UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

'09 CIV 00996

SEROL HOLDING CORPORATION, on Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. BANCO SANTANDER S.A., BANCO SANTANDER INTERNATIONAL, OPTIMAL INVESTMENT SERVICES S.A., PRICEWATERHOUSECOOPERS, HSBC SECURITIES SERVICES (IRELAND) LTD., HSBC INSTITUTIONAL TRUST SERVICES (IRELAND) LTD., HSBC BANK USA, N.A., MANUEL ECHEVERRÍA FALLA, ANTHONY L. M. INDERRIEDEN, and BRIAN WILKINSON, Defendants.	Civil Action No. CLASS ACTION CLASS ACTION COMPLAINT DEMAND FOR JURY TRIAL

INTRODUCTION

1. This is a class action on behalf of all persons or entities who owned shares of Optimal Strategic US Equity Ltd. on December 10, 2008 and were damaged thereby (the "Class"). Excluded from the Class are the defendants, any entity in which defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such individual or entity.

2. This action arises from defendants' wrongful conduct in connection with the fraud and Ponzi scheme run by Bernard L. Madoff ("Madoff") through his investment firm Bernard L. Madoff Investment Securities LLC ("BMIS"). On December 11, 2008, Madoff's Ponzi scheme was disclosed to the public. Madoff and BMIS had fraudulently reported steady, positive returns on billions of dollars in investments they controlled when, in fact, they had lost most, if not all, of the investors' money in the largest Ponzi scheme in financial history. The U.S. Government has filed criminal charges against Madoff and the SEC is investigating BMIS and related entities. Investors' losses are estimated at $50 billion.

3. Plaintiff invested with Madoff and BMIS indirectly through Optimal Multiadvisors, Ltd. ("Optimal Fund") and one of its two sub funds, Optimal Strategic US Equity Ltd. ("Optimal SUS"). The vast majority of the capital of the Optimal SUS sub fund was invested with Madoff and his related entities. Plaintiff has been informed that its investment in the Optimal SUS sub fund is now worthless. The other Optimal Fund sub fund, Optimal Arbitrage Ltd., did not invest with Madoff or BMIS.

4. Optimal Investment Services S.A. ("Optimal Investment") served as the investment manager for the Optimal Fund. The Optimal Fund was marketed by Banco Santander S.A. ("Banco Santander") and its affiliates, including Banco Santander International ("Santander International") in

the United States. Banco Santander owns 99% of Optimal Investment through which it has absolute control of the Optimal family of funds.

5. During the relevant period, Optimal Investment's website stated, "intensive due diligence is vital to ensuring the integrity and sustainability of the investment process . . . . Each investment undergoes lengthy and detailed scrutiny according to clearly defined manager selection criteria." This representation was deleted from the website after the Madoff scandal broke in the news. In addition, the Optimal SUS "Explanatory Memorandum" for investors, dated January 7, 2008, said "[t]he Investment Manager [Optimal Investment] bases its investment decisions on a careful analysis of many investment managers."

6. Optimal Investment received a weighted average annual commission of 1.90% of assets under management, or approximately €44 million annually, to manage the funds defendants invested with Madoff. In return for these fees, investors were entitled to, but did not receive, reasonable and adequate due diligence by Optimal Investment and Banco Santander. As a result, plaintiff and the Class have lost all or almost all of their investments.

7. Spanish prosecutors announced an investigation into Banco Santander's relationship with BMIS on January 12, 2009.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the claims pursuant to the Court's diversity jurisdiction. 28 U.S.C. §1332(a).

9. This Court also has jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. §1332(d)(2). With respect to CAFA, (i) the amount in controversy exceeds the jurisdictional amount, (ii) the Class consists of hundreds, and perhaps thousands, of individuals, and (iii) the plaintiff is a citizen of a foreign state and one defendant is a citizen of New York.

10. Venue in this judicial District is proper because substantial acts in furtherance of the alleged fraud and/or its effects have occurred within this District. Additionally, certain of the defendants maintain offices and conduct substantial business in this District. Moreover, every class member who invested in the Optimal funds in United States dollars was required to have his or her investment money transmitted to HSBC Bank USA, N.A. in New York.

THE PARTIES

11. Plaintiff SEROL Holding Corporation ("SEROL" or "Plaintiff") is, and was at all times relevant hereto, a Bermuda corporation. During the Class Period, SEROL invested $207,000 in the Optimal SUS sub fund through its account with Santander International in Miami, Florida. Due to the activities alleged herein, Plaintiff has lost all, or substantially all, its investment in Optimal SUS, and has paid substantial advisory fees for illusory services. Plaintiff invested in Optimal SUS and invested in United States dollars, which were transmitted by Banco Santander to HSBC Bank USA, N.A. in New York.

12. Defendant Banco Santander is the parent bank of Grupo Santander, the leading financial institution in Spain, and one of the largest financial conglomerates in the world. Banco Santander was established on March 21, 1875 and incorporated under the laws of the Kingdom of Spain. As of the end of the third quarter 2008, Banco Santander had total assets of approximately €953 billion, 132,000 employees, and the largest market capitalization of any bank in the Euro zone. Its corporate headquarters are located in Ciudad Grupo Santander, 28660 Boadilla del Monte, Madrid, Spain. Upon information and belief, Banco Santander transacted business in the United States related to the claims alleged herein.

13. Defendant Santander International is the wholly-owned subsidiary of Banco Santander which conducts business in the United States. It has offices in Miami, Florida at 1401

Brickell Avenue, Suite 1500, Miami, Florida. In 2007, it earned $233 million in net income, had total assets of $42 billion, and had loans outstanding of approximately $32 billion.

14. Defendant Optimal Investment is an investment management company, incorporated in Switzerland with almost $10 billion in assets under management as of January 2008. Its principal offices are located at 2-4, Place des Alpes CP 1824, Geneva, Switzerland, with additional offices located in New York and Madrid. Optimal Investment was, and continues to be, the investment manager for the Optimal Fund and Optimal SUS. Upon information and belief, Optimal Investment transacted business in the United States related to the claims alleged herein.

15. Defendant Manuel Echeverría Falla ("Echeverría") was the Chief Executive Officer and Chief Investment Officer of Optimal Investment from its inception in June 2001 until September 2008. Echeverría was also one of three directors of the Optimal Fund. Prior to 2001, he was Executive Vice President of Banco Santander (Suisse) S.A. and served as manager of the Portfolio Management and Fund Management Group for the International Private Banking Division of Grupo Santander from 1989 to 2001. During these twelve years, Echeverría built Grupo Santander's expertise in alternative investment strategies. Echeverría left Optimal Investment in September 2008. Upon information and belief, Echeverría transacted business in the United States related to the claims alleged herein.

16. Defendant Anthony L. M. InderRieden ("InderRieden") is a director of the Optimal Fund. InderRieden served as a director of the prior administrator of the Optimal Fund, Fortis Fund Services (Bahamas) Ltd., until 2002. Upon information and belief, InderRieden transacted business in the United States related to the claims alleged herein.

17. Defendant Brian Wilkinson ("Wilkinson") is a director of the Optimal Fund. Between October 2001 and March 2006, Wilkinson was Managing Director of the Administrator.

Upon information and belief, Wilkinson transacted business in the United States related to the claims alleged herein.

18. Defendants Echeverría, InderRieden and Wilkinson are collectively referred to as the "Director Defendants."

19. Defendants Banco Santander, Santander International, Optimal Investments and the Director Defendants are collectively referred to as the "Santander Defendants."

20. Defendant PricewaterhouseCoopers' ("PwC") Dublin, Ireland, office served as Optimal Fund's auditors. PwC provides auditing services worldwide, is the largest professional services firm in Ireland, and one of the "Big Four" auditing firms. Here, PwC failed to perform its annual audits of the financial statements and financial condition of Optimal Fund and Optimal SUS in accordance with professional standards applicable to those audits. PwC's Dublin office is located at North Wall Quay, Dublin 1, Ireland. Upon information and belief, PwC transacted business in the United States related to the claims alleged herein.

21. Defendant HSBC Securities Services (Ireland) Ltd. ("HSBC Administrator" or the "Administrator") was the administrator, registrar, and transfer agent of Optimal Fund and Optimal SUS. The Administrator had responsibility for the administration of Optimal Fund and Optimal SUS, including the calculation of Net Asset Value ("NAV") and preparation of the accounts. The Administrator also served as the Company Secretary to Optimal Fund. The Administrator is an indirect wholly-owned subsidiary of HSBC Holdings plc, a public company incorporated in England. Upon information and belief, the Administrator transacted business in the United States related to the claims alleged herein.

22. Defendant HSBC Institutional Trust Services (Ireland) Ltd. ("HSBC Custodian" or the "Custodian") was the custodian of Optimal Fund and purportedly sought to provide safe custody

for, and control of, the Optimal Fund's assets it held. The Custodian is an indirect wholly-owned subsidiary of HSBC Holdings plc. Upon information and belief, the Custodian transacted business in the United States related to the claims alleged herein.

23. Defendant HSBC Bank USA, N.A. ("HSBC Bank") is a subsidiary of HSBC USA, Inc. HSBC Bank's main offices are located at 452 Fifth Avenue, New York, NY, 10018. For all Class members who submitted their investments in the Optimal funds in United States dollars, HSBC Bank served as the intermediary bank which collected all such deposits. Such deposits were transferred by wire to HSBC Bank in New York.

NON-PARTIES

24. The Optimal Fund is an investment fund classified as a Standard Fund pursuant to the provisions of the Investment Funds Act and Regulations of The Bahamas. The Optimal Fund is not a defendant in this action. The registered address of the Optimal Fund is Fort Nassau Centre, Marlborough Street, P. O. Box N 4875, Nassau, The Bahamas.

25. Optimal SUS is a sub fund of the Optimal Fund and is organized as an International Business Company under the laws of the Commonwealth of The Bahamas. Optimal SUS is not a defendant in this action. The Optimal Fund offered non-voting participating shares in Optimal SUS to Plaintiff and other similarly situated investors.

26. Each member of the Class invested in Optimal SUS, which, in turn, invested substantially all its assets with BMIS. The investments were executed through the purchase of non-voting participating shares, which were subdivided into five different classes: (i) Class A USD Participating Shares; (ii) Class A Euro Participating Shares; (iii) Class B USD Participating Shares; (iv) Class B Euro Participating Shares; and (v) Class C USD Participating Shares. Generally, Class A shares were offered to new investors while Class B and C shares were issued "under special circumstances and at the sole discretion of the Directors."

CLASS ACTION ALLEGATIONS

27. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3). The Class is so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes that Class members number in the hundreds and perhaps thousands.

28. Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff is a member of the Class, Plaintiff's claims are typical of the claims of all Class members, and Plaintiff does not have interests antagonistic to, or in conflict with, those of the Class. In addition, Plaintiff has retained competent counsel experienced in class action litigation.

29. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by defendants' wrongful conduct in violation of the common law.

30. There are numerous questions of law and fact which are common to the Class and which predominate over any questions affecting individual members, including:

(a) Whether defendants were negligent in failing to adequately investigate Madoff and BMIS;

(b) Whether statements made by defendants to Plaintiff and the Class were false and misleading and misrepresented material facts about the Optimal Fund and Optimal SUS;

(c) Whether defendants acted knowingly, recklessly or negligently in making materially false and misleading statements during the Class Period;

(d) Whether defendants' conduct alleged herein was intentional, reckless, grossly negligent, or negligent in violation of fiduciary duties owed to Plaintiff and the Class and, therefore, in violation of the common law; and

(e) Whether and to what extent Plaintiff and the Class were damaged.

31. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since a multiplicity of actions could result in an unwarranted burden on the judicial system and could create the possibility of inconsistent judgments. Moreover, a class action will allow redress for many persons whose claims would otherwise be too small to litigate individually. There will be no difficulty in the management of this action as a class action.

DEFENDANTS' MISCONDUCT

32. Madoff was arrested on December 11, 2008, and charged with criminal securities fraud after admitting that his money management operations were "all just one big lie," and "a giant Ponzi scheme." Madoff also admitted that "there [was] no innocent explanation" and estimated investors' losses at $50 billion.

33. The same day, the SEC filed an emergency action in this Court to halt all ongoing fraudulent activities by Madoff and BMIS. That action is *SEC v. Bernard L. Madoff*, 08 Civ. 10791-LLS (S.D.N.Y. Dec. 11, 2008).

34. Banco Santander issued a press release on December 14, 2008, in response to Madoff's arrest. That press release stated that Banco Santander's clients' exposure to Madoff through Optimal SUS was approximately €2.33 billion (USD $3.1 billion). These are by far the largest reported losses from investors at a single bank. In contrast, Banco Santander itself only lost €17 million.

The Explanatory Memorandum

35. All investments in Optimal SUS were made pursuant to an Explanatory Memorandum (the "Memorandum"), which stated that the only valid representations consisted of those contained in the Memorandum. *See* Exhibit 1 ("Ex. 1"), attached hereto, at 2. The Subscription Form, required to be submitted by each investor, also stated that the investment was

"based solely on the Memorandum together (where applicable) with the most recent annual report and accounts of the Fund." Ex. 1 at 39.

36. The Memorandum stated that Optimal SUS had "established a discretionary account with a US broker-dealer (the 'Broker-Dealer')" who utilized a "split-strike conversion" strategy. Ex. 1 at 28. The Memorandum did not disclose that the Broker-Dealer was Madoff and BMIS.

37. The Memorandum described the Broker-Dealer's investment strategy as "consisting of the purchasing of equity shares, the selling of related options representing a number of underlying shares equal to the number of shares purchased, and the buying of related put options representing the same number of underlying shares." Ex. 1 at 28. The goal was "to limit losses when stock prices decline while still affording an upside potential that is capped" (Ex. 1 at 28), as well as the "preservation and consistent enhancement of capital" (Ex. 1 at 2).

38. The Memorandum stated that all investment decisions were made by Optimal Investment and that the Broker-Dealer was merely responsible for execution, as follows:

(a) "The Broker-Dealer is responsible for the execution of the fund's trading strategy and all investment decisions in the account at the Broker Dealer are effected by [Optimal Investment]." Ex. 1 at 28.

(b) "The Broker-Dealer acts as the agent and attorney-in-fact of Optimal SUS in connection with its sale of securities to Optimal SUS and the purchase of securities from Optimal SUS . . . ." *Id.*

(c) "All decisions with respect to the general management of the fund are made by [Optimal Investment] who has complete authority and discretion in the management and control of the business of the fund . . . . As a result, the success of the fund for the foreseeable future will depend largely upon the ability of [Optimal Investment], and no person should invest in the fund

unless willing to entrust all aspects of the management of the fund to [Optimal Investment], having evaluated their capability to perform such functions." Ex. 1 at 30.

(d) "Although the Broker-Dealer has limited investment discretion as to the selection of securities or other property purchased or sold by or for the fund's account, the Broker-Dealer has discretion with respect to the timing and size of transactions . . . ." Ex. 1 at 31.

39. The Memorandum further reassured investors about the care that Optimal Investment would take in selecting and monitoring the managers to whom it entrusted the funds' assets, including the so called "Broker-Dealer," and emphasized that Optimal Investment "specialized" in such selection:

(a) Optimal Investment "bases its investment decisions on a careful analysis of many investment managers." Ex. 1 at 11.

(b) Optimal Investment "shall select managers with varied investment styles who have established records of success or who [Optimal Investment] believes demonstrate the potential to become outstanding investment managers." *Id.*

(c) "It is the Fund's task to select and diversify among the distinctive investment techniques and strategies of each portfolio manager to achieve the Fund's investment objectives." Ex. 1 at 8.

(d) "The Fund's investment objective is the preservation and consistent enhancement of capital." *Id.*

(e) Optimal Investment "specializes in advising multi-manager and multi-strategy portfolios." Ex. 1 at 10.

(f) "Custodial risk . . . The Fund must satisfy itself to ensure that such third party [such as Madoff] has and maintains the necessary competence, standing and expertise appropriate to hold the assets concerned." Ex. 1 at 22.

40. The Memorandum set forth the fee schedule by which defendants were compensated for their services, as follows:

(a) An annual investment management fee charged by Optimal Investment of 2.15% of the NAV of the shares for Class A shares, 1.65% for Class B shares, and 1.15% for Class C shares. Ex. 1 at 29.

(b) "[T]he administration fee is 2.5 basis points subject to a maximum of USD 200,000 per annum per account. The Administrator is also entitled to charge an investment service fee of USD 35 per transaction." Ex. 1 at 12.

(c) "[T]he custody fee is one basis point," in addition to "all reasonable out of pocket expenses." Ex. 1 at 13.

41. Defendants' actions with respect to Plaintiff's and the Class's assets fell far short of the legal duties owed, and representations made, to Plaintiff and the Class to induce their investment in Optimal SUS.

Red Flags Defendants Would Have Uncovered Had They Performed Reasonable Due Diligence

42. In May of 2001, an article entitled "Madoff Tops Charts; Skeptics Ask How" appeared in *MAR/Hedge*, a semi-monthly newsletter reporting on the hedge fund industry. The article raised significant questions about Madoff's so-called split-strike conversion strategy, as follows:

> [M]ost of those who are aware of Madoff's status in the hedge fund world are baffled by the way the firm has obtained such consistent, nonvolatile returns month after month and year after year.

* * *

> Those who question the consistency of the returns . . . include current and former traders, other money managers, consultants, quantitative analysts and fund-of-funds executives . . . .
>
> . . . They noted that others who have used the [split-strike conversion] strategy . . . are known to have had nowhere near the same degree of success.
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> * * *
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> The best known entity using a similar strategy, a publicly traded mutual fund dating from 1978 called Gateway, has experienced far greater volatility and lower returns during the same period.
>
> * * *
>
> In addition, experts ask why no one has been able to duplicate similar returns using the strategy and why other firms on Wall Street haven't become aware of the fund and its strategy and traded against it, as has happened so often in other cases; why Madoff Securities is willing to earn commissions off the trades but not set up a separate asset management division to offer hedge funds directly to investors and keep all the incentive fees for itself, or conversely, why it doesn't borrow money from creditors, who are generally willing to provide leverage to a fully hedged portfolio of up to seven to one against capital at an interest rate of Libor-plus, and manage the funds on a proprietary basis.

When pressed by the author of the article to truly explain the basis of the split-strike conversion strategy, Madoff replied, "'I'm not interested in educating the world on our strategy, and I won't get into the nuances of how we manage risk.'"

43. Another article appeared in *Barron's*, also in May 2001, entitled "Don't Ask, Don't Tell: Bernie Madoff is so secretive, he even asks his investors to keep mum," in which *Barron's* reported that certain option strategists for major investment banks could not understand how BMIS and Madoff achieved the results they claimed with their purported investment strategy. Madoff responded by stating, "'It's a proprietary strategy. I can't go into great detail.'"

44. Harry Markopolos ("Markopolos"), a derivatives expert with experience managing split-strike conversion strategies, provided an analysis to the SEC on November 7, 2005, warning

that Madoff was running a Ponzi scheme. Markopolos asserted that the consistency of Madoff's positive returns was mathematically impossible, stating that it was "highly likely" that "Madoff Securities is the world's largest Ponzi Scheme."

45. Markopolos's analysis further stated as follows:

> At my best guess level of BM's assets under management of $30 billion, or even at my low end estimate of $20 billion in assets under management, BM would have to be over 100% of the total [S&P 100] put option contract open interest in order to hedge his stock holdings as depicted in the third party hedge funds marketing literature [*e.g.*, the Optimal Memorandum]. In other words, there are not enough index option put contracts to hedge the way BM says he is hedging[.] And there is no way the OTC market is bigger than the exchange listed market for plain vanilla S&P 100 index put options.
>
> . . . One hedge fund . . . has told that BM uses Over-the-Counter options and trades exclusively thru [sic] UBS and Merrill Lynch. . . .
>
> . . . The counter-party credit exposures for UBS and Merrill Lynch would be too large for these firms [sic] credit departments to approve. The SEC should ask BM for trade tickets showing he has traded OTC options thru [sic] these two firms. Then the SEC should visit the firms' OTC derivatives desk, talk to the heads of trading and ask to see BM's trade tickets.
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> * * *
>
> It is mathematically impossible for a strategy using index call options and index put options [as described by Madoff] to have such a low correlation to the market where its returns are supposedly generated from. . . . BM's [Bernard Madoff's] performance numbers show only 7 extremely small [monthly] losses during 14.5 years . . . .
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> * * *
>
> [S]ince Madoff owns a broker-dealer, he can generate whatever trade tickets he wants. . . . [H]ave the [feeder funds] matched [the trade tickets] to the time and sales of the exchanges? For example, if BM says he bot [sic] 1 million shares of GM, sold $1 million worth of OTC OEX calls and bot [sic] $1 million worth of OTC OEX puts . . . the GM share prints would show on either the NYSE or some other exchange while the broker-dealers he traded OTC options thru [sic] would show prints of the hedges they traded to be able to provide BM with the OTC options at the prices listed on BM's trade tickets.
>
> . . . Madoff does not allow outside performance audits. One London based hedge fund . . . asked to send in a team of Big 4 accountants to conduct a

performance audit during their planned due diligence. They were told "No, only Madoff's brother-in-law who owns his accounting firm is allowed to audit performance for reasons of secrecy in order to keep Madoff's proprietary trading strategy secret so that nobody can copy it."

* * *

Madoff is suspected of being a fraud by some of the world's largest and most sophisticated financial services firms. Without naming names, here's an abbreviated tally:

A. A managing director at Goldman, Sachs prime brokerage operation told me that his firm doubts Bernie Madoff is legitimate so they don't deal with him.

* * *

[Royal Bank of Canada] and [Societe Generale] have removed Madoff some time ago from approved lists of individual managers . . . .

. . . Madoff was turned down . . . for a borrowing line from a Euro bank. . . . Now why would Madoff need to borrow more funds? . . . Looks like he is stepping down the payout.

* * *

BM tells the third party FOF's [fund of funds] that he has so much money under management that he's going to close his strategy to new investments. However, I have met several FOF's who brag about their "special access" to BM's capacity. This would be humorous except that too many European FOF's have told me this same seductive story about their being so close to BM that he'll waive the fact that he's closed his funds to other investors but let them in because they're special. It seems like every single one of these third party FOF's has a "special relationship" with BM.

46. Had defendants conducted reasonable and adequate due diligence, they would have detected the fraud based on the red flags and glaring inconsistencies identified by Markopolos. In fact, given that Optimal Investments had provided Madoff with billions of dollars in assets, defendants had considerably more access than Markopolos to Madoff's operations to detect these red flags. For example, one of Markopolos's critical tests was the confirmation with the supposed counterparties of the trades Madoff claimed to have executed. But, as reported by the *Associated*

Press on January 16, 2009, in an article entitled "Madoff fund may have made no trades," "[T]he securities and brokerage industry self-policing organization, the Financial Industry Regulatory Authority, confirmed that there was no evidence of Madoff's secretive investment fund executing trades through its brokerage operation. And Fidelity Investments, which had a money-market fund listed among the many trades included in statements Madoff's fund sent to customers, says Madoff was not a client." Defendants' minimal and reasonable inquiries with Fidelity, or other similar counterparties, would have alerted defendants to the fraud.

47. Markopolos's obvious questions about the legitimacy of Madoff's enterprise were echoed by other finance professionals. In 2007, hedge fund investment adviser Aksia LLC ("Aksia") urged its clients not to invest in Madoff feeder funds after performing due diligence on Madoff. Aksia identified the following red flags:

(a) Aksia discovered the 2005 letter from Markopolos to the SEC set forth above.

(b) Madoff's auditor, Friehling & Horowitz ("F&H"), was a three-person accounting firm located in a 13-by-18 foot office in Munsey, New York. A financial institution of the size of BMIS is typically audited by a big-four accounting firm, or one of the other larger and more reputable auditors. In addition, while F&H purportedly audited BMIS, F&H had filed annual forms with The American Institute of Certified Public Accountants ("AICPA") attesting that it had not performed audits for the past fifteen years. The AICPA has begun an ethics investigation into F&H. Federal investigators have issued a subpoena to F&H and have requested documents going back to 2000.

(c) The comptroller of BMIS was based in Bermuda. Most mainstream hedge fund investment advisers have their comptroller in house.

(d) BMIS had no outside clearing agent that could confirm its trading activity.

48. Societe Generale ("SocGen") sent a due diligence team to New York in 2003 to investigate Madoff. As reported by *The New York Times* on December 17, 2008, in an article entitled "European Banks Tally Losses Linked to Fraud," SocGen concluded that something was not right. "'It's a strategy that can lose sometimes, but the monthly returns were almost all positive' . . . ."

49. In a December 12, 2008 article in *The New York Times* entitled "Look Back at Wall St. Wizard Finds Magic Had Its Skeptics," Robert Rosenkranz, a principal at Acorn Partners, an investment advisory firm, stated: "'Our due diligence, which got into both account statements of his customers, and the audited statements of Madoff Securities, which he filed with the S.E.C., made it seem highly likely that the account statements themselves were just pieces of paper that were generated in connection with some sort of fraudulent activity' . . . ."

50. Jeffrey S. Thomas, Chief Investment Officer at Atlantic Trust, which manages $13.5 billion, said that it had "reviewed and declined to invest with Madoff." The firm said it spotted a number of "red flags" in Madoff's operation, including a lack of an outside firm to handle trades and accounting for the funds and the inability to document how Madoff made profits.

51. In contrast to the above-quoted experts, defendants here entrusted Madoff with more than $3 billion of the Class's assets without conducting any reasonable due diligence. Instead, defendants ensured that the Memorandum contained a clause relating to their due diligence obligations, as follows:

> [T]here is the risk that the Broker-Dealer could abscond with those assets. There is always the risk that the assets with the Broker-Dealer could be misappropriated. In addition, information supplied by the Broker-Dealer may be inaccurate or even fraudulent. The Investment Manager and the Administrator are entitled to rely on such information (provided they do so in good faith) and are not required to undertake any due diligence to confirm the accuracy thereof.

Ex. 1 at 33.

52. While purporting to limit the amount of due diligence conducted by Optimal Investment on "information supplied by" Madoff, that clause did not relieve Optimal Investment of the responsibility to (i) conduct due diligence independent of the information supplied by Madoff, or (ii) obtain information about Madoff from third parties.

Banco Santander's Coercive and Inadequate Offer

53. In late January 2009, Banco Santander began privately approaching members of the Class who lost money as a result of the Madoff scandal, attempting to coerce them into surrendering their legal claims for a small fraction of their losses. Specifically, Banco Santander offered individual clients preferred stock in an affiliate of Banco Santander's with a face value purportedly equal to their original investment in Optimal SUS.

54. Banco Santander's offer is woefully inadequate for several reasons. First, Banco Santander limited its offer to the amount of Class members' initial investment. Thus, it does not compensate Class members for any interest or gain their money would have earned had it been prudently invested. Second, the preferred stock pays only a 2% yield. Because of the small yield and the fact that the preferred shares would have a very low trading volume on the exchange, the value of the preferred stock on the secondary market would likely be 40% of its face value. Indeed, Banco Santander announced that it is creating reserves for the costs of the preferred stock at only 36% of its face value. Third, Class members who accept Banco Santander's offer must promise not to sue the bank and to keep all their accounts at Banco Santander and not transfer them to another bank. Finally, Banco Santander's "offer" does not apply to institutional investors.

55. In order to coerce Class members into accepting these onerous and unreasonable terms, Banco Santander has been meeting with Class members in person and engaging in what *The Wall Street Journal* calls "high-pressure tactics." According to the *Journal*, some Class members

have been given only 48 hours to accept Banco Santander's offer, while others have been given as little as six hours to decide.

COUNT I

Negligent Misrepresentation Against All Defendants

56. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if set forth fully herein.

57. The defendants owed to Plaintiff and the Class a duty: (a) to act with reasonable care in preparing and disseminating the information set forth in written materials, including the monthly account statements, and other representations relied upon by Plaintiff and the Class in deciding to purchase the investments; and (b) to use reasonable diligence in determining the accuracy of and preparing the information contained therein.

58. The defendants breached their duty to Plaintiff and the Class by failing to investigate, confirm, prepare, and review with reasonable care the information contained in the written materials and other representations and by failing to disclose to Plaintiff and the Class, among other things, the facts alleged above, and in failing to correct the misstatements, omissions, and inaccuracies contained therein.

59. As a direct, foreseeable, and proximate result of this negligence, Plaintiff and the Class have sustained damages, suffered mental and emotional distress, and have lost a substantial part of their respective investments, together with lost interest and general and incidental damages in an amount yet to be determined, and to be proven at trial.

60. By reason of the foregoing, the defendants are jointly and severally liable to Plaintiff and the Class.

COUNT II

Breach of Fiduciary Duty Against the Santander Defendants

61. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if set forth fully herein.

62. The Santander Defendants owed fiduciary duties to the Plaintiff and the Class and breached such duties.

63. The duties expressly assumed by the Santander Defendants and owed to the Plaintiff and the Class include, *inter alia*:

(a) The duty to act with reasonable care to ascertain that the information set forth in the written materials, including the monthly account statements, and other presentations communicated to and relied upon by Plaintiff and the Class in deciding to purchase the investments, was accurate and did not contain misleading statements or omissions of material facts.

(b) The duty to allow individual representatives selling the investments to act with reasonable care to ascertain that the investment opportunity presented to Plaintiff and the Class was suitable and in accordance with their investment goals and intentions by providing to such representatives truthful sales information concerning such investments.

(c) The duty to deal fairly and honestly with Plaintiff and the Class.

(d) The duty to avoid placing themselves in situations involving a conflict of interest with Plaintiff and the members of the Class.

(e) The duty to manage the accounts of Plaintiff and the members of the Class and to manage, monitor, and operate the investments exclusively for the best interest of the Plaintiff and the members of the Class.

(f) The duty to make recommendations and execute transactions in accordance with the goals, investment objectives, permissible degree of risk, and instructions of Plaintiff and the members of the Class.

64. The Santander Defendants failed to fulfill their fiduciary duties owed to Plaintiff and the members of the Class in the following respects:

(a) Failing to act with reasonable care to ensure that the information set forth in the written materials and other presentations communicated to and relied upon by Plaintiff and the other members of the Class in deciding to purchase the investments was accurate and did not contain misleading statements or omissions of material facts;

(b) Failing to act with reasonable care to provide truthful sales information to representatives' agents to ensure that the investment opportunity presented to Plaintiff and the Class was suitable and in accordance with their investment goals and intentions;

(c) Engaging in transactions which resulted in a conflict of interest between the defendants and Plaintiff and the Class whose financial interests the defendants had undertaken to advance, supervise, manage, and protect;

(d) Failing to adequately and fully disclose to Plaintiff and the Class the full extent and nature of the conflicts of interest in which the defendants and their affiliates would be engaging;

(e) Profiting and allowing all defendants and their affiliates to profit at the expense of Plaintiff and the Class;

(f) Engaging in transactions that were designed to and did result in a profit to all defendants and their affiliates at the expense of Plaintiff and the Class; and

(g) Failing to exercise the degree of prudence, diligence, and care expected of financial professionals managing client funds.

65. The acts of the Santander Defendants in breaching their fiduciary obligations owed to Plaintiff and the members of the Class show a willful indifference to the rights of Plaintiff and the other members of the Class.

66. As a proximate result of the Santander Defendants' breaches of their fiduciary duties, Plaintiff and the other Class members have sustained damages, suffered mental and emotional distress, and have lost a substantial part of their respective investments, together with lost interest and general and incidental damages in an amount yet to be determined, and to be proven at trial.

67. By reason of the foregoing, the Santander Defendants are jointly and severally liable to Plaintiff and the other Class members.

68. In addition, the Santander Defendants' acts were willful and wanton and aimed at the public generally. Therefore, Plaintiff and the Class are entitled to punitive damages.

COUNT III

Violations of General Business Law §349 Against All Defendants

69. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if set forth fully herein.

70. Defendants' acts and conduct in furtherance of their scheme or artifice constitute deceptive acts and practices in the conduct of a business or in the furnishing of a service, within the meaning of §349 of the New York General Business Law and, as such, are unlawful.

71. Upon information and belief, the same acts and conduct used by defendants to defraud Plaintiff have been used repeatedly and are of a recurring nature.

72. The acts and conduct of defendants, by which they knowingly fraudulently represented to potential purchasers the nature of the investments that defendants were selling to Plaintiff, affect the public interest.

73. As a result of defendants' unlawful acts and conduct in violation of §349 of the New York General Business Law, Plaintiff and the Class have been damaged in an amount to be proven at trial.

COUNT IV

Gross Negligence Against All Defendants

74. Plaintiff repeats and realleges the foregoing allegations as if fully set forth herein. This Count is asserted against all defendants.

75. As investment managers with discretionary control over the assets entrusted to them by Plaintiff and the Class, defendants owed Plaintiff and the Class a duty to manage and monitor the investments of Plaintiff and the Class with reasonable care. Defendants breached this duty.

76. Defendants further breached their duty of care by failing to:

(a) Take all reasonable steps to ensure that the investment of the assets of Plaintiff and the Class were made and maintained in a prudent and professional manner;

(b) Take all reasonable steps to preserve the value of Plaintiff's and the Class's investments;

(c) Perform all necessary and adequate due diligence; and

(d) Exercise generally the degree of prudence, caution, and good business practices that would be expected of any reasonable investment professional.

77. As a direct and proximate result of defendants' gross negligence, Plaintiff and the Class have suffered damages and are entitled to such damages from defendants, jointly and severally.

COUNT V

Unjust Enrichment Against All Defendants

78. Plaintiff repeats and realleges the foregoing allegations as if fully set forth herein. This Count is asserted against all defendants.

79. Defendants financially benefited from their unlawful acts which caused Plaintiff and the Class to suffer injury and monetary loss.

80. As a result of the foregoing, it is unjust and inequitable for defendants to have enriched themselves in this manner, and each defendant should pay its own unjust enrichment to Plaintiff and the Class.

81. Plaintiff and the Class are entitled to the establishment of a constructive trust over the benefits defendants realized from their unjust enrichment and inequitable conduct.

COUNT VI

Aiding and Abetting Breach of Fiduciary Duty – Against PwC

82. Plaintiff incorporates by reference and realleges the paragraphs above.

83. The Santander Defendants owed Plaintiff and the Class certain fiduciary duties as alleged herein.

84. By committing the acts alleged herein, the Santander Defendants have breached their fiduciary duties owed to Plaintiff and the Class.

85. Defendant PwC aided and abetted the Santander Defendants in breaching their fiduciary duties owed to Plaintiff and the Class. PwC colluded with or aided and abetted the Santander Defendants' breaches of fiduciary duties, and was an active and knowing participant in the Santander Defendants' breaches of fiduciary duties owed to Plaintiff and the Class. Among other things, PwC knowingly or recklessly ignored information that indicated or should have indicated that

the money invested by Plaintiff and the Class in Optimal SUS was being invested with Madoff and BMIS and that Madoff and BMIS were involved in a Ponzi scheme.

86. Plaintiff and the Class shall be irreparably injured as a direct and proximate result of the aforementioned acts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the other members of the Class, demands judgment against defendants as follows:

A. Enjoining defendants from contacting Class members in an attempt to settle their claims through coercive and inadequate offers and through deceptive representations and in-person solicitations;

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

C. Awarding damages suffered by Plaintiff and the Class as a result of the wrongs complained of herein, together with appropriate interest. Plaintiff and the Class specifically seek the recovery not only of all the principal initially invested through the Santander Defendants, but also all interest and profits which Plaintiff and the Class would have earned had their money been prudently invested;

D. Awarding Plaintiff and the Class punitive damages, where appropriate;

E. Enjoining defendants from using the Optimal Fund's or Optimal SUS's assets to defend this action or to otherwise seek indemnification from the funds for their wrongful, deceitful, reckless, and negligent conduct as alleged herein;

F. Awarding Plaintiff and the Class costs and disbursements and reasonable allowances for the fees of Plaintiff's and the Class's counsel and experts, and reimbursement of expenses; and

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

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: February 4, 2009

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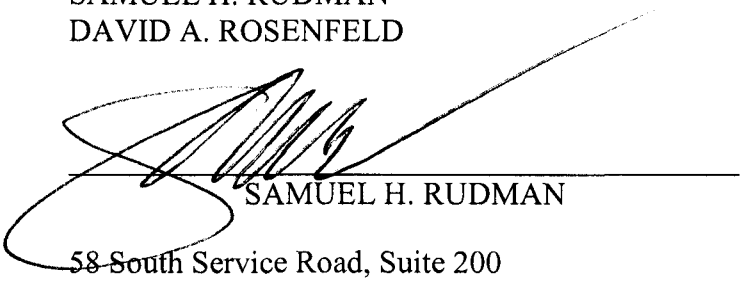

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