UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

TERRI MORSE BACHOW, Individually on Behalf of Herself and on Behalf of All Others Similarly Situated, 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. 09-cv-262-K

FIRST AMENDED CLASS ACTION COMPLAINT

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 an 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. During the Class Period, Defendants grossly and falsely overstated Fund's net asset value ("NAV") by including the full value of tens of millions of dollars worth of deferred tax assets in the Fund's stated NAV, without establishing an adequate valuation allowance to reflect the fact that there was persuasive evidence that the asset was worthless. Defendants belatedly admitted that this asset, in the sum of $49.1 million, was worthless and wrote it off by recording a valuation allowance in the sum of $49.1 million.

4. During 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 issue a press release announcing that it had established a $49.1 million valuation allowance 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. §§ 78(i)(b), 78(t) and 78t-1(a). 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.

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 Advisers 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 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 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 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. As the investment adviser, Swank Advisers controlled or possessed the authority to control the activities of 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 and, consequently directly or indirectly controlled or possessed the authority to control the activities of the Fund.

16. Defendant Jerry V. Swank ("Jerry Swank") is a resident of the State of Texas whose principal place of business is 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. In those capacities, Defendant Jerry Swank directly or indirectly controlled or possessed the authority to control the activities of the Fund.

17. Defendant Mark W. Fordyce, CPA ("Fordyce") is a resident of Texas whose principal place of business is 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. Forcdyce 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. In those capacities, Defendant Fordyce directly or indirectly controlled or possessed the authority to control the activities of the Fund.

18. Defendant Brian R. Bruce ("Bruce") is a resident of Texas with a place of business 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. In those capacities, Defendant Bruce directly or indirectly controlled or possessed the authority to control the activities of the Fund.

19. Defendant Edward N. McMillan ("McMillan") is a resident of Texas with a place of business at 3300 Oak Lawn Avenue, Suite 650, Dallas, TX 75219. McMillan is and was, throughout the Class Period, the Fund's so-called "Lead Independent Trustee" and a member of the Fund's Audit Committee. In those capacities, Dfendant McMillan directly or indirectly controlled or possessed the authority to control the activities of the Fund.

20. Defendant Ronald P. Trout ("Trout") is a resident of Texas with a place of business 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. In those capacities, Defendant Trout directly or indirectly controlled or possessed the authority to control the activities of the Fund.

SUBSTANTIVE ALLEGATIONS

21. Mutual funds – like the Fund – enable investors to invest capital in the stock and bond markets. Specifically, mutual funds are intended to enable small investors to (a) accumulate diversified stock portfolios investing 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 their investment goals and objectives as stated in their prospectuses.

23. Before the beginning of the Class Period, on or about August 24, 2007, the Fund filed an amended Registration Statement on Form N-2 ("Prospectus") with the SEC. According to 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. The Prospectus was signed by Defendant Jerry Swank as President & Chief Executive Officer and trustee, by Defendant Fordyce as Chief Financial Officer, Principal Accounting Officer, and attorney in fact, and by Defendants Bruce, McMillan, and Trout as trustees.

25. 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 Net Asset Value or NAV – is the net difference between the closing value assigned to the Fund's assets on that day and the closing value assigned to the Fund's liabilities on that day. To the extent that these assets are comprised of widely traded securities, 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. It also reflects subjectively assigned values for non-freely-traded securities and a computed value for deferred tax assets and/or liabilities, in instances when such deferred tax assets or liabilities are appropriately recognized.

26. 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.

27. 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 also decline.

28. The NAV of any mutual fund, like the Fund, is especially important to investors, since it is closely tied to the prices at which the mutual fund's shares are traded. The NAV of mutual funds also serves as the basis for the advisory fees charged by and paid to mutual fund investment advisers.

29. 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 accounted for income tax pursuant to the provisions of Financial Accounting Standards Board Statement No. 109 – Accounting For Income Taxes ("FAS 109") and claimed to be entitled to accrue a deferred tax asset in any year in which it incurred a loss, under the theory that the loss could be offset against future taxable earnings.

30. FAS 109 provides that deferred tax assets may be accounted for by a "carryforward" item, 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.

31. Generally accepted accounting principles ("GAAP"), including in particular FAS 109, establishes financial accounting and reporting standards for the effects of income taxes that result from an enterprise's activities during the current and preceding years. FAS 109 requires an asset and liability approach for financial accounting and reporting for income taxes.

32. Under FAS 109, a deferred tax asset is to be recognized for temporary differences that will result in deductible amounts in future years and for carryforwards. For example, a temporary difference is created between the reported amount and the tax basis of a liability for estimated expenses if, for tax purposes, those estimated expenses are not deductible until a future year. Settlement of that liability will result in tax deductions in future years, and a deferred tax asset is recognized in the current year for the reduction in taxes payable in future years.

33. The amount of a deferred tax asset is measured by using the enacted tax rates that are expected to apply to taxable income (*e.g.*, capital gains, ordinary income, etc.) in the periods in which the deferred tax asset or liability is expected to be recovered or settled. If it is more likely than not that a portion of the tax benefits will ***not*** be realized, a valuation allowance should be established to reduce the deferred tax asset. All available evidence, both positive and negative, is considered to determine whether, based

on the weight of that evidence, a valuation allowance is needed for some portion or all of a deferred tax asset.

34. The weight given to the potential effect of such negative and positive evidence should be commensurate with the extent to which it can be objectively verified. The more negative evidence – that a portion of the tax benefits will not be recovered or settled – that exists, the more positive evidence is necessary, and the more difficult it is, to support a conclusion that a valuation allowance is not needed.

35. Future realization of the tax benefit of an existing deductible temporary difference or carryforward ultimately depends on the existence of sufficient taxable income of the appropriate character (for example, ordinary income or capital gain) within the carryforward period available under the tax law.

36. Concluding that a valuation allowance is ***not*** needed is extremely difficult to defend when, as here, there is negative evidence such as cumulative losses in recent years, a history of operating loss, losses expected in early future years, and unsettled circumstances that, if unfavorably resolved, would adversely affect future operations and profit levels on a continuing basis in future years. In such an instance, the enterprise must be able to convincingly illustrate that future taxable income is virtually assured (*i.e.*, by converting a portfolio of non-taxable bonds to taxable bonds).

37. Before and during the Class Period, the Fund had a history of generating losses , not gains, the losses were other than temporary, and the cost or tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period, all of which made it extremely unlikely that the Fund would realize the income necessary for it to use the deferred tax asset.

38. In addition, before and during the Class Period, a substantial portion of the Fund's investments were not liquid. Before and during the Class Period, it was not reasonably foreseeable that the Fund would earn capital gains or other profit from the disposition of those assets against which the deferred tax asset could be utilized. This additionally made it extremely unlikely that the Fund would ever use the deferred tax asset.

39. For the period ended May 31, 2008, the Fund had a net operating loss of approximately $4,914,000 and a capital loss of approximately $10,687,000 for federal income tax purposes. Accordingly, during the Class Period, there was extremely strong evidence that it was far more likely than not that the Fund would ***not*** generate taxable income and, therefore, (i) tax benefits would ***not*** be realized and (ii) a valuation allowance ***was*** required to reduce the deferred tax asset to zero.

40. As Chairman of the Board, Chief Executive Officer, and President of the Fund, the Managing Partner of Swank Advisers, and a trustee of the Fund, before and throughout the Class Period, Defendant Jerry Swank knew from his review of the Fund's books and records (including without limitation the reports of the Fund's portfolio positions, its reports of investment profit and loss, and its general ledger) or was severely reckless in ignoring the following material facts:

a. the Fund's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income) that were other than temporary;

b. the cost or tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period;

c. a substantial portion of the Fund's investments were not liquid;

d. it was not reasonably foreseeable that the Fund would earn capital gains or other profit from the disposition of those assets; and

e. there was extremely strong evidence that it was far more likely than not that the Fund would ***not*** generate taxable income and, therefore, (i) tax benefits would ***not*** be realized, (ii) a valuation allowance ***was*** required to reduce the deferred tax asset to zero, and (iii) the NAV, or percentage of assets invested, Top Five Positions of the Fund, were falsely overstated.

41. As the Fund's Chief Financial Officer, Principal Accounting Officer, Treasurer, and Secretary, Chief Financial Officer of Swank Advisers, and a trustee of the Fund, before and throughout the Class Period, Defendant Fordyce knew from his review of the Fund's books and records (including without limitation the reports of the Fund's portfolio positions, its reports of investment profit and loss, and its general ledger) or was severely reckless in ignoring the following material facts:

a. the Fund's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income) that were other than temporary;

b. the cost or tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period;

c. a substantial portion of the Fund's investments were not liquid;

d. it was not reasonably foreseeable that the Fund would earn capital gains or other profit from the disposition of those assets; and

e. there was extremely strong evidence that it was far more likely than not that the Fund would ***not*** generate taxable income and, therefore, (i) tax benefits would ***not*** be realized, (ii) a valuation allowance ***was*** required to reduce the deferred tax asset to zero, and (iii) the NAV, or percentage of assets invested, Top Five Positions of the Fund, were falsely overstated.

42. The Fund's history of generating net operating losses and capital losses, the fact that the tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period, and the absence of compelling evidence that the tax benefit would be recovered through future operations made it far more likely that the Fund would ***not*** utilize the tax benefit.

43. Ultimately, without indicating that it received or considered any new or changed information, on December 19, 2008, the Fund announced that it "recorded a valuation allowance for the full amount of the deferred tax asset as the Fund believes it is ***more likely than not that the asset will not be utilized***." (Emphasis added).

44. 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.

45. During the Class Period, the Fund established a valuation allowance 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.

46. According to a Company press release issued on December 19, 2009, shortly before the end of the Class Period, the Fund had established a valuation allowance

in the amount of just $15.9 million against the $49.1 million deferred asset, and thus included a net deferred tax asset in the amount of $33.2 million in its NAV.

47. Before and during the Class Period, as the amount of the Fund's net deferred tax asset grew:

a. the Fund's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income) that were other than temporary continued;

b. the cost or tax basis of the Fund's assets continued to materially exceed their fair values;

c. a substantial portion of the Fund's investments remained illiquid;

d. it became less reasonably foreseeable that the Fund would earn capital gains or other profit from the disposition of those assets; and

e. evidence grew that it was far more likely than not that the Fund would ***not*** generate taxable income and, therefore, (i) tax benefits would ***not*** be realized and (ii) a valuation allowance ***was*** required to reduce the deferred tax asset to zero.

48. Before and throughout the Class Period, as the amount of the Fund's deferred tax asset grew, and despite the other facts alleged herein, the Fund continued not to establish an adequate valuation reserve against the risk that the Fund could or would never utilize or recognize the deferred tax asset.

49. Throughout the Class Period, the net deferred tax asset was a material asset of the Fund, and at times during the Class Period, unbeknownst to the investment community, the net deferred tax asset was the single largest asset of the Fund.

50. At least since September, 2008, the Fund and Swank Advisers were aware from discussions with the Fund's auditor, Deloitte & Touche USA LLP, or with its tax advisor, Deloitte Tax LLP, or both (collectively "Deloitte"), of Deloitte's concerns regarding 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.

51. As the Fund's Chief Financial Officer, Principal Accounting Officer, Treasurer, and Secretary, Chief Financial Officer of Swank Advisers, and a trustee of the Fund, before and throughout the Class Period, Defendant Fordyce was aware of and involved in the discussions with Deloitte alleged above, and therefore knew or was severely reckless in ignoring Deloitte's concerns regarding the inappropriateness of carrying the deferred tax asset as an asset on the Fund's books and reflecting it as an asset in the Fund's calculation of its NAV.

52. As Chairman of the Board, Chief Executive Officer, and President of the Fund, the Managing Partner of Swank Advisers, and a trustee of the Fund, before and throughout the Class Period, Defendant Jerry Swank was aware of and involved in the discussions with Deloitte alleged above, and therefore knew or was severely reckless in ignoring Deloitte's concerns regarding the inappropriateness of carrying the deferred tax asset as an asset on the Fun's books and reflecting it as an asset in the Fund's calculation of its NAV.

53. Throughout the Class Period, 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 highly unlikely ability of the Fund to realize the carrying value of the deferred tax asset.

54. For example, before the Class Period, 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.

55. 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***. [Emphasis added.]

56. 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 purportedly believed it was more likely than not that the deferred tax asset would be utilized.

57. 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.

58. The Fund's Certified Shareholder Report was certified and signed 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 (a) he established adequate disclosure controls and procedures (or ensured the establishment of adequate disclosure controls and procedures) to ensure that material information would be made known to him, and (2) based on his own personal knowledge, 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.

59. The Fund's Certified Shareholder Report was also certified and signed 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 (a) they established adequate disclosure controls and procedures (or ensured the establishment of adequate disclosure controls and procedures) to ensure that material information would be made known to them, and (2) based on their own personal knowledge, 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.

60. During the Class Period, Defendants did not cause or permit the Fund to correct information from the Fund's Certified Shareholder Report that no longer presented the Fund's financial condition, results of operations, and changes in net assets fairly because:

a. the financial statements included a deferred tax asset against which a sufficient valuation reserve was ***not*** 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.

61. When they filed or caused the Fund to file the Certified Shareholder Report with the SEC on February 2, 2008, and make the statement "management expects to realize the full benefit of the deferred tax asset," given the Fund's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income), and because the tax basis of the Fund's assets

materially exceeded their fair values as of the beginning of the Class Period, well known to them, Defendants Jerry Swank and Fordyce knew they had no reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset, or they made the statement with severely reckless disregard as to its truth or falsity.

62. On August 6, 2008, shortly before the beginning of the Class Period, 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.

63. The Fund's Semi-Annual Certified Shareholder Report was certified and signed by Defendants Jerry Swank, as President & Chief Executive Officer, and 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, Defendants Swank and Fordyce certified, *inter alia*, that (a) they established adequate disclosure controls and procedures (or ensured the establishment of adequate disclosure controls and procedures) to ensure that material

information would be made known to them, and (2) based on their own personal knowledge, 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.

64. 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.

65. During the Class Period, Defendants did not cause or permit the Fund to correct information from the Fund's Semi-Annual Certified Shareholder Report that no longer presented the Fund's financial condition, results of operations, and changes in net assets fairly because:

a. the financial statements included a deferred tax asset against which s sufficient valuation reserve was ***not*** 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.

66. 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 purportedly believed it was more likely than not that the deferred tax asset would be utilized: "At May 31, 2008, the Fund did not record a valuation allowance against its

deferred tax assets, because the Fund believes it is more likely than not that the Fund will realize its deferred tax asset."

67. When they filed or caused the Fund to file the Semi-Annual Certified Shareholder Report with the SEC on August 6, 2008, and made the statement that management expected the deferred tax asset would be realized, given the Fund's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income), and because the tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period, well known to them, Defendants Swank and Fordyce knew they had no reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset, or they made the statement with severely reckless disregard as to its truth or falsity.

68. During the Class Period, Defendants, including Swank and Fordyce, failed to disclose the following material facts, necessary to make the statements (both the foregoing and subsequent statements) not false or misleading:

a. the fair values of the Fund's assets were so far below the Fund's cost or tax basis for the assets that there was little or no chance that the assets would ever be sold at a profit;

b. the Fund possessed compelling evidence that the tax benefit would ***not*** be realized, and little or no contrary evidence that the tax benefit would be realized;

c. the Fund's investments were illiquid;

d. it was not reasonably foreseeable that the Fund would earn capital gains on its investments;

e. the Fund's real or reasonably expected investment losses were other than temporary or short-term; and

f. Deloitte expressed concern to the Fund and to Defendants Jerry Swank and Fordyce in September, 2008, that the deferred tax asset was not properly stated because the Fund had not established an adequate valuation allowance for the asset.

69. 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.

70. 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.

71. 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.

72. For example, the "fact sheet" issued as of November 28, 2008, stated that the Fund's Total Assets were "$90 million" as of that date. The "fact sheet" also purported to identify the Fund's "Top Five Positions" as follows:

Top Five Positions *(As of 11/28/08)*	Investment (millions)	% of Portfolio Assets
Genesis Energy LP	$5.23	5.8%
TransMontaigne Partners LP	5.07	5.6
Energy Transfer Equity LP	4.28	4.8
Plains All American Pipeline LP	3.42	3.8
Inergy LP	2.66	3.0

73. The "fact sheet" issued as of November 28, 2008, was materially false and misleading, in that it failed to disclose that the deferred tax asset accounted for approximately one-half of the Fund's stated $90 million in assets. Thus, the reported "% of Portfolio Assets" for each of the "Top Five Positions" understated the actual percentages of those investments. By way of illustration, the $5.23 million reportedly invested in Genesis Energy LP represented almost 12 percent of the Fund's invested assets (after deducting the stated amount of the deferred tax asset), not the 5.8 percent stated in the "fact sheet."

74. As a result, the Fund assets actually invested were only one-half of the amounts stated in the "fact sheet," and the concentration of the Fund's Top Five Positions

was twice the amounts stated in the "fact sheet." This meant that Plaintiff and the other Class members had only one-half as much of their investment invested in pursuit of the Fund's stated investment objectives, and their investments were twice as exposed to the risk of concentration as stated.

75. 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, given Cushing's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income), and because the tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period, Defendants Swank and Fordyce knew they 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 allowance was sufficient and that the NAV, percentage of assets invested, and Top Five Positions of the Fund were false, or were severely reckless in disregarding the truth or falsity of the statements.

76. 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.

77. However, in fact, throughout the Class Period, the Fund's assets were not invested consistent with the investment goals and objectives of the Fund as stated 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.

78. During the Class Period, the Fund's deferred tax asset that was carried as an asset on the Fund's Statement Of Assets And Liabilities had swollen from the stated amount of $7,009,739 as reflected in the August 8, 2008, 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.

79. Defendants Jerry Swank's and Fordyce's failure to cause or permit the Fund to report its assets in accordance with GAAP during the Class Period, or to correct prior reports of the Fund's assets, together with their knowledge of the large (and constantly growing) percentage of Fund assets that the deferred tax asset represented during the Class Period, the compelling evidence that the tax benefit would ***not*** be realized, and the absence of contrary evidence that the tax benefit would be realized, establishes that they acted with an intent to deceive or defraud Plaintiff and the other members of the Class during the Class Period.

80. Defendants Jerry Swank and Fordyce were aware of the misstatements in and omissions from the untrue public statements alleged herein and they were severely reckless in disregarding the danger that Plaintiff and the other members of the Class would be misled during the Class Period in light of the large (and constantly growing) percentage of Fund assets that the deferred tax asset represented during the Class Period,

the compelling evidence that the tax benefit would ***not*** be realized, and the absence of contrary evidence that the tax benefit would be realized, all of which were well-known to Defendants Jerry Swank and Fordyce.

81. The Defendants' senior executive positions, their access to information about the Fund's assets, the materiality of the deferred tax asset as a significant percentage of the Fund's assets throughout the Class Period, Defendants' Jerry Swank's and Fordyce's certification of public filings during the Class Period, and their duties under the ICA and the Sarbanes-Oxley Act of 2002, gives rise to a strong inference that, throughout the Class Period, Defendants either (a) intended to deceive Plaintiff and the other members of the Class, or (b) knew the risk that Plaintiff and the other members of the Class would be misled or recklessly ignored the obvious risk that they would be misled.

82. During the Class Period, the advisory fees paid to Defendant Swank Advisers were based upon the Fund's stated NAV.

83. Defendants had a strong motive to overstate the value of the Fund's assets because the fees paid to Swank Advisers as an investment adviser and the Individual Defendants' own compensation was based upon and directly tied to the Fund's stated NAV, and the opportunity to do so by virtue of the control they each exercised over the statements issued by or on behalf of the Fund.

84. Throughout the Class Period, Defendant Swank Advisers had an affirmative obligation under Section 15(c) of the ICA, 15 U.S.C. § 80a-15(c), to furnish all material information to the Fund's trustees to permit the trustees to evaluate the

payment of fees to the investment adviser, including information relating to the Fund's NAV.

85. Throughout the Class Period, the Individual Defendants, as trustees of the Fund, had an affirmative obligation under Section 15(c) of the ICA, 15 U.S.C. § 80a-15(c), to inform themselves of all material facts relating to the payment of fees to the investment adviser. Such facts included the report of the Fund's net assets, on which the investment adviser's fees were based, including information relating to the Fund's NAV.

86. 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 was 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 of the markets on December 18, 2008.

87. The December 19, 2008, announcement did not identify any new or changed information that the Fund or any Defendant received or considered which caused the Fund to establish a valuation allowance to fully offset the deferred tax asset when no such valuation allowance had been established previously during the Class Period.

88. 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. an appropriate valuation allowance on the deferred tax asset was established on a timely basis as required.

89. 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.

90. 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 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

91. 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.

92. 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.

93. 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 Defendants considered all available evidence, both positive and negative, to determine that a valuation allowance was not needed for the deferred tax asset during the Class Period;

c. whether, given the Fund's history of generating net operating losses and capital losses (which may only be used to offset capital gains and cannot be used to offset ordinary income), and because the tax basis of the Fund's assets materially exceeded their fair values as of the beginning of the Class Period, Defendants had any reasonable basis to conclude that the Fund was more likely than not to utilize the deferred tax asset;

d. whether statements made by Defendants to the investing public during the Class Period misrepresented or omitted material facts about the Fund's financial condition;

e. whether Defendants acted knowingly or recklessly in making materially false and misleading statements about the Fund's financial condition during the Class Period;

f. 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

g. whether members of the Class have sustained damages as a result thereof and, if so, what measure of damages is proper.

94. 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.

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

96. 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.

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

PRESUMPTION OF RELIANCE:
<u>FRAUD ON THE MARKET DOCTRINE</u>

98. 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 in an efficient and open market, 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.

99. Plaintiff and the other 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.

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

COUNT I

Violation Of Section 10(b) Of The Exchange Act And Rule 10b-5 Of The Securities And Exchange Commission Against Defendants Jerry Swank and Fordyce

101. Plaintiff repeats and realleges paragraphs 1 through 100 above as if fully set forth herein.

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

103. During the Class Period, Defendants Jerry Swank and Fordyce directly engaged in a common plan, scheme, and unlawful course of conduct, pursuant to which they 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.

104. During the Class Period, Defendants Jerry Swank and Fordyce, 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.

105. 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.

106. As a direct and proximate result of the wrongful conduct, Plaintiff and the other members of the Class suffered substantial damages in connection with their purchases of the Fund's shares during the Class Period in an amount to be proven at trial.

107. By reason of the foregoing, Defendants Jerry Swank and Fordyce directly violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder in that they: (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 Swank Capital, Jerry Swank, Fordyce, Bruce, Trout, and McMillan

108. Plaintiff repeats and realleges paragraphs 1 through 107 above as if fully set forth herein.

109. This Count is asserted against Defendants Swank Capital, Jerry Swank, Fordyce, Bruce, Trout, and McMillan (the "Control Person Defendants") as control persons and is based upon section 20(a) of the 1934 Act, 15 U.S.C. § 78t(a).

110. The Control Person Defendants 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 Control Person 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.

111. The Control Person Defendants 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 they had the ability to prevent the issuance of the statements or cause the statements to be corrected.

112. In particular, as alleged herein, the Control Person 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 they are 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.

113. By virtue of their positions as controlling persons, the Control Person Defendants are liable pursuant to section 20(a) of the Exchange Act.

114. As a direct and proximate result of the wrongful conduct, Plaintiff and the other members of the Class suffered substantial damages in connection with their purchases of the Fund's shares during the Class Period in an amount to be proven at trial.

COUNT III

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

115. Plaintiff repeats and realleges paragraphs 1 through 100 above as if fully set forth herein.

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

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

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

119. 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.

120. 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.

121. 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."

122. 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.

123. 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.

124. 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 issuing, causing to be issued, participating in the issuance of, or 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.

125. 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 and its shareholders.

126. 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 and its shareholders.

127. 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).

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

WHEREFORE, Plaintiff, on her own behalf and on behalf of the Class, demands judgment against the Defendants, jointly, severally, or individually, 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 wrongdoing 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: June 4, 2009

Respectfully submitted,

s/ Roger L. Mandel

ROGER L. MANDEL
Texas Bar No. 12891750
MARC R. STANLEY
Texas Bar No. 19046500

MARTIN WOODWARD
Texas Bar No. 00797693

STANLEY, MANDEL & IOLA, L.L.P.
3100 Monticello Avenue, Suite 750
Dallas, TX 75205
214.443.4300 (Voice)
214.443.0358 (Fax)

s/ Mark C. Rifkin
Mark C. Rifkin (MR-0904)
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
(212) 545-4600

Co-Lead Counsel for the Class

Norman Shabel
SHABEL & DENITTIS, P.C.
5 Greentree Centre, Suite 302
Marlton, NJ 08053
(856) 797-9951

Attorneys for Plaintiff and the Class

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