

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

LARRY HINES,
ROBERT FALCETTI, SR.,
THOMAS A. PAASO,
RAYMOND F. MEAGHER and
LLOYD HALL

Plaintiffs,

FISERV, INC., FIRST TRUST CORPORATION,
d/b/a RETIREMENT ACCOUNTS, INC., FISERV
TRUST COMPANY, TD AMERITRADE
TRUST COMPANY and
DOES 1-100 inclusive,

Defendants.

Case 8:08-cv-02569-JSM-TBM

AMENDED CLASS ACTION
COMPLAINT FOR:
1) BREACH OF FIDUCIARY
DUTY;
2) AIDING AND ABETTING;
BREACH OF FIDUCIARY DUTY;
3) AIDING AND ABETTING
COMMON LAW FRAUD;
4) NEGLIGENCE;
5) BREACH OF CONTRACT;
6) VIOLATION OF THE FLORIDA
SECURITIES AND INVESTOR
PROTECTION ACT;
7) AIDING AND ABETTING
VIOLATION OF THE FLORIDA
SECURITIES AND INVESTOR
PROTECTION ACT.

AMENDED CLASS ACTION COMPLAINT

DEMAND FOR A JURY TRIAL

Plaintiffs (collectively "Plaintiffs") for their Amended Complaint as against Defendants, allege as follows:

INTRODUCTION

1. This case involves the actions of defendants First Trust Corporation d/b/a Retirement Accounts, Inc., and a subsidiary of Fiserv, Inc., Fiserv Trust Company, a former subsidiary of Fiserv, Inc. which was recently merged into TD Ameritrade Trust Company and Fiserv, Inc., a holding company (all defendants collectively hereinafter being referred to as "Fiserv"; NASDAQ: FISV), a large financial services conglomerate with annual revenues

approaching Four Billion Dollars and a market capitalization of over Five Billion Dollars, which describes itself as “[T]he world’s largest service provider to banks, credit unions, lending institutions, and investment advisors” with over 18,000 clients worldwide.

2. At all relevant times, Fiserv knew it was being used by, and yet turned a blind eye to, a long-term *Ponzi* scheme perpetrated by one Louis J. Pearlman (“Pearlman”) that robbed hundreds if not thousands of elderly and unsophisticated investors, many who were in their 70's and 80's, out of in excess of \$300 million of the investors’ life savings by facilitating the purchase by these investors of certain illusory investments (hereinafter described and referred to as the “Transcon Investments”) which were to be maintained in individual retirement accounts (“IRAs”) established by joint agreement between Fiserv and Pearlman and maintained for each investor by Fiserv. Hereinafter, the *Ponzi* scheme perpetrated by Pearlman and his co-conspirators is referred to as the “Pearlman Fraud.”

3. Purportedly acting as IRA custodian and trustee on behalf of its customers, Fiserv purchased the Transcon Investments from unregistered broker-dealers for “deposit” into the investors’ accounts and continued to do so over the course of many years despite numerous, detailed customer complaints alerting Fiserv to serious problems with the investments and despite the fact that the Transcon Investments: a) were purely illusory; b) failed to qualify as the type of investments which are eligible to be deposited into qualified retirement accounts according to IRS regulations; and c) failed to meet Fiserv’s own standards as to permissible IRA investments for Fiserv IRA custodial accounts.

4. Many of the investors lost their entire life savings which they amassed by sacrificing and cautiously saving throughout the course of their working lives. The losses at issue are not the simple result of the failure of legitimate investments to perform as expected; rather, this was a massive and pervasive fraud which could not have been perpetrated had Fiserv (and its employees) not breached fiduciary, statutory and contractual duties owed to its customers. The actions and inaction of Fiserv provided substantial assistance to the fraudulent scheme perpetrated by Pearlman, which devastated the class members and their families.

5. The named plaintiffs and their counsel have thus far reviewed the investment files of only a fraction of the Class Members. The shocking evidence of Fiserv’s actions and omissions contained therein strongly suggests that the details set forth below represent the tip of the iceberg and are indicative of a widespread pattern of malfeasance, demonstrating that a class

action is the most effective and efficient vehicle for obtaining redress.

THE NATURE OF THE PEARLMAN FRAUD

6. The term “*Ponzi Scheme*” derives from the notorious Charles Ponzi, who stole millions of dollars from Boston investors in 1920 and describes a financial fraud which is perpetrated by utilizing monies obtained under false pretenses from subsequent investors to pay “interest” or “dividends” and return of principal to earlier investors who have no reason to suspect that no legitimate enterprise is actually generating revenues to make these payments. A *Ponzi* scheme will only last as long as there are new investors who part with their investment funds anticipating unusually high returns. Eventually, the house of cards will have to collapse, usually leaving the later-in-time investors holding the bag and the con-artist promoters in jail. The *Ponzi* scheme perpetrated by Pearlman did not unravel until the State of Florida Office of Financial Regulation (“OFR”) finally brought injunctive proceedings against Pearlman on December 27, 2006, after years and years of on-again, off-again investigations, effectively shutting down his operations. Only after that did Fiserv finally stop protecting the financial fraud at the heart of this case.

7. From the early 1980's until December 2006, Pearlman and related entities wholly owned by Pearlman such as Transcontinental Airlines, Inc., Trans Continental Travel Services Inc., Clean Systems Technology, Inc., and other related companies and entities (collectively, “Transcon”), offered and sold, and received proceeds from, unregistered securities identified either as the “Employee Investment Savings Accounts (“E.I.S.A.”), or as common or preferred stock in one or more of the Transcon companies.

8. The E.I.S.A. savings program was marketed by Pearlman and his cohorts as providing CD and/or savings accounts to friends and family of Transcon, with pass-through Federal Deposit Insurance Corporation (“FDIC”) insurance and reinsurance through Lloyd of London and AIG. The preferred stock sold in Trans Continental Travel Services Inc. was slated to pay 10% annual dividends. Stock in other entities was sold as well, including Airship International, Inc., another of the Transcon companies.

9. Unbeknownst to the Plaintiffs and other bilked investors, the Transcon companies were little more than shell companies designed to defraud investors. There was no charter airline with 50 airplanes as presented by Transcon on its balance sheets. Pearlman, the entertainment impresario who obtained fame by promoting the “boy bands” NSync and the Backstreet Boys,

was expert at moving assets out of one company and into another, and therefore out of reach of creditors. He and his co-conspirators created an elaborate fake accounting scheme, with false data from a fictional accounting firm, creating entirely fabricated financial statements which were summarily republished in Dun & Bradstreet reports for a decade or more.

10. By the time the scheme unraveled in late 2006, Trans Con had few if any profitable entities or divisions. No actual segregated E.I.S.A savings accounts were ever established for investors and companies issuing preferred stock had little or no income or assets other than deposits from the E.I.S.A. program. As is typical in *Ponzi* schemes of this nature, Pearlman and his co-conspirators used incoming funds from newer investors to pay principal and interest or dividends to already existing investors.

11. Transcon's E.I.S.A. "savings program" was initially sold by Pearlman and his co-conspirators directly to investors. As the program expanded, the Transcon Investments were sold through a loose network of sales agents, who were either licensed securities brokers or insurance salespeople and who all reported to Pearlman's chief salesman, Michael Crudele.

12. Transcon eventually recruited and utilized defendant Retirement Accounts, Inc. ("RAI") and, later, Fiserv Trust Company, to act as custodian for Transcon investors' retirement plans.

13. Funds paid by the Class Members to invest in the Transcon Investments were deposited by Pearlman and his co-conspirators into various Transcon accounts with Florida based banks.

14. Class Members were to be passive and were not expected or obligated to perform any entrepreneurial effort in conjunction with their Transcon Investments to produce the income or profit, which would result in the payment of the interest.

15. According to an OFR analysis, between January 2003 and December 2006 alone, approximately \$118 million in proceeds from the sale of the E.I.S.A. program were received and deposited in the Transcon bank accounts.

16. Investors in the Transcon Investments were never advised that their funds would be paid out to earlier investors for account redemption or as interest payments.

17. Investors in the Transcon Investments were never advised that their funds would be paid to third parties in any manner.

18. Investors in the Transcon Investments were informed:
 - a. that the E.I.S.A. program investor funds were held in U.S. bank accounts;
 - b. that the FDIC insured each E.I.S.A. account up to \$100,000;
 - c. that a Lloyd's of London insurance policy and Subsequently an AIG insurance policy covered each E.I.S.A. account;
 - d. that a Florida C.P.A. firm, Cohen & Siegel, issued an opinion concerning the E.I.S.A. program on May 3, 1995.

19. Investors in the Transcon Investments, or some of them, were provided a document to demonstrate that Lloyd's of London insured E.I.S.A. accounts in U.S. financial institutions under Lloyd's Policy # 823/AM9 100780 with the "Assured" being Trans Continental Airlines, Inc. Orlando, Florida, 32819 U.S.A.

20. F.S. § 517.021, entitled Definitions, provides at subsection (20) the following definition of a security:

(20) "Security" includes any of the following:

- (a) ...
- (f) An evidence of indebtedness.
- (q) An investment contract.

21. The Transcon Investments were "securities" as defined by F.S. §§ 517.021 (20)(f) and (q).

22. The Transcon Investments were not "federal covered securities" as defined by F.S. § 517.021(10).

23. Upon information and belief, in connection with the sale of the Transcon Investments, no persons were ever registered as an "issuer," "dealer" or "associated person" pursuant to the registration provisions of Chapter 517, Florida Statutes.

24. At all times material to this action, the Transcon Investments offered to Class Members were never registered as "securities" pursuant to the registration provisions of Chapter 517, Florida Statutes.

25. Florida Statutes Chapter 517.301 provides a cause of action for, among other things, misrepresentations and omissions in connection with the rendering of investment advice.

26. Recommending the investment in the Transcon Investments constitutes the rendering of investment advice.

27. Pearlman and his co-conspirators obtained money from the Transcon Investors by means of a scheme to defraud, and misrepresentations and omissions of material facts in connection with the rendering of investment advice in violation of F.S. § 517.301 of the Florida Securities Investor Protection Act, falsely misrepresented to the Class Members material facts as set forth herein above.

28. In connection with the transactions described above, Pearlman and his co-conspirators also omitted to disclose material facts to the Transcon Investors in violation of F.S. § 517.301, Florida Securities and Investor Protection Act, as set forth herein above.

29. In connection with the transactions described above, Pearlman and his co-conspirators employed a scheme to defraud and engaged in business which operated as a fraud, as previously set forth herein. Said conduct is in violation of F.S. § 517.301 Florida Statutes.

30. F.S. § 517.301, entitled Fraudulent transactions; falsification or concealment of facts, provides at section (1)(a)1, 2, and 3, the following:

(1) It is unlawful and a violation of the provisions of this chapter for a person:

(a) In connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, including any security exempted under the provisions of s. 517.051 and including any security sold in a transaction exempted under the provisions of s. 517.061, directly or indirectly:

1. To employ any device, scheme, or artifice to defraud;
2. To obtain money or property by means of any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
3. To engage in any transaction, practice, or course of business, which operates or would operate as a fraud or deceit upon a person.

31. Pearlman and his co-conspirators violated the registration and anti-fraud provisions of the Florida Securities and Investor Protection Act in selling unregistered securities and engaging in fraudulent misrepresentations and omissions in connection with the sale of the Transcon Investments.

32. In late 2006, Pearlman's *Ponzi* scheme began to unravel. Transcon was unable to pay investors interest on their investments or cash people out of their Transcon Investments.

THE STATE OF FLORIDA TAKES ACTION

33. Finally, in December 27, 2006, OFR filed suit after years of investigating Pearlman. In February 2007, the Florida regulators announced that Pearlman had indeed engaged in a massive fraud and a receiver was appointed by the Court to take possession of all of the Transcon companies and assets. Later, Pearlman himself and all the Transcon companies filed for bankruptcy, which bankruptcy proceeding is still pending and being jointly administered by a single Trustee, Soneet Kapila.

34. OFR sued Transcon to enjoin the continuing violation of the Florida Securities and Investor Protection Act, Chapter 517, Florida Statutes, and the Florida Financial Institution Code, Chapter 655, Florida Statutes.

35. On May 21, 2008, Pearlman was sentenced to 25 years in federal prison, after pleading guilty to charges of conspiracy, money laundering, and making false statements during a bankruptcy proceeding. U.S. District Judge G. Kendall Sharp gave Pearlman the chance to cut his prison time, by offering to reduce the sentence by one month for every million dollars he helps bankruptcy Trustee Kapila recover. Pearlman is currently in Federal prison serving his sentence.

JURISDICTIONAL ALLEGATIONS

36. Jurisdiction is proper under 28 U.S.C. § 1332 (d). The matter in controversy exceeds \$5,000,000 and at least one member of the class of plaintiffs is a citizen of a State different from that of a defendant.

37. Pursuant to 28 U.S.C. § 1391(b), venue in this Court is appropriate. All defendants are subject to personal jurisdiction in the Middle District of Florida, and a substantial portion of the acts underlying the claims contained in this Complaint occurred in this District.

38. Plaintiff Larry Hines is an individual citizen of the State of Florida who resides in Apollo Beach, Florida. He invested IRA monies he earned from employment in the Pearlman Fraud through Fiserv and has lost approximately \$563,000 as a result of Fiserv's conduct.

39. Plaintiff Robert T. Falcetti, Sr. is an individual citizen of the State of Florida who resides in Lakeland, Florida. He invested IRA monies the Pearlman Fraud through Fiserv and has lost approximately \$400,000 as a result of Fiserv's conduct.

40. Plaintiff Thomas A. Paaso is an individual citizen of the State of Florida who resides in Land-O-Lakes, Florida. He invested IRA monies he earned through employment in the Pearlman Fraud through Fiserv and has lost approximately \$300,000 as a result of Fiserv's

conduct.

41. Plaintiff Raymond F. Meagher is an individual citizen of the State of Florida who resides in Pinecrest, Florida. He invested IRA monies he earned through employment in the Pearlman Fraud through Fiserv and has lost approximately \$200,000 as a result of Fiserv's conduct.

42. Plaintiff Lloyd Hall is an individual citizen of the State of Florida who resides in Tampa, Florida. He invested IRA monies he earned through employment in the Pearlman Fraud through Fiserv and has lost approximately \$150,000 as a result of Fiserv's conduct.

43. Defendant Retirement Accounts, Inc. is the trade name for First Trust Corporation, a Colorado corporation with a principal place of business in Denver, Colorado.

44. Defendant Fiserv Trust Company is a chartered trust company, which, until recently, had its principal place of business in Denver, Colorado, and was a citizen of the State of Colorado. It was merged with TD AMERITRADE Trust Company, the latter becoming the surviving corporation, on August 18, 2008. TD Ameritrade Trust Company is a Maine Corporation with a principal place of business in Columbia, MD.

45. Fiserv, Inc. is a Wisconsin based public company which is a citizen of the State of Wisconsin.

46. DOE DEFENDANTS 1 - 25 are individuals or corporations who engaged in the wrongful conduct herein and/or aided and abetted and assisted in the Pearlman Fraud.

47. Certain individuals who were central to the Pearlman Fraud are not named in this complaint. As described above, they include Louis J. Pearlman, who is currently in prison, and Michael Crudele, who was recently sued by the bankruptcy Trustee and agreed to pay approximately \$1,000,000 in settlement to the Trustee. It is believed that further collection efforts against Crudele would be fruitless. Any remaining Pearlman co-conspirators are not sued because they are either under criminal investigation or their assets are being pursued by the Trustee.

CLASS ACTION ALLEGATIONS

The Relief Sought for Members of the Class

48. This action is brought by Plaintiffs, for themselves and on behalf of all others similarly situated, under the provisions of Article 23 of the Federal Rules of Civil Procedure against defendants for: (i) aiding and abetting common law fraud; (ii) aiding and abetting

violation of the Florida Investor Protection Act; (iii) aiding and abetting breach of fiduciary duty; (iv) negligent misrepresentation; (v) negligence; (vi) breach of fiduciary duty; (vii) breach of contract; (viii) violation of the Florida Investor Protection Act; (ix) money damages to be paid by Fiserv associated with the above claims; (vii) for relief incident and subordinate thereto, including the costs and expenses of this action and an award of attorneys' fees and reimbursement of expenses to Plaintiffs' counsel.

49. The claims of the lead plaintiffs are typical of the claims of the other members of the Class in that all Class Members have been damaged in a similar manner by Fiserv's actions.

50. Plaintiffs are committed to prosecuting this action and have retained competent counsel experienced in litigation of this nature. Plaintiffs are adequate representatives of the Class. A class action is superior to any other method available for the fair and efficient adjudication of this controversy because it would be impractical and undesirable for each of the individual Class Members who has suffered damages to bring separate actions. Moreover, Fiserv has acted and will continue to act on grounds generally applicable to the Class, thereby making appropriate final relief with respect to the Class as a whole.

Common Questions of Law and Fact Predominate

51. The prosecution of separate claims or defenses by or against individual members of the class would create a risk of adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests.

52. Fiserv has acted and/or refused to act on grounds generally applicable to all members of the Class and relief concerning the class as a whole is therefore appropriate. Each of Fiserv's actions challenged herein affect Plaintiffs and each Class Member in an identical fashion.

53. There are common questions of law and fact in this class action that relate to and affect the rights of each member of the Class including, *inter alia*:

- a) Whether Fiserv breached its contractual obligations to Plaintiffs and members of the class under the terms of Fiserv's custodial accounts agreements.
- b) Whether Fiserv's breach of contract entitles Plaintiffs and members of the

Class to money damages for the loss of the amounts invested by Plaintiffs and members of the Class in the Transcon Investments.

- c) Whether Fiserv owed fiduciary duties to Plaintiffs and members of the Class, including a duty of loyalty, a duty of candor, a duty of fair dealing, a duty to avoid self-dealing, an affirmative duty to furnish information and disclose all material facts involving the beneficiaries' fiduciary accounts, and a duty to administer such accounts solely in the beneficiaries' interests, rather than in Fiserv's own interests.
- d) Whether Fiserv held itself out as an expert in matters involving retirement accounts;
- e) Whether, as a fiduciary which held itself out as an expert in matters involving retirement accounts, Fiserv was required to exercise a higher degree of care in managing fiduciary accounts than would have been required of the average person.
- f) Whether the Fiserv breached fiduciary and contractual duties owed to Plaintiffs and the Class by failing to conduct its fiduciary operations in conformity with the requirements of Florida law, Federal Law and other applicable law and regulations.
- g) Whether the Fiserv breached its fiduciary duties to Plaintiffs and members of the Class by failing to disclose all material facts involving the custodial accounts maintained by Fiserv for the benefit of Plaintiffs and members of the Class.
- h) Whether Fiserv breached its fiduciary duties owed to Plaintiffs and members of the Class by failing to administer the fiduciary accounts solely in the interests of the beneficiaries thereof.
- i) Whether Fiserv aided and abetted Pearlman in his *Ponzi* scheme.
- j) Whether Fiserv's conduct in aiding and abetting Pearlman in his *Ponzi* scheme constituted a violation of Florida law.
- k) Whether Fiserv's conduct constituted self-dealing at the expense of Plaintiffs and the members of the Class.
- l) Whether the Fiserv is liable to Plaintiffs and members of the Class for the

- damages they suffered due to breach of fiduciary duties and otherwise;
- m) What remedies are appropriate compensation for the damages caused to Plaintiffs and each member of the Class.
 - n) Whether the Plaintiffs and members of the Class are entitled to a reasonable award of attorneys' fees, interest and costs of suit.
54. The relief sought is common to the entire Class including, inter alia:
- a) payment by Fiserv of compensatory damages caused by its breaches of fiduciary and contractual duties;
 - d) payment by Fiserv of the costs and expenses of this action, including the attorneys' fees of Plaintiffs' counsel.

Typicality

55. The claims of Plaintiffs, who represent the Class, are typical of the claims of all Class members thereof Plaintiffs are situated identically to all members of the Class with respect to the issues presented in this case. The claims of Plaintiffs are based on the same fundamental factual allegations and legal theories as the claims of all other members of the Class. Similarly, if Fiserv has violated Florida statutory law, such violation affects the Plaintiffs and Class Members in an identical fashion.

56. All persons maintaining retirement accounts with Fiserv which were invested in the Transcon Investments have been adversely affected by the wrongdoing of Fiserv as described herein.

57. Upon information and belief, the use of custodial accounts maintained by Fiserv in which retirement funds were used to purchase the Transcon Investments was designed by Fiserv to generate management and/or other fees and benefits for Fiserv without regard for the best interests of the holders or beneficiaries of such accounts such as Plaintiffs and the members of the Class.

Numerosity

58. Upon information and belief, Fiserv served as a custodian, and as such, a fiduciary for hundreds of custodial accounts affected by the wrongdoing described herein.

59. The members of the Class are so numerous as to make a Class Action appropriate, and are estimated to be no less than 300 in number, and quite possibly more. The exact number of such accounts is within the knowledge of Fiserv.

Class Definition

60. The proposed Class is defined as follows:

All persons maintaining accounts with Fiserv in which retirement funds were invested in the Transcon Investments. Excluded from the class are: the defendants and any judge or judicial officer who may hear any aspect of this case (and his or her law clerks) and any person, firm, trust, corporation or other entity related to or affiliated with Pearlman and/or Transcon.

Adequacy of Representation

61. Plaintiffs can and will adequately represent and protect the interests of the Class and have no interests that conflict with or are antagonistic to the interests of Class Members. Plaintiffs have retained attorneys competent and experienced in class actions. No conflict exists between Plaintiffs and Class Members. Plaintiffs and Class Members are identically situated with respect to the claims alleged herein.

62. The attorneys for Plaintiffs are experienced and capable of prosecuting complex litigation such as this case. The attorneys for Plaintiffs and the Class will actively conduct and be responsible for the prosecution of this litigation and the expenses thereof. The attorneys for Plaintiffs have adequate resources, experience and commitment to litigate this matter.

FISERV'S ROLE AND COMPLICITY IN THE PEARLMAN FRAUD

63. IRA accounts are governed by the Internal Revenue Code and accompanying Treasury Regulations. An important feature of an IRA is that legal title to the account is held by a custodial trustee rather than directly by the IRA owner. This is because the financial planning goal of an IRA is to defer the possession and use of income so that taxes are paid on the money during retirement, when the owner is in a lower tax bracket than when employed.

64. In exchange for administrative review fees, annual account fees, transaction fees and lockbox fees paid by investors, and possibly other financial consideration not yet unearthed by Plaintiffs' investigation to date, paid to either Fiserv alone and/or its employees, Fiserv undertook the responsibility of acting as a custodial trustee, holding legal title to IRA accounts on a substantial number of the bilked victims of the Pearlman Fraud.

65. Fiserv apparently operated under the incorrect assumption that if it attempted to contractually disclaim any liability for the loss of an investment's value, it could, with impunity, collect various fees and charges from investors while wilfully ignoring the clear signs of the

Pearlman Fraud. Fiserv – which holds itself out as one of the nation’s premiere custodial trustees – thereby allowed Pearlman to use it as an essential element of the fraud, to the extreme detriment of Fiserv’s customers.

66. Fiserv, in its previous iteration as First Trust Corporation d/b/a Retirement Accounts, Inc., first began to act as IRA custodian for the Transcon Investments as early as 2002 if not before. Prior to that time, one of Pearlman’s own companies served as IRA custodian. Adding legitimacy to what was in actually a colossal fraud, Pearlman enlisted RAI to serve as his “IRA custodian of choice”, thereby allowing unsuspecting retirement account owners to be further duped. Later, when Fiserv placed First Trust, RAI and two other affiliate companies under one umbrella, Fiserv Trust Company became Pearlman’s “custodian of choice.” Potential investors were informed by their individual sales representatives that, in order to invest retirement funds in the Transcon Investments, they would have to open an account with RAI/Fiserv.

67. Upon information and belief, Fiserv accepted millions of dollars from investors who sent retirement monies to Fiserv to purchase Transcon Investments, which monies Fiserv remitted to Pearlman and his co-conspirators. Yet Fiserv already knew that it had facilitated similar massive frauds in the past through defendant First Trust Corporation, initially through a financial fraud perpetrated by an IRA custodian called Qualified Pensions, Inc. ("QPI"). When QPI failed and a receiver took control of its custodial accounts, First Trust purchased many of those accounts from the receiver and became the new, substitute custodian for those accounts. At the time it became trustee for the QPI accounts, Fiserv was well-aware that QPI had been notorious for its lax oversight of the investments it purchased for its IRA customers and had thus become a magnet for unscrupulous investment sponsors selling illusory investments. According to the Motion for Approval of Final Receiver’s Report filed in that case (styled, SEC v. Qualified Pensions, Inc., United States District Court for the District of Columbia, 95-1746-LFO): "QPI had attracted business by accepting virtually any customer-directed investment. QPI’s unusual degree of tolerance for holding unconventional investments was apparently known to a number of promoters of investments. As a result, many of QPI’s customers had fallen prey to promoters of investment that ranged in quality from normal to dubious to fraudulent."

68. Following that fiasco, First Trust permitted the same atrocious behavior to occur by acting as the IRA custodian of choice for another *Ponzi* perpetrator, this time by the notorious

Daniel Heath, another con-artist from California who, together with his co-conspirators, perpetrated a fraudulent scheme that was the subject of an enforcement proceeding brought by the Securities Exchange Commission, which scheme raised more than \$187 million from over 1,800 victims, mostly senior citizens and the elderly. Heath was sentenced on September 26, 2008 to 127 years and four months in state prison and he, together with his co-conspirators, was ordered to pay a total of \$117 million in restitution to the defrauded investors. Again, First Trust was the custodian for the IRA accounts established for the purpose of permitting Heath to encourage investors to place their hard-earned retirement funds in Heath investments. The Heath investments occurred during the period 1995 to 2004, as detailed in a certain amended class action complaint filed against First Trust Corporation in the United States District Court, Central District of California in 2005 bearing case number 2:05-cv-03124-ABC-CT.

69. The QPI and Heath frauds demonstrate Fiserv's "unusual degree of tolerance for holding unconventional investments" which was furthered with the Transcon Investments. Indeed, continuing into 2005 and 2006, Fiserv was already aware of the history of the QPI fraud and its own defalcations and complicity in the Heath disaster, but failed to rectify its own internal practices and observe the warning signs with respect to the Pearlman Fraud which would have resulted in the savings of millions of dollars of losses incurred by Fiserv IRA account holders who were in no position to know that they were being victimized. Past history would naturally suggest that Fiserv would have subjected Pearlman and the Transcon Investments to heightened scrutiny in light of Fiserv's experience with QPI and Heath, had it not been for Fiserv's fixation on profits.

70. Simply put, Fiserv had ample opportunity to learned from its prior mistakes yet appears to have "looked the other way" for profit, despite the completely mystifying nature of the Transcon Investments as witnessed by Fiserv's own inability to uniformly characterize the Transcon Investments on its own customers' statements. Apparently Fiserv believed that, as long as its contracts contained exculpatory language purportedly insulating Fiserv from liability, it could act with impunity.

71. With Fiserv's assistance, the Pearlman Fraud persisted until December 2006, when the OFR filed its action in State Court Pearlman and his co-conspirators. Had Fiserv acted responsibly and within its legal obligations, none of the Class Members' funds could possibly have been invested in the Transcon Investments in light of the IRS requirements that IRA

accounts be placed in custodial accounts.

72. It is now abundantly clear to Class Members that the simple goal of the Pearlman Fraud was to take investors' money, steal it or otherwise squander it, and use new investors' money to make principal and interest payments to the existing investors lucky enough to redeem their investments and/or to take interim payments in cash. While the scheme was ongoing, however, Fiserv was in a unique position to notice all of the many "red flags" that were raised – and to stop the Pearlman Fraud. Instead, as set forth herein, Fiserv viewed Pearlman as its valued customer and their real customers as mere nuisances.

73. In light of these and other numerous irregularities and breaches of the terms and conditions of the various investments, Fiserv had knowledge of the Pearlman Fraud and ample basis to put it to an end. Indeed, faced with numerous detailed customer complaints, Fiserv had an obligation to stop the Pearlman Fraud before other senior citizens were victimized. However, Fiserv did exactly the opposite; Fiserv actively assisted Pearlman's fraudulent scheme. Fiserv failed to conduct even the most basic administrative review before purchasing the Transcon Investments with customer funds, failed to enforce the rights of its customers, and failed to respond to customer complaints.

74. Examples of Fiserv's complicity with or knowledge or reason to suspect the Pearlman Fraud include:

- Failure to conduct a sufficient administrative review of the Transcon Investments to ascertain problems inherent on their face;
- Continuing to report Transcon Investments at values provided by Pearlman when the investments were completely valueless;
- Failing to require Pearlman to provide documentation as to the nature of the Transcon Investments so that Fiserv could verify the nature of the investments themselves;
- Treating Pearlman as its customer – rather than the investors for whom Fiserv served as trustee handling hard-earned monies saved in IRAs, and who paid Fiserv's various fees;
- Rather than serving the interests of its elderly clientele, as demonstrated above, Fiserv was more concerned with perpetuating the Pearlman Fraud;
- Customers who contacted Fiserv requesting documentation regarding their

investments went unanswered.

- Customer requests for distributions from their Transcon Investments resulted in significant delays without explanation by Fiserv.
- Representatives of Fiserv, designated as “Team H” and identified as the appropriate personnel assigned to address customer requests concerning the Transcon Investments, voiced frustration about continuing difficulties with Pearlman and Transcon regarding customer requests for distributions and the proper crediting and calculation of “interest” which the customers understood they had earned on their investments
- Problems with normal systematic distributions expected by Fiserv customers occurred with such regularity that Fiserv customers became familiar with the names of the Fiserv employees with whom they regularly communicated, including Barb Star, Melanie Cash, Maggie Martinez and Deb Yarborough.
- Fiserv account statements listing the Transcon Investments alternatively, *within the same account*, as mutual funds, assets, shares, non standard assets and brokerage accounts.

75. From the very outset of Fiserv’s initial dealings with Pearlman, and continuing throughout the relationship, Fiserv regularly failed to require Pearlman to provide appropriate documentation of the various Transcon Investments or even to inquire as to whether there were any offering documents which would be required in the event the Transcon Investments were claimed to be exempt from registration. In fact, Fiserv substantially assisted Pearlman, and repeatedly breached the duties it owed to its own customers, by failing to review any Transcon Investment materials, by failing to administer and enforce the terms of the Transcon Investments and by failing to follow its own internal procedures regarding the determination as to whether the Transcon Investments were eligible to be placed in IRA custodial accounts.

76. Fiserv required its customers (or their Financial Representatives) to sign a number of documents, each of which set forth Fiserv’s policy that it would review offering materials for unregistered or private investments such as those offered by Pearlman. While there were slight variations in the language from document to document and over the years, Fiserv maintained a policy to have the offering materials, private placement memorandum or prospectus for each investment on file and to review this documentation to determine its "administrative feasibility."

77. For example, forms used by RAI, as early as January 2002 and possibly before that time, stated: "Private offerings must meet certain administrative requirements before they can be held in an RAI retirement plan. Any such requirement or information must be provided by the investment sponsor (presumably Pearlman). RAI does not conduct due diligence and does not review or retain investment related information. Any required subscription or enrollment documents must be provided by the Account Owner along with an "Investment Authorization" form signed by the Account Owner or the Account Owner's designated agent."

78. The same form stated that "Debt instruments require an independent third party servicing agent (not RAI)."

79. The same form stated that "The following investments *may not be permitted within RAI's IRA plans . . . Private debt instrument without a Trust Indenture or Serving Agreement.*" (Emphasis supplied)

80. IRA forms used by RAI during this period described RAI's "Operationally Compatible Investment Policy as follows: " Basic guidelines for this policy are set by the IRS; other investment restrictions are set by RAI for administrative purposes. We reserve the right not to honor an Account Owner's investment authorization if adequate information has not been provided or is RAI cannot meet special administrative requirements of the investment." (Emphasis in original)

81. Fiserv represented to its customers that it would comply with IRS regulations, and that further restrictions on the acceptance of certain investments could be imposed as a part of Fiserv's own additional policies.

82. With respect to the various investments involved in the Pearlman Fraud, Fiserv breached its contractual obligation to determine if the Transcon Investments complied with its own internal administrative requirements and IRS regulations. Upon information and belief, Fiserv either failed to determine the nature of the Transcon Investments, or, alternatively, knew that the Transcon Investments were fraudulent and illusory and failed, for reasons only known to Fiserv, to alert its customers and the authorities.

83. By investing its customers' IRA funds in Transcon Investments without conducting a review of the investments offering materials and without otherwise conducting an investigation of the investment as the duty is described in the Subscription Agreement – which Fiserv signed on behalf of its customers – Fiserv breached the contractual and fiduciary duties it

owed to its customers and substantially assisted the Pearlman Fraud.

84. As the trustee of Class Members' IRAs, purchasing investments on behalf of its customers, Fiserv was the legal owner of the Transcon Investments and was contractually and legally obligated to take custody of the promissory notes, bonds, or other form of physical documentation representing the Transcon Investments. The IRA Plan and Trust Agreements and the Roth IRA Plan and Trust Agreements used during Fiserv's course of dealing with Pearlman stated that among its other powers or duties, Fiserv "shall have the power or duty: To hold any securities or other property in the Trust in the name of the Trustee or its nominee, or in another form as it may deem best, with or without disclosing the trustee relationship."

85. Fiserv's crucial failure to investigate the existence of any offering materials and any other documentation representing the Transcon Investments prevented Fiserv from ascertaining the nature or structure of the Transcon Investments and precluded any possibility of Fiserv fulfilling its duties as trustee to enforce the terms of the investments on behalf of its customers.

86. Fiserv's contracts indicate that as the custodian or trustee of the class members' IRAs, Fiserv is subject to the mandates of Internal Revenue Code § 408 and the corresponding Treasury Regulations. Those rules required Fiserv to "act within accepted rules of fiduciary conduct" and "assure the uninterrupted performance of its fiduciary duties."

87. Fiserv violated 26 C.F.R. § 1.408-2(b)(5) by commingling assets. Because there was never securities in Plaintiffs' accounts, all of the accounts only had cash which was taken out and given to someone else withdrawing money.

88. Fiserv violated 26 C.F.R. §§ 1.408-2(b)(4) and 2(b)(6) by unlawfully forfeiting the interest Plaintiffs earned while the funds were cash in the accounts. Because the Plaintiffs now have no money in their accounts, interest, which they are entitled to, has not distributed to them properly.

89. Fiserv violated 26 C.F.R. § 1.408-5(e)(i)(A)(1) by not fulfilling its responsibilities as owner in the investment and disposition of the property held in a fiduciary capacity.

90. Fiserv violated 26 C.F.R. § 1.408-5(e)(i)(A)(2) by failing to keep a proper and accurate written record of the assets held in each account.

91. Fiserv breached its fiduciary duties and contractual obligations by failing to adhere to its mandated duties as an IRA custodian/trustee.

92. Fiserv substantially assisted the Pearlman Fraud by allowing Pearlman to characterize the investments in whatever manner was most convenient or beneficial for Pearlman, rather than taking custody of the offering materials, promissory notes, or other investment documents to ensure that the Transcon Investments were structured and serviced properly. Fiserv's assistance to Pearlman in this regard extended the life of the *Ponzi* scheme causing detriment to all Class Members.

93. As trustee, purchasing the Transcon Investments for the benefit of its customers, Fiserv had the duty to observe the terms of the Transcon Investments. Pearlman's repeated breaches of the terms of the Transcon Investments, in the form of delayed interest payments and failure to pay distributions as requested and required by the terms of the Transcon Investments further suggest Fiserv's knowledge of Pearlman Fraud. Fiserv also substantially assisted the Pearlman Fraud by concealing Pearlman's breaches of the terms of the Transcon Investments, however, when Fiserv:

- allowed Pearlman to make late interest payments;
- failed to enforce default provisions by failing to call the Transcon Investments when interest was not paid when due or within the time period to cure;
- failed to seek instructions or approval from the beneficial owners – the Pearlman Fraud investors – to waive the terms any Pearlman default
- Fiserv essentially treated Pearlman as its customer, by failing to call investors' attention to Pearlman's inability to make required payments, which extended the length of, and substantially assisted the Pearlman Fraud to the severe detriment of all Class Members.
- Fiserv also failed to observe maturity dates on many investments, thereby extending the life of and substantially assisting the Pearlman Fraud.
- Fiserv also substantially assisted the Pearlman Fraud by continuing to report the values of the investments at par – or whatever value Pearlman provided – at times when the Transcon Investments were in default because Pearlman was failing to make interest payments. Again, Fiserv had knowledge of and substantially assisted the Pearlman Fraud by preventing Pearlman Fraud investors from learning of the fraud, thus extending the life of the Pearlman Fraud, and causing harm to all Class Members.

- Fiserv knew that Pearlman was mismanaging investors' money because Fiserv received repeated detailed complaints in the form of phone calls and letters from its customers regarding their Transcon Investments. Fiserv, however, was utterly unresponsive in the face of persistent attempts by its own customers who were invested in the Pearlman Fraud even to obtain information regarding their investments.
- Fiserv also ignored and/or cynically dismissed the alarming concerns repeatedly raised by those customers invested in the Pearlman Fraud, including concerns over Pearlman's defensive aversion to providing any information regarding the investments and the recurring inability of Pearlman Fraud investors to recover their principal upon demand. Plaintiffs believe that Fiserv's refusal to cooperate with or respond to its customers' repeated requests and concerns regarding their Transcon Investments substantially assisted the Pearlman Fraud by masking deeply-rooted problems with the investments and delaying the revelation of the fraud to the great number of investors, thus causing severe detriment to all Class Members.
- Fiserv was put on notice of Pearlman's dubious activities at least as early as 2002. Customers began to inform Fiserv of Pearlman's failure to pay principal upon demand, yet Fiserv continued to invest its customers' IRAs in the Pearlman Fraud without pause to inquire into the legitimacy of the Transcon Investments. Fiserv also substantially assisted the Pearlman Fraud by continuing to issue account statements with valuations as reported by Pearlman – thus providing investors with a false sense of assurance in the performance of their investments – even with the knowledge that the investments were not only illiquid private investments, but as alleged more fully herein, Fiserv knew or had more than ample reason to believe that the Transcon Investments were essentially valueless.
- Fiserv also received – and dismissed – numerous phone complaints from other Pearlman Fraud investors with concerns about their Transcon Investments and errors in account statements. Fiserv often directed its customers that they had to contact Pearlman directly regarding such information. However, when customers complained to Pearlman about errors in Fiserv's account statements, they were

directed to telephone Fiserv.

- Fiserv had knowledge of Pearlman's fraudulent activities due to the number and significance of customer complaints regarding their Transcon Investments, and Pearlman's failure or refusal to pay principal on demand. Fiserv breached its duties to its customers and substantially assisted the Pearlman Fraud by ignoring substantial customer complaints, and by continuing to purchase and value the Transcon Investments at par when Fiserv knew that the investments were not only illiquid, but essentially valueless as Pearlman refused to pay back investors' principal.
- Fiserv knowledge of the problems associated with Pearlman and the Transcon Investments is exemplified by customers' attempts to liquidate, completely or partially their investments or obtain current dividends/interest:
- Fiserv's unwillingness to provide investors with information regarding their Transcon Investments can only be explained in terms of Fiserv breaching its fiduciary and contractual duties to its customers and its role in assisting the Pearlman Fraud. As the nation's "largest trustee of self-directed individual and business plans" and "a wholly-owned subsidiary of Fiserv, Inc., one of the largest suppliers of information technology services to banks worldwide," Fiserv boasts of having a sophisticated system for filing and tracking of information and documentation as basic as the notes, subscription agreements, and offering materials such as PPMs or prospectuses for the Transcon Investments that Fiserv purchased on behalf of its customers. Either Fiserv did not have the documents they were required to keep as custodian and trustee of these IRAs because they never required Pearlman to provide such documents, or Fiserv lied to its customers about not having the requested documentation because Fiserv simply did not want to produce the documents, as doing so would have risked the revelation and unraveling of the Pearlman Fraud. Regardless of Fiserv's reason for not providing its customers with information regarding their Transcon Investments, the failure to provide such information substantially assisted the Pearlman Fraud by concealing the innate problems with the investments and delaying the revelation of the fraud.

94. The IRS requires that IRA owners withdraw at least a minimum amount, known as a Required Minimum Distribution ("RMD"), from their retirement accounts annually, starting the year an investor turns age 70½. Thus, the RMD requirement demands that retirement assets have a certain degree of liquidity. While RMDs may vary based on the ages of the investor and beneficiary, as well as the rate of return earned on the investment, RMD amounts on most retirement accounts are usually less than 1/20 of the principal in the retirement account. Fiserv knew that the Transcon Investments were completely illiquid and that Pearlman was breaching his duties to investors and mismanaging their investments because the Pearlman Fraud investment accounts frequently failed to maintain enough cash to pay even the investors' relatively small RMDs when such distributions came due. Additionally, while the RMDs were not objectively large, because investors' account values were inflated, so were the RMD amounts – subjecting customers to greater penalties upon a failure to take the distribution.

95. By allowing Pearlman to continually fail to make timely interest payments on the Transcon Investments, such that Pearlman Fraud investors were repeatedly unable to satisfy RMDs, Fiserv breached its fiduciary and contractual duties to its customers and subjected its customers to severe IRS penalties – 50% of the amount that tax records indicate should have been distributed but was not distributed – and aided and abetted the Pearlman Fraud:

- By continuing to issue account statements with par values as reported by Pearlman – at times when Fiserv knew that the investments were essentially valueless because of the repeated problems with illiquidity, Pearlman's repeated failure to pay principal on demand, and the insufficiency of the accounts to make customers' RMDs – Fiserv delayed revelation of the Pearlman Fraud and breached its fiduciary and contractual duties to its customers by subjecting them to even more severe IRS penalties. If Fiserv had adjusted the values it reported for the Transcon Investments as it became aware that the values were, indeed, less than that reported by Pearlman, the RMDs for Pearlman Fraud investors would have been lower, lessening the likelihood of the customers' violation of RMD rules.
- By continuing to invest 100% of many of its customers' IRAs into the Pearlman Fraud at a time when Fiserv knew the investments were illiquid and essentially

valueless, Fiserv breached its duties as trustee of these accounts and substantially assisted the Pearlman Fraud by ensuring the continued influx of money necessary to sustain the *Ponzi* scheme.

- Indeed, whereas one of Fiserv's primary responsibilities to IRA account holders was with respect to compliance with the IRC and IRS rules, the repeated number of times Fiserv was forced to issue notices that its Pearlman Fraud customers had insufficient liquid funds to take RMDs must have raised a "red flag" that there were problems with the Pearlman investments.
- Despite years of repeated customer complaints and the consistent inability of Pearlman Fraud investment accounts to be able to make investors' RMDs, Fiserv admittedly did absolutely nothing in response to the serious concerns and problems plaguing the Transcon Investments.
- Fiserv aided and abetted the Pearlman Fraud by failing to make a full and fair disclosure of the information that it in fact knew regarding the Transcon Investments – including that Fiserv knew that Pearlman was selling securities in violation of Florida law, that Fiserv knew that the values of the investments were significantly less than Fiserv reported on account statements, that Fiserv knew that the Transcon Investments were unregistered securities being sold by unlicensed salesmen and that Fiserv knew that the liquidity problems with the Transcon Investments had persisted for years.
- Fiserv's February 22, 2007 letter to Pearlman Fraud investors reported that Fiserv had learned of the OFR complaint and the appointment by the Court of a Receiver of the Transcon assets. The letter further stated that "Due to the situation, we are unable to determine if the last reported value for your investment is accurate," suggesting that, in the past, Fiserv believed that its prior reports of valuations *were* accurate.
- Fiserv also explained to the investors that "For clients needing to take a Required Minimum Distribution from their IRA based on their 2008 year-end account values, we will work to ensure that the updated account value is provided to the IRS on Form 5498."
- Fiserv set up a toll-free telephone number for Pearlman Fraud investors to speak

to a Client Relations Department, Team A.

- Fiserv failed to properly report the interest or dividends on the quarterly statement when payments were due indicating that Fiserv apparently did not receive any interest payments or dividend reinvestment documentation from Pearlman during those periods. Fiserv's failure to alert its customers to Pearlman's defaults, and then to correctly reflect on a future quarter's statement that the amounts already had been reinvested, is not only a breach of both Fiserv's fiduciary and contractual duties to its customers, it substantially assisted and perpetuated the Pearlman Fraud by covering for Pearlman's breaches and late payments.
- Fiserv substantially assisted the Pearlman Fraud by failing to require timely interest payments and/or dividend reinvestments, allowing such dividend reinvestments to be done without requiring additional investment paperwork, failing to notify its customers of Pearlman's breaches of duty, and then further covering for Pearlman's breaches by reporting the transactions on its customers' account statements improperly. Thus, Fiserv not only failed to require Pearlman to comply with the terms of the Transcon Investments, but also disguised Pearlman's breaches of duty to the investors, helping to extend the life of the Pearlman Fraud to the severe detriment of all Class Members.
- During the time that Fiserv acted as the exclusive custodial trustee for the Transcon Investments, there were abundant signs that Fiserv was aware of the Pearlman Fraud. Fiserv knew that the Transcon Investments were worth substantially less than their reported value (or even valueless) much earlier than December 2006 when OFR filed its action in Florida State Court.
- In addition to the numerous Fiserv customers who contacted Fiserv regarding difficulties with the Pearlman Fraud beyond mere record-keeping, including the refusal of Pearlman to provide investment documents, the refusal of Pearlman to allow the redemption of investments for cash, and the fact that customers' accounts who were invested in the Pearlman Fraud often contained insufficient funds to allow the investor to take the RMD required by the IRS, numerous other red flags existed. These signs included that: the "Designated Representatives" selected by Fiserv's customers were not NASD- licensed financial representatives

or affiliated with registered broker-dealers and the Transcon Investments were not registered offerings; that there were no investment documents such as private placement offering memoranda which would be required for any Regulation D exempt private placement, and that the investment advisors and the investment issuer created a conflict which disqualified the Transcon Investments from favorable tax treatment under IRS Code §4975, regarding prohibited transactions through related parties.

- Although the fact should have been easily detected had Fiserv done an appropriate administrative review of the Transcon Investments, Fiserv failed to discern whether Pearlman, or any of the Pearlman co-conspirators involved with selling the Transcon Investments, including the “Designated Representatives” selected by the Class Members, was a registered broker-dealer or affiliated with a registered broker-dealer as required by state and federal securities laws.
- Fiserv also failed to inquire into whether Pearlman or any of the Pearlman co-conspirators involved with selling the Transcon Investments, including the “Designated Representatives” selected by the Class Members, was a NASD-licensed financial representative or investment sponsor. Furthermore, Fiserv should have made the inquiry as soon as it became clear that Pearlman was, in fact, acting as a broker-dealer conducting a public securities offering to investors other than family and friends – and that the Transcon Investments could not possibly fall within the narrow private issuer exemption.
- Had Fiserv, as the custodial trustee executing these transactions for the benefit of the individual investors, inquired into Pearlman’s status as a unregistered broker-dealer, as required by Fiserv’s role as a fiduciary and by industry practice, Fiserv would have discovered that Pearlman was not registered and that the Transcon Investments were not eligible for a private placement exemption under federal or state law.
- As trustee of its customers’ IRAs, Fiserv had a duty to refrain from participating in any prohibited transactions under Internal Revenue Code Section 4975. The IRA Plan and Trust Agreement required that “[N]either the Trustee nor any other party may engage, either directly or indirectly, in a prohibited transaction with

respect to the Participant's IRA, as defined in IRS Code § 4975."

· For example, while interest payments generally should be made on the same day of the week each month, the timing of interest payments and/or dividend reinvestments paid to investors in the same Pearlman Fraud investment were inconsistent and sometimes never even made at all for periods of months; while the interest rate received by owners of the same investment generally should be the same, the interest rate provided by most of the Transcon Investments varied widely – such that the amount of interest paid to investors within the same investment was often inconsistent. Also during many quarters, investors received payments in random amounts not calculated according to a given interest rate, or did not receive any interest payments or dividend reinvestment at all; the Pearlman Fraud investors often received a "dividend reinvestment" rather than cash interest payments – a classic sign of a *Ponzi* scheme is to avoid paying out any cash – and the form of payment, whether dividend reinvestment or cash interest changed frequently and often differed among investors who owned the same Pearlman investment at the same time; while the maturity date of all investments purchased by investors in the same offering should usually be the same, the Pearlman Fraud had many different maturity dates for different owners who owned the same investment; while industry convention is to pay interest on debt instruments every six or twelve months, the Transcon Investments provided for monthly interest payments at relatively high rates of return;

· Fiserv's own contracts indicate that, as the custodian or trustee of plaintiffs' Individual Retirement Accounts (IRAs), Fiserv is subject to the mandates of Internal Revenue Code § 408, and the corresponding Treasury Regulations. Those regulations require Fiserv to "act within accepted rules of fiduciary conduct" and "assure the uninterrupted performance of its fiduciary duties."

· When selling the Transcon Investments to investors with retirement accounts, Pearlman's co-conspirators used contract forms provided to them by Fiserv. Furthermore, the overwhelming majority of victims who used IRA money to invest in the Pearlman Fraud used Fiserv as their custodial trustee. Fiserv was aware of this virtually exclusive relationship, and Fiserv employees, maintained

close relations with Pearlman and some of the other Pearlman co-conspirators in order to maintain that relationship, and often treated Pearlman as its customer rather than the elderly investors for whom Fiserv served as the IRA trustee. Fiserv helped to further the Pearlman Fraud by lending credibility to Pearlman's scheme. While touting its "independence" to investors, Fiserv used its services to enable Pearlman's *Ponzi* scheme, and at the same time collecting large amounts of fees.

- Fiserv is subject to the regulations promulgated by the FDIC, which requires institutions that manage accounts in trust to maintain record keeping systems that "provide a detailed picture of all funds and other assets under the control of the fiduciary from the account's inception to its closing. Procedures must be developed to process work in a uniform and orderly manner and a practical system of checks and balances must be developed to ensure the integrity of the work performed."
- As a custodial trustee of self-directed retirement accounts, Fiserv is also governed by the FDIC's Interagency Statement on Retail Sales of Nondeposit Investment Products, which, among other duties, requires institutions such as Fiserv to: conduct an appropriate review of any third party with whom the institution engages in a transaction when that third party is involved in recommending certain non-deposit investment products – such as the Transcon Investments at the heart of this case; disclose the existence of any material relationship between the institution and an investment company whose shares are sold by the institution; to train personnel who are involved in the selling of non-deposit investment products to "impart a thorough knowledge of the products involved, of applicable legal restrictions, and of customer protection requirements..."; to have in place compliance policies and procedures to "ensure that non-deposit investment product sales activities are in compliance with applicable laws and regulations... Compliance procedures should identify any potential conflicts of interest... [and] should also provide for a system to monitor customer complaints and their resolution."

COUNT I

BREACH OF FIDUCIARY DUTY

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

97. Fiserv's contracts indicate that as the custodian or trustee of the Class Members' IRA's, Fiserv is subject to the mandates of Internal Revenue Code § 408, and the corresponding Treasury Regulations. Those rules require Fiserv to "act within accepted rules of fiduciary conduct" and "assure the uninterrupted performance of its fiduciary duties."

98. As Trustee of Plaintiffs' IRA custodial accounts, Fiserv owed Plaintiffs and the Class Members a fiduciary duty.

99. Also as described above, Fiserv substantially assisted the Pearlman Fraud and thus breached its fiduciary duties owed to the Plaintiffs and the Class Members.

100. Plaintiffs have suffered substantial financial injury as a result of Fiserv's conduct, as alleged herein.

101. Fiserv engaged in the above-described acts while Fiserv had a fiduciary relationship with Class Members. Whereas Fiserv was a custodian and/or trustee of Class Members' accounts, Fiserv owed a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal with them fairly and impartially. Fiserv's conduct constitutes a breach of Fiserv's fiduciary duties. The result of these breaches was, inter alia, to convince the Class Members that their money was safe, that the periodic statements of value issued by Fiserv accurately reflected the actual values of their accounts, and the Transcon Investments were legitimate. Such reliance was reasonable and resulted in massive damage to the Class Members

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for damages, interest, prejudgment interest, attorneys' fees and costs, and for such other and further relief that this Court deems appropriate.

COUNT II

AIDING AND ABETTING BREACH OF FIDUCIARY DUTY

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

103. Pearlman and his co-conspirators, having rendered investment advice to the Class Members, were themselves fiduciaries owing a fiduciary duty of care to the Class Members.

104. Fiserv had knowledge of the Pearlman Fraud, or at least some of the elements of the Pearlman Fraud and rendered substantial assistance to Pearlman and his co-conspirators in their fraudulent conduct.

105. As a result of Fiserv's aiding and abetting the Pearlman Fraud and Pearlman's breaches of fiduciary duties, the Pearlman Fraud was allowed to grow and flourish, causing all Plaintiffs to suffer damages, with interest thereon, in an amount to be determined at trial.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for damages, interest, prejudgment interest, attorneys' fees and costs, and for such other and further relief that this Court deems appropriate.

COUNT III

AIDING AND ABETTING COMMON LAW FRAUD

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

107. Fiserv had knowledge of the Pearlman Fraud, or at least some of the elements of the Pearlman Fraud and rendered substantial assistance to Pearlman and his co-conspirators in their fraudulent conduct.

108. As a result of Fiserv's aiding and abetting Pearlman and his co-conspirators, the Pearlman Fraud was allowed to flourish, and all Class Members suffered damages, with interest thereon, in an amount to be determined at trial.

109. Plaintiffs have suffered substantial financial injury as a result of Fiserv's conduct, as alleged herein.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for damages, interest, prejudgment interest, attorneys' fees and costs, and for such other and further relief that this Court deems appropriate.

COUNT IV

NEGLIGENCE

110. Plaintiffs incorporate by reference the preceding paragraphs, as if fully set forth herein.

111. Fiserv had during the relevant period a duty to use due care and protect plaintiffs from injury, which included, among other things, a duty to verify, ensure, and adequately investigate the truthfulness and accuracy of the statements they made, as well as to refrain from

disseminating false and misleading statements.

112. Fiserv violated FDIC regulations by failing to maintain record keeping systems that "provide a detailed picture of all funds and other assets under the control of the fiduciary from the account's inception to its closing" and by failing to establish procedures "to process work in a uniform and orderly manner and a practical system of checks and balances must be developed to ensure the integrity of the work performed."

113. Fiserv further violated FDIC-imposed obligations by failing to conduct an appropriate review of Pearlman, as the third party; by failing to disclose the existence, if any, of a relationship between Pearlman and Fiserv, by failing to train personnel who are involved in transactions concerning Pearlman investment products to "impart a thorough knowledge of the products involved, of applicable legal restrictions, and of customer protection requirements..."; by failing to have in place compliance policies and procedures to "ensure that non-deposit investment product sales activities are in compliance with applicable laws and regulations;" and by failing to establish compliance procedures to identify "potential conflicts of interest... [and] to monitor customer complaints and their resolution."

114. Fiserv breached the duty of care owed to its customers, the Class Members, as described above.

115. Fiserv's breaches of duty were the proximate cause plaintiffs' injuries, in that each of Fiserv's breaches were a substantial factor in bringing about the injuries suffered by the Class members. As a result of Fiserv's negligent conduct, the Class Members were damaged. The Class Members reasonably and foreseeably relied on what turned out to be false information concerning the investments they made in the Pearlman Fraud and have been damaged as a result, and are entitled to recover all actionable damages, including general, consequential, incidental and special damages, lost profits, lost opportunities and other damages.

116. Fiserv's actions were malicious, fraudulent, oppressive, and intended to injure the Class Members, rendering Fiserv liable for punitive damages.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for damages, interest, prejudgment interest, attorneys' fees and costs, and for such other and further relief that this Court deems appropriate.

COUNT V
BREACH OF CONTRACT

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

118. As set forth above, Fiserv, as custodial trustee, obligated itself to certain contractual duties, inter alia: to timely and accurately report customers' holdings and the accurate value thereof to both customers and the IRS; to ensure that only qualified investments meeting IRS and IRC standards be placed into Class Members' Fiserv IRA accounts; to enforce the rights and remedies available to holders of Transcon Investments; and not to commingle funds from multiple accounts held by customers.

119. Fiserv breached one or more of these duties in its dealings with respect to Transcon Investments. Class Members have suffered substantial financial injury as a direct, foreseeable and proximate result of Fiserv's contractual breaches, as alleged herein. In addition to the general damages flowing directly from these breaches, the Class Members are entitled to recover consequential, incidental and special damages, lost profits, lost opportunities and other economic damages.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for damages, interest, prejudgment interest, attorneys' fees and costs, and for such other and further relief that this Court deems appropriate.

COUNT VI
VIOLATION OF THE FLORIDA SECURITIES
AND INVESTOR PROTECTION ACT

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

121. The Transcon Investments involved a commitment of money.

122. The Transcon Investments involved a common enterprise.

123. The Transcon Investments involved an expectation of profit solely through the efforts of another.

124. The Transcon Investments constituted investment contracts.

125. The Transcon Investments involved the offer, sale or purchase of a security.

126. The Transcon Investments were sold to the Class Members in violation of F.S. §§ 517.12(1); 517.301(1)(a) 1 and 517.07(1).

127. In connection with the establishment of the IRA custodial account between Fiserv and the Class Members, Fiserv acted as agent for Pearlman within the meaning of F.S. §§ 527.211(1) and (2) which provides the following remedy in the event of a violation of the anti-fraud or registration requirements of the Florida Securities and Investor Protection Act:

Each person making the sale and every director, officer, partner, or agent of or for the seller, if the director, officer, partner, or agent has personally participated or aided in making the sale, is jointly and severally liable to the purchaser in an action for rescission, if the purchaser still owns the security, or for damages, if the purchaser has sold the security.

128. Fiserv acted as agent for Pearlman and his co-conspirators by providing access to IRA custodial services to victims of the Pearlman Fraud, upon information and belief, by receiving financial compensation or consideration for agreeing to act as the “IRA custodian of choice” for victims of the Pearlman Fraud, by treating Pearlman and his co-conspirators as its customers, as opposed to the account holders victimized by the Pearlman Fraud, by allowing the Pearlman Fraud to be perpetuated despite numerous and all-too-obvious red flags that had all the earmarks of a classic *Ponzi* scheme.

129. To victims of the Pearlman Fraud who established Fiserv IRA custodial accounts, Fiserv was an agent of Pearlman and his co-conspirators since they were told that, if they wanted to invest their retirement funds in the Transcon Investments, they had no choice but to open Fiserv accounts, representations on which they relied in their decisions to open Fiserv accounts and invest in the Transcon Investments.

130. By reason of the foregoing, Fiserv violated F.S. §§ 517.12(1); 517.301(1)(a) 1 and 517.07(1), and each Class Member is entitled to damages and/or rescission from Fiserv.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for rescission, damages, interest, prejudgment interest, attorneys’ fees and costs, and for such other and further relief that this Court deems appropriate.

COUNT VII

AIDING AND ABETTING VIOLATION OF THE FLORIDA SECURITIES AND INVESTOR PROTECTION ACT

131. Plaintiffs incorporate by reference all prior paragraphs of this Complaint as

though fully set forth herein.

132. Fiserv aided and abetted Pearlman and his co-conspirators, acting in concert with various sales agents at their control, and in connection with the offer and sale of an investment or security as represented by the Transcon Investments by providing substantial assistance to Pearlman and his co-conspirators who employed various devices, schemes, or artifices to defraud Class Members in connection with their purchase of the Transcon Investments through custodial accounts maintained with Fiserv.

133. Fiserv aided and abetted Pearlman and his co-conspirators, acting in concert with various sales agents at their control, in connection with the offer and sale of an investment or security as represented by the Transcon Investments by providing substantial assistance to Pearlman and his co-conspirators who directly or indirectly obtained money or property, often monies directed through Class Members' Fiserv custodial accounts, by means of an untrue statement of a material fact or by an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

134. Fiserv aided and abetted Pearlman and his co-conspirators, acting in concert with various sales agents at their control, in connection with the offer and sale of the Transcon Investments by providing substantial assistance to Pearlman and his co-conspirators who obtained money or property through the offer and sale of unregistered securities within the state of Florida.

135. Fiserv aided and abetted Pearlman and his co-conspirators, acting in concert with various sales agents at their control, in connection with the offer and sale of the Transcon Investments by providing substantial assistance to Pearlman and his co-conspirators who obtained money or property through the offer and sale of unregistered securities within the state of Florida although none of the parties were registered as securities salesmen with the State of Florida.

136. Pursuant to F.S. § 517.211(2), remedies available in cases of unlawful sale, Class Members are entitled to damages and/or rescission from Fiserv.

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment for rescission, damages, interest, prejudgment interest, attorneys' fees and costs, and for such other and further relief that this Court deems appropriate.

Dated: April 16, 2009

Respectfully Submitted:

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