

ORIGINAL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

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TERRI MORSE BACHOW, Individually on  
Behalf of Herself and All Others Similarly  
Situating,

Plaintiff

v.

SWANK ENERGY INCOME ADVISERS, LP,  
SWANK CAPITAL, LLC, JERRY V. SWANK,  
MARK W. FORDYCE, CPA, BRIAN R. BRUCE,  
RONALD P. TROUT, and EDWARD N.  
McMILLAN,

Defendants.

C.A. No.

**3-09CV0262-K**

CLASS ACTION COMPLAINT

<p>U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS <b>FILED</b> FEB 10 2009 CLERK, U.S. DISTRICT COURT By <u>JK</u> Deputy</p>	163421
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Plaintiff, Terri Morse Bachow, individually and on behalf of all others similarly situated, by and through her undersigned attorneys, alleges upon personal knowledge as to herself and her own acts, and upon information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through Plaintiff's attorneys, which included, among other things, a review of the public documents and announcements made by defendants, Securities and Exchange Commission ("SEC") filings, and press releases regarding defendant Swank Energy Income Advisers, LP ("Swank Advisers") and the Cushing MLP Total Return Fund (the "Fund"), as follows:

**NATURE OF THE ACTION**

1. This is a class action for violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), on behalf of investors in the Fund between September 1, 2008, and December 19, 2008, inclusive (the "Class Period").

2. This is also a derivative action for breach of fiduciary duty under Sections 36(b) and 36(a) of the Investment Company Act of 1940 (the "ICA"), 15 U.S.C. § 80a-35(b), on behalf of the Fund for harm inflicted upon it by its fiduciaries.

3. Throughout the Class Period, Defendants grossly and falsely overstated Fund's net asset value ("NAV") by including the full value of a \$49.1 million deferred tax asset in the Fund's stated NAV, without establishing an appropriate valuation reserve against the risk that the Fund could or would never utilize or recognize the deferred tax asset.

4. Throughout the Class Period, Defendants also concealed the fact that the deferred tax asset was the Fund's largest asset and accounted for more than one-half of the Fund's stated NAV.

5. On December 19, 2008, Defendants caused the Fund to announce that it had established a \$49.1 million valuation reserve against the deferred tax asset, essentially reducing the value of the deferred tax asset to zero and reducing the Fund's stated NAV by \$49.1 million.

6. When Defendants caused the Fund to write down the deferred tax asset to zero on December 19, 2008, and reduced the Fund's stated NAV accordingly, the market price at which the Fund's shares traded plummeted by nearly 50 percent, dropping from \$7.40 immediately before the announcement to just \$3.81 after it, causing Fund shareholders to lose tens of millions of dollars.

#### **JURISDICTION AND VENUE**

7. The federal securities claims alleged herein arise under Sections 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. Section 78(i)(b), 78(t) and 78t-1(a) and pendent common law claims. The breach of fiduciary duty claims alleged herein arise under Section 36(b) of the ICA, 15 U.S.C. § 80a-35(b).

8. Jurisdiction over the subject-matter of this action is conferred upon this Court by Section 27 of the Exchange Act, 15 U.S.C. § 78aa, Section 44 of the ICA, 15 U.S.C. § 80a-43, and 28 U.S.C. § 1331. The Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(a), over the state law claims asserted herein because they arise out of and are part of the same case or controversy as Plaintiff's federal claims.

9. In connection with the acts and practices alleged herein, Defendants directly or indirectly used the instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications, and the facilities of the national securities markets and national securities exchanges.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Swank and the Fund maintain their principal offices and transact business in this district and because some or all of the wrongdoing alleged herein occurred in this district.

### **PARTIES**

11. Plaintiff is a resident of the State of Florida and purchased shares of the Fund during the Class Period as set forth in the Certificate attached hereto. Plaintiff purchased Fund shares on the New York Stock Exchange.

12. The Fund is registered under the ICA as a non-diversified, closed-end mutual fund with its principal place of business is located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Shares of the Fund are and were, throughout the Class Period, traded in an orderly and efficient market on the New York Stock Exchange under the ticker symbol SRV. The Fund is not a defendant herein, and no claims are asserted against the Fund.

13. The Fund was formed as a Delaware statutory trust on May 24, 2007, pursuant to a Declaration of Trust dated as of May 23, 2007, and its shares were first sold to the public on or

about August 27, 2007. On that day, the Fund issued and sold approximately 1,740,000 shares at an initial offering price of \$20.00 per share.

14. Defendant Swank Advisers is limited partnership organized and existing under the laws of the State of Texas. Swank Advisers' principal place of business is located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Pursuant to an investment management agreement with the Fund, defendant Swank Advisers is, and was throughout the Class Period, the investment adviser to the Fund.

15. Defendant Swank Capital, LLC ("Swank Capital"), is a limited liability company organized and existing under the laws of the State of Texas. Swank Capital's principal place of business is 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Defendant Swank Capital is, and throughout the Class Period was, the general partner of Swank Advisers.

16. Defendant Jerry V. Swank ("Jerry Swank") is a resident of the State of Texas whose principal place of business is located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Jerry Swank is and was, throughout the Class Period, a Trustee and Chairman of the Board, Chief Executive Officer, and President of the Fund, the Managing Partner of Swank Advisers, and (upon information and belief) the principal of Swank Capital.

17. Defendant Mark W. Fordyce, CPA ("Fordyce") is a resident of Texas whose principal place of business is located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Fordyce is and was, throughout the Class Period, a Trustee of the Fund and the Fund's Chief Financial Officer, Principal Accounting Officer, Treasurer, and Secretary, as well as Chief Financial Officer of Swank Advisers.

18. Defendant Brian R. Bruce ("Bruce") is a resident of Texas with a place of business located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Bruce is and was,

throughout the Class Period, a Trustee of the Fund and Chairman of the Fund's Audit Committee.

19. Defendant Edward N. McMillian ("McMillian") is a resident of Texas with a place of business located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. McMillian is and was, throughout the Class Period, the Fund's so-called "Lead Independent Trustee" and a member of the Fund's Audit Committee.

20. Defendant Ronald P. Trout ("Trout") is a resident of Texas with a place of business located at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Trout is and was, throughout the Class Period, a Trustee of the Fund, Chairman of the Fund's Nominating, Corporate Governance, and Compensation Committee, and a member of its Audit Committee.

#### **SUBSTANTIVE ALLEGATIONS**

21. Mutual funds – like the Fund – enable investors to invest long-term capital in the stock and bond markets. Specifically, mutual funds are intended to enable small investors to (a) accumulate diversified stock portfolios for retirement or other long-term investing with smaller amounts of capital than otherwise would be required for such investing, (b) avoid the transaction costs that ordinarily accompany stock and bond trades, and (c) utilize the services of professional investment advisers whose services otherwise would not be available at affordable prices.

22. Mutual fund shares are issued pursuant to prospectuses that must comply with the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77a, *et seq.*, and the ICA. Closed-end mutual funds – like the Fund – use cash raised from investors to purchase such securities as are consistent with the stated investment goals and objectives of the mutual funds in their prospectuses.

23. The Fund filed an amended Registration Statement on Form N-2 (“Prospectus”) with the SEC on or about August 24, 2007. According to the Fund’s Prospectus, the Fund’s stated investment objective is and was, throughout the Class Period, to obtain a high after-tax total return from a combination of capital appreciation and current income. According to the Prospectus, the Fund seeks to provide its stockholders with a vehicle to invest in the energy infrastructure sector. According to the Prospectus, the Fund invests primarily in the securities of master limited partnerships (“MLPs”), other equity securities, debt securities, and securities of non-United States issuers. Also according to the Prospectus, throughout the Class Period, the Fund was to invest at least 80 percent of its net assets, plus any borrowings for investment purposes, in MLP investments.

24. Mutual fund shares are valued periodically, usually once each day following the close of the financial markets in New York at 4:00 p.m. Eastern Time. The value – known as the NAV – reflects the closing prices of the securities in the fund’s portfolio, plus the value of any uninvested cash that the fund manager maintains or receives as dividends that day from the fund’s investments, minus any expenses accrued that day.

25. Shares of closed-end mutual funds – like the Fund – trade in the open market at market prices that are almost entirely dependent upon the funds’ stated NAV. As the stated NAV of any closed-end mutual fund increases, the market prices at which the fund’s shares trade also rise. Likewise, as the stated NAV of any closed-end mutual fund declines, so too the market prices at which the fund’s shares trade decline.

26. The market prices at which closed-end mutual funds – like the Fund – trade also reflect the expected dividend yield or other earnings on the funds’ investments. Thus, as the amount of assets invested, or the percentage of NAV invested, increases, the market prices at

which the fund's shares trade also rise. Likewise, as the amount of assets invested, or the percentage of NAV invested, declines, the NAV of any closed-end mutual fund declines, so too the market prices at which the fund's shares trade decline.

27. Unlike most mutual funds, according to the Prospectus, the Fund is treated for federal and state income tax purposes as a "regular corporation, or a 'C' corporation." According to the Fund, it is subject to federal and state taxes at a combined effective tax rate of 38 percent (35 percent federal tax plus 3 percent state tax). Accordingly, the Fund claims to be entitled to accrue a deferred tax asset in any year in which it incurs a loss which it may set off against any net profits in future years.

28. Pursuant to Financial Accounting Statement No. 109 – Accounting for Income Taxes ("FAS 109"), income tax liability may be accounted for by a "carryforward," equal to the amount of loss in one accounting period that may be set off against gains in a subsequent accounting period. However, FAS 109 also provides that the amount of the deferred tax asset represented by the carryforward must be "reduced . . . by the amount of any tax benefits that, based on available evidence, are not expected to be realized." In addition, pursuant to Interpretation No. 48 – Accounting for Uncertainty in Income Taxes ("FIN 48"), which interprets FAS 109, an income tax asset should only be recognized when there is a high degree of confidence that the tax position will be sustained upon examination by a taxing authority.

29. Unbeknownst to Plaintiff and the other members of the Class, a substantial part of the Fund's stated NAV during the Class Period consisted of a deferred tax asset that had accumulated as the Fund experienced nothing but losses since its inception. By the end of the Class Period, the deferred tax asset had grown to \$49.1 million.

30. During the Class Period, the Fund established a valuation reserve for the deferred tax asset, purportedly in accordance with FAS 109, to reflect the risk that the Fund would be unable to utilize the deferred tax asset.

31. Before the end of the Class Period, the Fund established a valuation reserve in the amount of just \$15.9 million, and thus included a net deferred tax asset in the amount of \$33.2 million in its NAV.

32. At least since September, 2008, the Fund and Swank Advisers were in discussions with the Fund's auditor, Deloitte & Touche USA LLP, or with its tax advisor, Deloitte Tax LLP, or both, concerning the appropriateness of the deferred tax asset. At no time during the Class Period was this ever disclosed to Plaintiff and the other Class members.

33. The Fund did not disclose to Plaintiff or the other members of the Class either (a) the fact of the deferred tax asset, (b) the amount of the deferred tax asset or its significance to the Fund's stated NAV, or (c) the uncertainty regarding the actual or fair value of the deferred tax asset.

34. For example, on February 2, 2008, the Fund filed its Certified Shareholder Report on Form N-CSR with the SEC, for its initial accounting period, August 27, 2007, to November 30, 2007. The Certified Shareholder Report included, among other financial statements, a Statement of Assets & Liabilities, which stated total assets of \$196,330,544 (including a deferred tax asset of \$4,055,250), total liabilities of \$37,227,543, and net assets applicable to common stockholders of \$159,103,001. The Certified Shareholder Report also included, among other financial statements, a Statement of Cash Flows for the initial accounting period, which stated a deferred tax asset of (\$4,055,250). The Certified Shareholder Report also included, among other

financial statements, a Statement of Operations for the initial accounting period, which stated deferred tax benefits in the amount of \$2,846,375.

35. The Fund's Certified Shareholder Report provided no explanation for the difference between the amount of deferred tax benefits stated in the Statement of Operations and the amount of the deferred tax asset stated in the Statement of Assets & Liabilities and Statement of Cash Flows.

36. Regarding tax accounting issues, the notes to the financial statements said, in full, as follows:

*Federal Income Taxation.*

The Fund, as a corporation, is obligated to pay federal and state income tax on its taxable income. Currently, the maximum marginal regular federal income tax rate for a corporation is 35 percent. The Fund may be subject to a 20 percent federal alternative minimum tax on its federal alternative minimum taxable income to the extent that its alternative minimum tax exceeds its regular federal income tax.

The Fund invests its assets primarily in MLPs, which generally are treated as partnerships for federal income tax purposes. As a limited partner in the MLPs, the Fund reports its allocable share of the MLP's taxable income in computing its own taxable income. The Fund's tax expense or benefit is included in the Statement of Operations based on the component of income or gains (losses) to which such expense or benefit relates. Deferred income taxes reflect the net tax effects of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes. A valuation allowance is recognized if, based on the weight of available evidence, it is more likely than not that some portion or all of the deferred income tax asset will not be realized. Management expects to realize the full benefit of the deferred tax asset.

37. The notes to the financial statement also stated that the Fund recorded no valuation allowance against the deferred tax asset on November 30, 2007, because the Fund believed it was more likely than not that the deferred tax asset would be utilized.

38. The Certified Shareholder Report included a Report of Independent Registered Public Accounting Firm, in which Deloitte & Touche LLP certified that the Fund's financial statements fairly presented, in all material respects, the Fund's financial position and results of operations for the initial accounting period and were prepared in conformity with generally accepted accounting principles.

39. The Fund's Certified Shareholder Report was certified by Defendant Fordyce, as Chief Financial Officer, Principal Accounting Officer, Treasurer & Secretary, pursuant to Rule 30a-2(a) under the ICA and the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201, *et seq.*. Among other things, Defendant Fordyce certified, *inter alia*, that the Fund's financial statements fairly presented the Fund's financial condition, results of operations, and changes in net assets for the initial accounting period, and that the statements in the Certified Shareholder Report (including the financial statements) did not contain any untrue statement of a material fact and or omit to state any material fact.

40. The Fund's Certified Shareholder Report was also certified by Defendants Jerry Swank, as President & Chief Executive Officer, and Fordyce, as Chief Financial Officer, Principal Accounting Officer, Treasurer & Secretary, pursuant to Section 906 of the Sarbanes-Oxley Act, 15 U.S.C. § 7241. Among other things, Defendants Jerry Swank and Fordyce certified that the Certified Shareholder Report fairly presented, in all material respects, the Fund's financial condition and results of operations for the initial accounting period.

41. The financial statements in the Fund's Certified Shareholder Report did not fairly present the Fund's financial condition, results of operations, and changes in net assets for the initial accounting period and were not prepared in accordance with GAAP, and the financial

statements contained untrue statements of material fact and omitted to state material fact in at least the following respects:

a. the financial statements included a deferred tax asset against which no valuation reserve was established; and

b. the financial statements overstated the Fund's net assets, results of operations, and net cash used in operating activities, for the initial accounting period.

42. When they filed or caused the Fund to file the Certified Shareholder Report with the SEC on February 2, 2008, Defendants had no reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset.

43. On August 6, 2008, the Fund filed its Semi-Annual Certified Shareholder Report on Form N-CSR with the SEC, for the accounting period December 1, 2007, to May 31, 2008. The Semi-Annual Certified Shareholder Report included, among other financial statements, a Statement of Assets & Liabilities, which stated total assets of \$223,765,671 (including a deferred tax asset of \$7,009,739), total liabilities of \$59,087,073, and net assets applicable to common stockholders of \$164,678,596. The Semi-Annual Certified Shareholder Report also included, among other financial statements, a Statement of Cash Flows for the six-month accounting period, which stated a deferred tax asset of (\$2,954,489). The Certified Shareholder Report also included, among other financial statements, a Statement of Operations for the six-month accounting period, which stated deferred tax benefits in the amount of \$4,301,800.

44. The Fund's Semi-Annual Certified Shareholder Report was signed by Defendants Jerry Swank, as President & Chief Executive Officer, and Fordyce, as Chief Financial Officer, Principal Accounting Officer, Treasurer & Secretary.

45. The Fund's Semi-Annual Certified Shareholder Report provided no explanation for the difference between the amount of deferred tax benefits stated in the Statement of Operations and the amount of the deferred tax asset stated in the Statement of Assets & Liabilities and Statement of Cash Flows.

46. The financial statements in the Fund's Semi-Annual Certified Shareholder Report did not fairly present the Fund's financial condition, results of operations, and changes in net assets for the six-month accounting period and were not prepared in accordance with GAAP, and the financial statements contained untrue statements of material fact and omitted to state material fact in at least the following respects:

a. the financial statements included a deferred tax asset against which no valuation reserve was established; and

b. the financial statements overstated the Fund's net assets, results of operations, and net cash used in operating activities, for the initial accounting period.

47. The notes to the financial statement also stated that the Fund recorded no valuation allowance against the deferred tax asset on May 31, 2008, because the Fund believed it was more likely than not that the deferred tax asset would be utilized.

48. When they filed or caused the Fund to file the Semi-Annual Certified Shareholder Report with the SEC on August 6, 2008, Defendants had no reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset.

49. Periodically throughout the Class Period (often once per week), Defendants published (or caused the Fund to publish) the Fund's stated NAV per share and issued (or caused the Fund to issue) "fact sheets" that purported to state, *inter alia*, the Fund's total assets, NAV per share, Swift Advisers' management fee (as a percentage of the Fund's NAV), the Top Five

Positions of the Fund, and that the Fund invested at least 80 percent of its net assets, plus any borrowings for investment purposes, in MLP investments. Each of the “fact sheets” was false and misleading in at least the following respects:

- a. the Top Five Positions failed to disclose that the largest asset of the Fund, by far, throughout the Class Period was the overstated deferred tax asset;
- b. the Fund’s stated total assets included an overstated deferred tax asset, for which an adequate valuation reserve was not established;
- c. the NAV per share was significantly overstated by virtue of the overstated deferred tax asset, for which an adequate valuation reserve was not established; and
- d. Swift Advisers’ management fee was a significantly higher percentage of the Fund’s actual NAV than its overstated NAV, since the management fee was charged on the overstated deferred tax asset as well as the invested assets of the Fund.

50. None of the “fact sheets” disclosed the growing amount of the Fund’s deferred tax asset, none of the “fact sheets” disclosed the amount, if any, of the valuation reserve against the deferred tax asset, and none of the “fact sheets” disclosed the fact that Defendants had no reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset or that the amount, if any, of the valuation reserve was sufficient.

51. When they published and issued (or caused the Fund to publish and issue) the Fund’s stated NAV and “fact sheets” throughout the Class Period, Defendants Defendants had no reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset or that the amount, if any, of the valuation reserve was sufficient.

52. Throughout the Class Period, Plaintiff and the other members of the Class reasonably and justifiably believed that the Fund’s assets were being invested consistent with the

stated investment goals and objectives of the Funds in its Prospectus, including in particular that the Fund intended to invest at least 80 percent of its net assets, plus any borrowings for investment purposes, in MLP investments.

53. However, in fact, throughout the Class Period, the Fund's assets were not invested consistent with the stated investment goals and objectives of the Funds in its Prospectus, in that approximately one-half of the Fund's stated NAV consisted of the overstated deferred tax asset, which was not invested at all. Thus, even if the Fund had invested 80 percent of its *other* assets, plus any borrowings for investment purposes, in MLP investments, only approximately 40 percent of the Fund's stated NAV was actually invested in MLP investments during the Class Period.

54. During the Class Period, the Fund's deferred tax asset had swollen from the stated amount of \$7,009,739 included in the Semi-Annual Certified Shareholder Report, to \$49.1 million. At the same time, the Fund's total assets had fallen precipitously from the amount of \$223,765,671 stated in the Semi-Annual Certified Shareholder Report to just \$90 million (including the \$49.1 million deferred tax asset) on November 28, 2008.

55. In the afternoon of December 19, 2008, Defendants shocked the investment community by causing the Fund to issue a press release announcing that the Fund determined it appropriate to establish a valuation allowance to fully offset the deferred tax asset. The result of this determination is a decrease in net asset value per share of \$3.49, resulting in a net asset value per share of \$3.79 as of the close on December 18, 2008.

56. Throughout the Class Period, Plaintiff and the other members of the Class reasonably believed, based upon Defendants' and the Fund's public statements, that:

- a. the amount of the deferred tax asset was a small portion of the Fund's total assets;
- b. the amount of the deferred tax asset was a small portion of the Fund's NAV;
- c. the Fund was more likely than not to utilize the deferred tax asset; and
- d. no valuation reserve on the deferred tax asset was established or required.

57. During the Class Period, Defendants did not (and did not cause the Fund to) correct or update the prior false and misleading statements regarding the deferred tax asset and the valuation reserve alleged herein.

58. As a result of the Fund's stunning announcement, on December 22, 2008, the first trading day after the Fund announced that it had written off of its deferred tax asset, the market price for Fund shares plummeted from \$7.40 to \$5.18. By the end of the next trading day, December 23, 2008, the stock price had declined to just \$3.81, a loss of almost 50 percent of the market value for Fund stock.

### **CLASS ACTION ALLEGATIONS**

59. Plaintiff brings this class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a Class consisting of all persons who, during the Class Period, purchased shares of the Fund on the New York Stock Exchange or any other public exchange. Excluded from the Class are Defendants, all of their officers, directors, employees, and partners, members of their immediate families, and their legal representatives, heirs, predecessors, successors, and assigns, and any entity in which any of the foregoing has a controlling interest.

60. The members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. As of December 31, 2008, the Fund had approximately 9.5 million shares of stock outstanding. While the exact number of Class members is unknown

to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believe there are thousands of members of the Class located throughout the United States.

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

- a. whether the federal securities laws were violated by Defendants' acts and omissions as alleged herein;
- b. whether statements made by Defendants to the investing public during the Class Period misrepresented or omitted material facts about the Fund's financial condition;
- c. whether defendants acted knowingly or recklessly in making materially false and misleading statements about the Fund's financial condition during the Class Period;
- d. whether the market prices of the Fund's stock were artificially inflated or distorted during the Class Period because of Defendants' conduct complained of herein; and
- e. whether members of the Class have sustained damages as a result thereof and, if so, what measure of damages is proper.

62. Plaintiff's claims are typical of the claims of the members of the Class as Plaintiff and all other members of the Class sustained damages arising out of Defendants' wrongful conduct in violation of the federal securities laws as complained of herein.

63. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

64. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members of the Class is impracticable.

Furthermore, because the damages suffered by individual Class members may be small relative to the cost of proceeding with such litigation, the expense and burden of individual litigation make it impossible for the Class members individually to redress the wrongs done to them.

65. There will be no difficulty in the management of this action as a class action.

**PRESUMPTION OF RELIANCE:  
FRAUD ON THE MARKET DOCTRINE**

66. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

(a) Defendants made false and misleading statements of material fact, and failed to disclose material facts, during the Class Period;

(b) the misstatements and omissions were material;

(c) the Fund's shares met the requirements for listing on the NYSE, Fund's shares were listed and actively traded on the NYSE, the Fund's shares were traded in an efficient and open market on the NYSE, and the Fund was followed by analysts,

(d) the misstatements and omissions alleged tended to induce a reasonable investor to misjudge the value of the Fund's shares.

67. Plaintiff and members of the Class purchased their Fund shares during the Class Period between the time Defendants misrepresented or failed to disclose material facts and the time the true facts were disclosed, without knowledge of the omitted facts.

68. Based upon the foregoing, Plaintiff and other members of the Class are entitled to a presumption of reliance upon the integrity of the market price for the Company's securities.

## COUNT I

### **Violation Of Section 10(b) Of The Exchange Act And Rule 10b-5 Of The Securities And Exchange Commission**

69. Plaintiff repeats and realleges paragraphs 1 through 68 above as if fully set forth herein.

70. This Count is asserted against defendants and is based upon section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder.

71. During the Class Period, Defendants directly engaged in a common plan, scheme, and unlawful course of conduct, pursuant to which it knowingly or recklessly engaged in acts, practices, and courses of business which operated as a fraud and deceit upon Plaintiff and the other members of the Class, and made various deceptive and untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading to plaintiff and the other members of the Class. The purpose and effect of said scheme, plan, and unlawful course of conduct was, among other things, to induce Plaintiff and the other members of the Class to purchase Fund shares securities during the Class Period at artificially inflated prices.

72. During the Class Period, Defendants, pursuant to said scheme, plan, and unlawful course of conduct, knowingly and recklessly issued, caused to be issued, participated in the issuance of, the preparation and issuance of deceptive and materially false and misleading statements to the investing public as particularized above.

73. As a result of the dissemination of the false and misleading statements set forth above, the market price of Fund stock was artificially inflated during the Class Period. In ignorance of the false and misleading nature of the statements described above and the deceptive and manipulative devices and contrivances employed by Defendants, Plaintiff and the other

members of the Class reasonably relied, to their detriment, on the integrity of the market price of the stock in purchasing Fund shares. Had Plaintiff and the other members of the Class known the truth, they would not have purchased Fund shares or would not have purchased them at the inflated prices they paid.

74. Plaintiff and the other members of the Class have suffered substantial damages as a result of the wrongdoing herein alleged in an amount to be proved at trial.

75. By reason of the foregoing, defendants directly violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder in that it: (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon plaintiff and the other members of the Class in connection with their purchases of Fund shares during the Class Period.

## COUNT II

### **Violation Of Section 20(a) Of The Exchange Act (Against the Individual Defendants)**

76. Plaintiff repeats and realleges paragraphs 1 through 75 above as if fully set forth herein.

77. Defendants Swank Capital, Jerry Swank, Fordyce, Bruce, Trout, and McMillan acted as controlling person of the Fund and Swank Advisers within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, participation in and awareness of the Fund's operations, and their knowledge of the Fund's accounting policies and practices generally, including accounting for the deferred tax asset in particular, these Defendants had the power to influence and control and did influence and control, directly or

indirectly, the decision-making of the Fund and Swank, including the content and dissemination of the various statements that Plaintiff alleges herein were false and misleading.

78. Defendants Swank Capital, Jerry Swank, Fordyce, Bruce, Trout, and McMillan were provided with or had unlimited access to copies of the Fund's reports, press releases, public filings and other statements alleged by Plaintiff to be misleading, both prior to and after those statements were issued, and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

79. In particular, as alleged herein, the Individual Defendants were all trustees of the Fund and had direct or supervisory responsibility for the Fund's accounting policies and practices, including accounting for the deferred tax asset in particular, and therefore are presumed to have had the power to control or influence the particular statements giving rise to the securities violations alleged herein, and exercised the same.

80. By virtue of their positions as controlling persons, Defendants Swank Capital, Jerry Swank, Fordyce, Bruce, Trout, and McMillan are liable pursuant to section 20(a) of the Exchange Act.

81. As a direct and proximate result of the wrongful conduct, plaintiff and other members of the Class suffered damages in connection with their purchases of the Company's securities during the Class Period.

### **COUNT III**

#### **Violation Of Section 36(b) Of The ICA Against Defendant Swank Advisers**

82. Plaintiff repeats and realleges paragraphs 1 through 68 above as if fully set forth herein.

83. The Fund is a registered investment companies within the meaning of the ICA.

84. Swank Advisers is an investment adviser for the Funds as that term is defined in Section 2 of the ICA.

85. Swank is an affiliate of the Swank Adviser for purposes of Section 36(b) of the ICA.

86. Pursuant to Section 36(b) of the ICA, 15 U.S.C. § 80a-35(b), the investment adviser of a mutual fund owes to the mutual fund the fiduciary duties of loyalty, candor, and due care with respect to the receipt of compensation for services or payments of a material nature paid by the mutual fund to such investment adviser or any affiliated person. Those fiduciary duties apply not only to the terms of the advisory fee agreements, but also to the manner in which advisers seek approval of such agreements.

87. Pursuant to Section 36(b) of the ICA, 15 U.S.C. §80a-35(b), Swank Advisers owes and owed to the Fund the fiduciary duties of loyalty, candor, and due care with respect to its receipt of compensation for services or payments of any material nature paid by the Funds or its shareholders to Swank Advisers or any affiliated person. Those fiduciary duties include, but are not limited to, the duty of the Adviser to seek approval of any advisory agreement upon full disclosure of all information material to the Trustees' decision regarding the Adviser's compensation.

88. Pursuant to Section 15(c) of the ICA, 15 U.S.C. § 80a-15(c), the investment adviser of a mutual fund owes to the mutual fund the duty to furnish the trustees of the fund "such information as may reasonably be necessary to evaluate the terms of any contract whereby a person undertakes regularly to serve or act as investment adviser of such [mutual fund] company."

89. Thus, among other things, Section 36(b) of the ICA prohibits and prohibited Swank Advisers from misrepresenting or overstating the Fund's NAV in order to increase the amount of their management fees or other compensation.

90. Pursuant to Section 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b), a mutual fund shareholder may bring a civil action against an investment adviser or any affiliated person who has breached his or its fiduciary duty concerning such compensation or other payments.

91. Defendants Swank Advisers and Swank Capital, as its affiliate, breached their fiduciary duties to the Funds by the acts alleged in this Complaint including, without limitation, knowingly and recklessly issued, caused to be issued, participated in the issuance of, the preparation and issuance of deceptive and materially false and misleading statements to the investing public as particularized above, all in exchange for their own benefit, including the receipt of excessive and unearned fees on the uninvested deferred tax asset.

92. By acting as alleged herein, Defendants Swank Advisers and Swank Capital placed their own self-interest in maximizing their compensation and other payments over the interests of the Fund.

93. As alleged herein, Swank Advisers and Swank Capital breached their fiduciary duties with respect to the receipt of compensation for services or other payments of a material nature from the Fund or its shareholders.

94. By virtue of the foregoing, Defendant Swank Advisers and Swank Capital have violated Section 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b).

95. As a direct and proximate result of the wrongful conduct alleged above, the Fund was harmed by, among other things, the payment of excessive and unearned fees on the uninvested deferred tax asset, for which Defendants are liable.

WHEREFORE, plaintiff, on its own behalf and on behalf of the Class, prays for judgment as follows:

A. declaring this action to be a proper class action and certifying plaintiff as class representative under Federal Rule of Civil Procedure 23;

B. awarding compensatory damages in favor of plaintiff and the other members of the Class against the Defendants for the damages sustained as a result of the wrongdoings of the Defendants, together with interest thereon;

C. awarding actual damages to the Fund for Defendants' breaches of fiduciary duty;

D. awarding plaintiff the fees and expenses incurred in this action, including reasonable allowance of fees for Plaintiff's attorneys, and experts; and

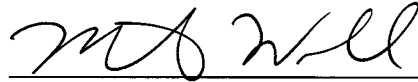
E. granting such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury on all issues so triable.

Dated February 10, 2009.

Respectfully submitted,



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*Attorneys for Plaintiff and the Class*

**PLAINTIFF'S CERTIFICATION**

Terri Morse Bachow ("Plaintiff") declares under penalty of perjury, as to the claims asserted under the federal securities laws, that:

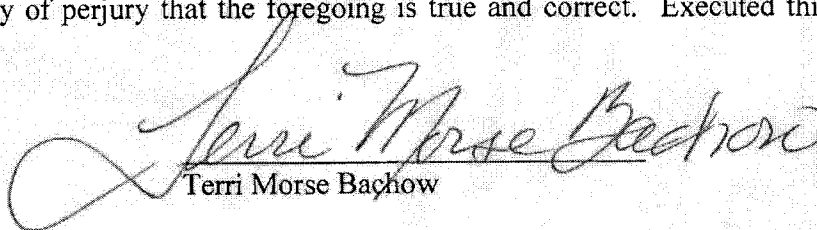
1. Plaintiff has reviewed the complaint and authorized the commencement of an action on Plaintiff's behalf.
2. Plaintiff did not purchase the security that is the subject of this action at the direction of plaintiff's counsel or in order to participate in this private action.
3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.
4. Plaintiff's transactions in the Cushing MLP Total Return Fund securities during the Class Period specified in the Complaint are as follows:

<u>Date</u>	<u># of Shares Purchased</u>	<u># of Shares Sold</u>	<u>Price</u>
9/30/08	1,000		\$13.41
10/8/08	1,000		\$10.72
12/24/08		2,000	\$3.78

5. During the three years prior to the date of this Certificate, Plaintiff has not sought to serve or served as a representative party for a class in an action filed under the federal securities laws. [Or, Plaintiff has served as a class representative in the action(s) listed below:]

6. Plaintiff will not accept any payment for serving as a representative party on behalf of the Class beyond the Plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating to the representation of the Class as ordered or approved by the Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 14 day of January, 2009.

  
Terri Morse Bachow

CIVIL COVER SHEET

ORIGINAL

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Terri Morse Bachow, Individually on Behalf of Herself and All Others Similarly Situated,

(b) County of Residence of First Listed Plaintiff Dade County, Florida (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Stanley, Mandel & Iola, L.L.P., 3100 Monticello Ave., Ste. 750, Dallas, Texas 75205, 214-443-4300

DEFENDANTS

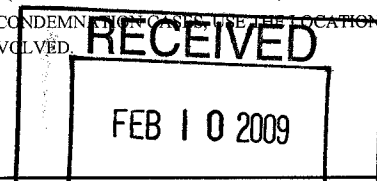
Swank Energy Income Advisers, LP, Swank

County of Residence of First Listed Defendant Dallas County, Texas (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

3-09CV0262-K



II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF/DEF 1-4, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Property, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation, 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. § 78j(b)
Brief description of cause: Class action for violation of Section 10(b) of the Securities Exchange Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23, DEMAND \$, CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE, DOCKET NUMBER

DATE: 02/10/2009, SIGNATURE OF ATTORNEY OF RECORD: [Signature]

FOR OFFICE USE ONLY: RECEIPT #, AMOUNT, APPLYING IFP, JUDGE, MAG. JUDGE