable investment managers, assemble a diversified group of investments, follow a professional investment strategy, and conduct ongoing due diligence." Id. These services further included "provid[ing] advice with respect to such matters as choosing managers, strategies and asset allocations" for Ivy's plan clients. Id. ¶¶ 141-42. In conjunction with the services described in the Income Plus Fund's Offering Memorandum above, supra at 7 (FAC ¶ 188), these allegations plausibly support, as the plaintiffs assert, that Ivy and JPJA agreed between them that Ivy would provide individualized investment advice to the plaintiff plans.

Ivy argues that its advice was not individualized because it was not "tailored to the needs of any ERISA plan, or . . . specific funds that JPJA managed." Defs.' Mot. to Dismiss at 55. 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). This

Court in Beacon ruled accordingly: "Ivy's advice was not of the character of a stockbroker recommending a particular security to its customers at large; rather Ivy made recommendations about fund diversification and allocations between various investments on an on-going basis. Moreover, an investment advisor need not review the entire allocation of a plan's assets to provide individualized investment advice." In re Beacon, 2010 WL 3895582, at *29. Indeed, drawing all inferences in favor of the plaintiffs, the allegations against Ivy in Beacon plead "individualized investment advice," because Ivy frequently and for a long period of time provided JPJA with advice regarding investment managers that was not available to the general public, and, for example, suggested to JPJA a method of circumventing Madoff's investment limits for the Income Plus Fund. Id. (citations omitted). Likewise, the plaintiffs in the instant case plausibly allege that, as understood by the parties, the agreement or understanding was that Ivy would provide JPJA with individualized advice about unique investment manager opportunities suited to their needs.

Here, the plaintiffs have plausibly alleged that there were agreements and understandings that Ivy would provide individualized recommendations on which JPJA 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. FAC ¶¶ 86-88. For instance, the plaintiffs refer to the May 15, 1991, investment consulting agreement under which JPJA "retained Ivy Asset Management to serve as investment advisor for its clients." Id. ¶ 86. That agreement provided that Ivy would receive JPJA's client lists so that it could "research, evaluate, recommend, and monitor investment managers." Id. These agreements thus explicitly required Ivy to provide monitoring and recommendation

services. This is more than sufficient to support the plausibility of an understanding that JPJA would provide the type of individualized advice encompassed by the regulation.

B. The money that JPJA 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). Ivy's receipt of fees from JPJA, itself a plan fiduciary, 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 3219284, *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 10-11, 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. § 1002(A)(ii), and its accompanying regulation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5.2, I hereby certify that on October 18, 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.

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