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11 Matt J. Rocca Trust, Original Joes 401K PSP,
12 and Original Joes Inc PS Trust PS PL

13 **FINRA DISPUTE RESOLUTION ARBITRATION**

14 In the Matter of the Arbitration Between
15 MATT J. ROCCA TRUST, ORIGINAL JOES
16 401K PSP, AND ORIGINAL JOES INC PS
17 TRUST PS PL,

18 Claimants,

19 vs.

20 MADISON AVENUE SECURITIES, LLC
21 AND DAVID LLOYD BARBER

22 Respondents.

23 **CLAIMANT'S STATEMENT OF CLAIM**

1 **I. INTRODUCTION**

2 This case focuses principally on the failure of Madison Avenue Securities (“Madison
3 Avenue”) to reasonably supervise its registered representative, David Lloyd Barber (“Barber”),
4 with a view to preventing and detecting Barber’s breaches of fiduciary duty and violations of
5 Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

6 Barber’s victim was Matt Rocca. First, Barber made off with approximately \$650,000 of
7 Mr. Rocca’s funds (\$400,000 while at Madison Avenue and \$250,000 while at a prior firm) by
8 soliciting Mr. Rocca to send him funds from his brokerage accounts to purchase Bank of
9 America jumbo certificate of deposits (CDs). Barber never bought the CDs. Instead, he kept the
10 funds for personal use and concealed his actions by lying to Mr. Rocca.

11 Furthermore, Barber concentrated as much as 50% of Mr. Rocca’s portfolio in volatile
12 energy stocks. In addition, despite Mr. Rocca’s desire to invest in high quality, dividend paying
13 stocks, Barber used margin to invest significant assets in non-dividend paying stocks that were
14 selling at or below \$5, and in complex and risky derivatives that the Financial Industry
15 Regulatory Authority (“FINRA”) publicly warned were unsuitable for retail investors. Barber
16 overtraded the account and, in many cases, traded stocks without authorization and disregarded
17 Mr. Rocca’s instructions. As a result, Mr. Rocca suffered approximately \$200,000 in losses
18 during a period when the market was up nearly 40%.

19 Madison Avenue allowed this betrayal.

20 Madison Avenue knew that Barber had been fired from a prior firm and fined and
21 suspended by FINRA for misusing client funds. Instead of placing Barber under heightened
22 supervision, Madison Avenue designated him as the person-in charge of a remote branch office
23 and took a “hear-no evil, see-no evil” approach to supervision. If Madison Avenue had
24 reasonable policies and procedures concerning the review of deposits and wire transfers to its
25 registered representatives, Madison Avenue could have detected and prevented Barber’s
26 misappropriation of Mr. Rocca’s \$400,000.

1 Had Madison Avenue established reasonable surveillance policies and procedures,
2 Madison Avenue would have seen that Barber had constructed an imprudent, high risk portfolio
3 that was not in Mr. Rocca's best interest. If Madison Avenue had reasonable policies and
4 procedures concerning prudent investment strategies, it could have re-constructed Mr. Rocca's
5 portfolios to be more representative of a well-managed, diversified portfolio and prevented the
6 devastating investment losses that Mr. Rocca suffered. Instead, it ignored the abuse.

7 As a result of Respondents' misconduct, Mr. Rocca is seeking compensatory damages of
8 no less than \$925,000 against Respondents, jointly and severally. Mr. Rocca is also seeking
9 attorneys' fees and costs, and an award of punitive damages pursuant to California Civil Code
10 §3294 to deter Madison Avenue Securities from placing unqualified individuals in management
11 positions and to encourage closer control over its stockbrokers.

12

13 **A. PARTIES**

14 **1. Respondents**

15 **Respondent Madison Avenue Securities** is a member of FINRA and provides
16 brokerage and financial advisory services to clients. The company conducts a range of securities
17 transactions through its registered representatives. It is located in San Diego, California.
18 Madison Avenue was a named respondent along with David Lloyd Barber in a FINRA
19 arbitration in San Diego involving similar allegations of breach of fiduciary duty and failure to
20 supervise, as well as similar unsuitable investments. The Panel awarded the claimant a total of
21 \$910,000 in compensatory damages, punitive damages, and attorneys' fees and costs against
22 Madison Avenue. See *Donna Gambee v. David Lloyd Barber, Madison Avenue Securities, LLC*,
23 Case Number 16-01450 (January 5, 2018).

24 **Respondent David Barber** was a registered representative with Madison Avenue until
25 January 2018. On March 6, 2018, FINRA permanently barred Barber from associating with a
26 member firm. Prior to his industry bar, Barber had been employed in the brokerage industry
27 since 1986 and had worked at numerous brokerage firms. In 2011, Raymond James terminated
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1 Barber following an internal investigation related to a customer complaint alleging
2 misappropriated funds. In March 2013, FINRA fined Barber and suspended his license based on
3 allegations he improperly received five loans of \$867,000 from three customers of his
4 employer, Raymond James. Barber has also been the subject of consumer initiated complaints,
5 including being named as a respondent in the *Gambee* arbitration cited above. In the *Gambee*
6 arbitration the panel awarded claimant over \$1.2 million in compensatory and punitive damages
7 against Barber.

8 **2. Claimant**

9 **Claimant Matt Rocca** is a 62-old businessman who owns a restaurant in San Jose
10 called Original Joe's. Mr. Rocca holds a Bachelor of Science Degree in Accounting from the
11 Santa Clara University. Mr. Rocca had a been a customer of Barber's father since the early
12 1990s before the father retired and passed the business and Mr. Rocca's account to Barber
13 around 1998.

14 **B. JURISDICTION, PARTIES AND RELATED PERSONS, AND VENUE**

15 FINRA has jurisdiction over this matter as it relates to Madison Avenue and Barber
16 pursuant to Rule 12200 of the FINRA Code of Arbitration Procedure because this dispute is
17 between a FINRA member and a customer. Claimant Matt Rocca was at all relevant times a
18 customer of Barber's while he was associated with either the now-defunct First Midwest
19 Securities or Madison Avenue. Respondent Barber was, at all relevant times, and is a registered
20 representative of a FINRA-member firm. Respondent Barber is primarily liable for his own
21 misconduct. Respondent Madison Avenue is a FINRA-member firm. Respondent Madison
22 Avenue is primarily liable for its own misconduct and vicariously liable for the acts and
23 omissions of its employees and agents by well-established legal principles, such as the common
24 law of *respondeat superior*, control person liability under Section 20 of the Securities Exchange
25 Act of 1934, and actual and apparent authority.

1 **C. BROKER-DEALER INDUSTRY STANDARDS**

2 In California, it is a long-settled rule that a stockbroker owes a fiduciary duty to his or
3 her customer in cases where “the stockbroker was an adviser to the customer about investment
4 decisions.” *Apollo Capital Fund LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th (2007)
5 The fiduciary relationship between customer and any stockbroker “must be exercised with the
6 utmost good faith and integrity.” *Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App.
7 2d 690 709 (1968)

8 All broker-dealers have a duty to reasonably supervise their employees by means of
9 effective and established procedures. See *In the Matter of Shearson, Hammill & Co, Inc.*,
10 Exchange Act Rel. 7743 (Nov. 12, 1965) (Commission Opinion). The independent contractor
11 model employed by certain broker-dealers, including Madison Avenue, entails greater
12 supervisory challenges than typically presented at traditional wire house brokerage firms.
13 Therefore, to discharge their supervisory duties, firms employing that model must establish
14 policies and procedures reasonably designed to address those challenges. See, e.g., *In the Matter*
15 *of Quest Capital Strategies, Inc. and David Chen Yu*, Exchange Act Rel. No. 44935 (Oct. 15,
16 2001) (Commission Opinion); *In the Matter of 1st Discount Brokerage, Inc. and Michael R.*
17 *Fisher*, Exchange Act Rel. No. 66212A (Jan. 23, 2012) (settled Order); *In the Matter of Royal*
18 *Alliance Assocs., Inc.*, Exchange Act Rel. No. 38174 (Jan. 15, 1997) (settled Order).

19 A brokerage firm has a duty to design reasonable policies and procedures to detect and
20 prevent unauthorized and deceptive wire transfers from customer brokerage accounts to bank
21 accounts and other broker accounts of the registered representative or entities controlled by the
22 registered representative. *In the Matter of H.D. Vest Investment Securities, Inc.*, Exchange Act
23 Rel. 74429 (March 4, 2015) (settled Order).

24 In Staff Legal Bulletin No. 17: Remote Office Supervision, (March 19, 2004) (the
25 “Bulletin”), the Securities and Exchange Commission warned broker-dealers that small, remote
26 offices require vigilant supervision. This is because their distance from compliance and
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1 supervisory personnel can make it easier for registered representatives in these offices to
2 conceal violations of the securities law.

3 In the Bulletin, the Securities and Exchange Commission specifically re-emphasized the
4 need for heightened supervision where a representative with a disciplinary history is employed
5 in a remote office. The Bulletin identified "red flags" that warn of potential misconduct in
6 remote branch offices. These include: (1) questionable or frequent transfers of cash or securities
7 between customer accounts; (2) an increase or change in the types of investments or trading
8 concentration that a representative in a remote office is recommending; and (3) the disciplinary
9 history of the representative.

10 In assessing damages for imprudent investments, "the calculation of damages based on
11 what a prudent investor would have done would be appropriate for a breach of the duty of
12 prudent investing ... and therefore would show the amount of profits lost..." *Uzyel v. Kadisha*,
13 188 Cal.App.4th 866, 116 Cal.Rptr.3d 244, 277 (2010).

14 Courts around the country have used the average percentage of performance of the Dow
15 Jones Industrials or the Standard & Poor's Index during the relevant period as the indicia of how
16 a given portfolio would have performed in the absence of the broker's misconduct. The damages
17 due investor would be the difference between what the investor would have had if the account
18 had been handled legitimately and what he in fact had at the time the violation ended. *Miley v.*
19 *Oppenheimer & Co.*, 637 F.2d 318, 326–27 (5th Cir. 1981); *Scalp & Blade, Inc. v. Advest, Inc.*
20 309 A.D. 2d 219 (N.Y, App. Div. 2003)

21 In assessing damages for fraud, oppression or malice, California Civil Code §3294
22 authorizes an award of punitive damages upon a showing of clear and convincing evidence. The
23 statute authorizes an award of punitive damages against the company if one of its managing
24 agents ratified or approved the misconduct.

25 **II. FACTUAL BACKGROUND**

26 Mr. Rocca came in contact with the Barber family through David Barbers' brother,
27 Mark, with whom Mr. Rocca attended college. Mr. Rocca had been a brokerage customer of
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1 David Barber's father before the father retired and passed the business to David. Following his
2 father's retirement, David Barber became Mr. Rocca's broker and financial adviser. Over the
3 next 20+ years a relationship of trust and confidence developed between Mr. Rocca and Barber.

4 Mr. Rocca relied on Barber personally to monitor his account and provide him his
5 account information. The two spoke frequently, talking stocks, reviewing certain holdings,
6 discussing the markets, and confirming the account value. Whenever Mr. Rocca, had an issue,
7 Barber was there to assure him everything was fine. However, as Mr. Rocca learned, these
8 assurances in the later years were filled with lies, part of a scheme to mislead him about the true
9 condition of his accounts.

10 **A. Certificate of Deposit Scam**

11 In 2014, while Barber was registered with the now-defunct First Midwest Securities,
12 Barber solicited Mr. Rocca to purchase a fractional interest in a Bank of America certificate of
13 deposit or CD. As part of the scheme, Barber told Mr. Rocca that he would pool Mr. Rocca's
14 assets with others, including his own father, to purchase a jumbo CD that matured in 6 months
15 and paid 3% interest. Barber also told Mr. Rocca that the CDs were available for purchase only
16 through licensed stockbrokers such as himself. Barber persuaded Mr. Rocca to withdraw
17 \$250,000 from his trust account and wire it directly to a bank account in Barber's name instead
18 of to Bank of America. But Barber never invested the money – he kept it for himself. It was all
19 a ruse. This misconduct was reminiscent of what Barber had orchestrated at Raymond James
20 before he was fired. It would repeat itself several times throughout the time Mr. Rocca was a
21 Madison Avenue customer.

22 **B. The Madison Avenue Transfer**

23 In March 2015, Barber transferred his securities licenses and all his accounts, including
24 three accounts of Mr. Rocca, from First Midwest Securities to Madison Avenue Securities. At
25 the time of the transfer, Madison Avenue knew that in 2013 FINRA had suspended Barber from
26 associating with a member firm and Raymond James had fired him in 2011 over customer
27 allegations that he had misappropriated their funds via unauthorized transfers to a bank account
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1 he controlled. Nevertheless, Madison Avenue hired Barber and named him as the person-in-
2 charge of Madison Avenue's Newport Beach branch office, a business location which carried
3 out retail sales activities. As the designated person-in-charge, Barber was responsible for
4 managing the activities of the individuals working at the branch office, had primary
5 responsibility for decisions relating to the employment and remuneration of its associated
6 individuals at this location, and for paying the expenses of this branch office.

7 The total assets in Mr. Rocca's three accounts opened at Madison Avenue amounted to
8 slightly less than \$2 million. In Mr. Rocca's transfer, Madison Avenue would have seen two
9 undiversified and poorly constructed portfolios with unrealized losses of over \$750,000.

10 **C. Imprudent Portfolio Construction and Risky Stock Selection**

11 Even though Mr. Rocca had told Barber he wanted to pursue an income and growth
12 objective that invested in high-quality, dividend-paying stocks, Barber did not abide by Mr.
13 Rocca's wishes. Mr. Rocca's holdings included a rash of non-dividend paying stocks selling at
14 or below \$5 a share: Pacific Drilling, Cytori Therapeutics, Seventy-Seven Energy, and Clean
15 Energy Fuels Corporation, and Lifevantage Corporation. Because Barber advised Mr. Rocca to
16 open a margin account, these stocks became collateral subject to call should the value of Mr.
17 Rocca's account fall below a certain level.

18 There were other problems. A third of Mr. Rocca's assets were invested in energy-
19 related stocks, which would later increase to over 50%. There was a complex derivative
20 instrument that exposed Mr. Rocca to a daily rolling long position in the first and second month
21 VIX futures contracts. There were exchange traded funds ("ETFs") that sought daily investment
22 results, before fees and expenses, that correspond to two times the inverse (-2x) of the daily
23 performance of the Dow Jones U.S. Real Estate Index in one case, and the U.S. Treasury 20+
24 Year Bond Index in another. In June 2009, FINRA had reminded firms that these types of
25 inverse and leverage ETFs typically are unsuitable for most retail investors, like Mr. Rocca.
26 Despite these irregularities, Madison Avenue did nothing to cause a re-balancing of Mr.
27 Rocca's portfolios.

1 **D. In and Out and other Unusual Trading**

2 Barber also initiated multiple and overlapping trades in the same or similar securities within
3 weeks, or even days, of one another. Barber earned a commission every time he initiated a
4 trade regardless of whether Mr. Rocca made or lost money. While Barber was earning
5 substantial commissions, Mr. Rocca was losing his life savings. For example, in a 4-month
6 period, Barber entered into 10 buy and sell transactions in the stock of a Bermuda-based
7 company, Teekay Corporation. For his efforts, Barber earned \$2,200 in commissions while
8 losing nearly \$6,000 for Mr. Rocca. In a 9-month period, Barber made 9 trades in another
9 Bermuda-based company called Frontline Ltd., earning \$2,100 in commissions while losing
10 \$19,000 of Mr. Rocca's money.

11 Another interesting trade was a \$60,000 investment in a mutual fund called BP Capital
12 Twinline Energy. This particular fund gave sales commission discounts to Mr. Rocca when he
13 purchased the fund above a certain threshold amount, sometimes referred to a breakpoint. The
14 first threshold was a 5.75% sales commission for investments less than \$25,000; the second was
15 a 5.0% sales commission for investments from \$25,000 up to \$50,000. The third was a 4.5%
16 sales commissions for investments above \$50,000. If Mr. Rocca purchased more, he could
17 obtain larger volume discounts as its purchases reached higher threshold amounts. In connection
18 with his investment of \$60,000, Mr. Rocca should have been charged a sales commission of
19 4.5%. However, Mr. Rocca missed the volume discount was because instead of making one
20 purchase at the \$60,000 amount, Barber split the order into 3 separate smaller purchases of
21 \$25,000, \$25,000, and \$10,000. This resulted in Barber collecting the higher sales commissions
22 on each order. Mr. Rocca's accounts held the BP Capital Twinline Energy position for less than
23 1 year and lost money.

24 **E. Certificate of Deposit Scam Part 2**

25 In 2015, Barber again solicited Mr. Rocca to purchase a fractional interest in a Bank of
26 America certificate of deposit or CD. Barber persuaded Mr. Rocca to withdraw \$90,000 from
27 his trust account and send it directly to a bank account in Barber's name instead of to Bank of
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1 America. In December 2016, Mr. Rocca sent Barber 4 checks totaling \$45,000. In 2017, Mr.
2 Rocca either sent checks or wire transfers to Barber's bank account for a total of \$263,000. In
3 all, Mr. Rocca sent Barber \$398,000 for purchasing Bank of America CDs. But Barber never
4 invested the money – it was all a ruse. When Mr. Rocca asked for a return of his CD
5 investment, Barber margined Mr. Rocca's trust account and, using Mr. Rocca's stock as
6 collateral, borrowed funds against the stock, and sent him funds from the trust account. But he
7 concealed his deceit from Mr. Rocca. Because Barber controlled the flow of information to Mr.
8 Rocca about his accounts, Mr. Rocca did not know that Barber had betrayed him and helped
9 himself to his funds.

10 **F. Barber Further Conceals the Truth**

11 On the two occasions that Mr. Rocca reviewed his Madison Avenue statements, he saw
12 a noticeable drop in his account value. He telephoned Barber to inquire on both occasions. In
13 the first occasion, Barber assured Mr. Rocca that his account had completely recovered from the
14 significant quarter-end drop. In the other, Barber blamed the low account value on an
15 accounting mistake, saying that Mr. Rocca's SPDR Gold Shares ETF holding had been omitted
16 from the valuation. Once Barber factored in the Gold Shares, he assured Mr. Rocca that his
17 account value returned to its normal level. But, these were all lies. Barber had either
18 misappropriated Mr. Rocca's funds or lost them through margin and imprudent investments.

19 In March 2018, Mr. Rocca learned from Mark Barber that an arbitration panel had
20 awarded \$2 million against his brother and FINRA had disbarred him. Mark Barber suggested
21 he review his Madison Avenue statements immediately.

22 Mr. Rocca looked at his account statements with horror. His trust account, which began
23 fluctuated in the beginning between \$1,600,000 and \$700,000, now had an account value of
24 \$1,500. Barber had imprudently over-concentrated the accounts in energy stocks. Barber had
25 sold all the winners to cover margin calls and held the losers, presumably to conceal the
26 unrealized losses from Mr. Rocca. The high-quality stocks that he thought he owned Barber had
27 sold without his knowledge or authority.

1 **G. Madison Avenue Failed to Detect the Violations**

2 At the time of Barber’s actions, Madison Avenue did not question the imprudent
3 construction of Mr. Rocca’s portfolios or inquire whether it was in his best interest. Nor did
4 they question the unusual activity occurring in Mr. Rocca’s account throughout 2015. In less
5 than 9 months, Mr. Rocca’s Madison Avenue trust account had lost over \$250,000 in value and
6 experienced over \$1 million in withdrawals. But instead of investigating unusual, “red flag”
7 activity in an account managed by a representative with a history of misusing customer funds,
8 Madison Avenue took “a hear-no-evil, see-no-evil” approach.

9 In ignoring the obvious dangers, Madison Avenue failed to detect Barber’s
10 misappropriation of Mr. Rocca’s funds. At the time of Barber’s fraudulent scheme, Madison
11 Avenue either had no procedures in place, or failed to adequately implement such procedures, to
12 identify payments by a customer into Barber’s bank accounts.

13 **H. Devastating Loss to a Lifetime of Savings**

14 Barber left Mr. Rocca’s accounts in shambles. Chesapeake Energy, a stock that Barber
15 had said was trading at 24, was in fact trading at 4 and change. The Pacific Drilling that Mr.
16 Rocca thought had long been sold remained in the account, virtually worthless. Seventy-Seven
17 Energy was worth zero. Since becoming a Madison Avenue customer, Mr. Rocca suffered over
18 \$200,000 in market losses during a bull market. All traces of the \$398,000 Mr. Rocca had sent
19 to Barber for Bank of America CDs had vanished. Even in a rising market of almost 40%, Mr.
20 Rocca’s other two accounts lost money.

21 Had Barber adhered to fiduciary standards of prudence and loyalty in managing Mr.
22 Rocca’s accounts, Mr. Rocca’s accounts would have been worth over \$935,000 more than they
23 were as of February 28, 2018. Mr. Rocca’s trust account would have been worth about
24 \$880,000 (instead of \$1,500) had Barber invested it prudently in the S&P 500 Index. Had
25 Barber adhered to his fiduciary standards with respect to the Original Joes Trust account, that
26 account would have been worth \$330,000 (instead of \$247,000) had it been invested in the S&P
27 500 Index.

1 **III. CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**

3 **(Breach of Fiduciary Duty against Defendants Madison Avenue and Barber)**

4 Barber breached his fiduciary duty and ethical obligations owed to Mr. Rocca. Barber
5 failed to place the interest of Mr. Rocca above his own interest by engaging in a course of
6 conduct that benefitted himself to the detriment of Mr. Rocca.

7 Specifically, Barber imprudently concentrated half of Mr. Rocca's accounts in energy
8 stocks. Barber also invested Mr. Rocca's assets in other imprudent investments, such as the
9 S&P 500 VIX Futures exchange traded notes, and levered inverse exchange traded funds that
10 FINRA had warned were unsuitable for most retail investors. Barber also used margin
11 imprudently to maintain these ridiculous positions.

12 In addition to recommending imprudent investments, Barber deceived Mr. Rocca into
13 withdrawing \$398,000 from his trust account and transferring it to him for purposes of buying a
14 fractional interest in a Bank of America CD. Instead of buying the CD for Mr. Rocca, Barber
15 converted the entire \$398,000 for his own personal use. Barber compounded his breaches by
16 concealing them from Mr. Rocca through false and misleading representations.

17 Based on the imprudent holdings in Mr. Rocca's portfolio, Madison Avenue had a
18 fiduciary duty to make further inquiry as to whether Barber's recommendations were in Mr.
19 Rocca's best interest and whether Mr. Rocca understood the nature of his portfolio and the risks
20 he was assuming.

21 Furthermore, Madison Avenue had a fiduciary duty to make further inquiry whether
22 Barber was acting in compliance with FINRA rules when he recommended and subsequently
23 accepted the transfer of funds from Mr. Rocca.

24 Madison Avenue's acts and omissions as alleged constitute a breach of its fiduciary
25 duties to Mr. Rocca. As a proximate cause of Respondents' breach of fiduciary duties as
26 alleged herein, Claimant sustained out-of-pocket damages of at least \$600,000, and market
27 adjusted damages of at least \$300,000 based upon the investment performance of the Standard
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1 & Poor's 500 Index during the relevant period. Furthermore, Mr. Rocca suffered an additional
2 \$250,000 in out-of-pocket damages as a result of Barber's misconduct that occurred prior to
3 joining Madison Avenue.

4 **SECOND CAUSE OF ACTION**

5 **(Fraud against Respondent Barber)**

6 Section 10(b) of the Exchange Act prohibits "any person, directly or indirectly, by the
7 use of any means or instrumentality of interstate commerce or of the mails, or of any facility of
8 any national security exchange . . . to use or employ, in connection with the purchase or sale of
9 any security . . . any manipulative or deceptive device or contrivance."

10 Rule 10b-5, promulgated under the Exchange Act, prohibits any person, "directly or
11 indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or
12 of any facility of any national securities exchange, (a) to employ any device, scheme or artifice
13 to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact
14 necessary in order to make the statements made, in the light of the circumstances under which
15 they were made, not misleading, or (c) to engage in any act, practice, or course of business
16 which operates or would operate as a fraud or deceit upon any person, in connection with the
17 purchase or sale of any security."

18 Barber, acting with scienter, violated Section 10(b) of the Exchange Act and Rule 10b-
19 5(a) and Rule 10b-5(c) by employing a device or scheme to defraud and by engaging in an act,
20 practice and course of business which operated as a fraud or deceit. Over the course of several
21 years, Barber schemed to defraud Mr. Rocca and engaged in a course of business that operated
22 as a fraud or deceit by misappropriating funds from Mr. Rocca under false pretense while at the
23 same time fraudulently concealing from Mr. Rocca the perilous financial condition of his
24 Madison Avenue brokerage accounts.

25 Barber also violated Section 10(b) of the Exchange Act and Rule 10b-5 by engaging in
26 deceit and making material misrepresentations and omissions. The specific deceit,
27 misrepresentations and omissions of material facts by Barber made to Mr. Rocca include: (1)
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1 deceit concerning the Bank of America certificates of deposit, (2) misrepresentations or
2 omissions to Mr. Rocca concerning the securities holdings in his accounts; and (3)
3 misrepresentations or omissions to Mr. Rocca concerning the asset value of his accounts.

4 Barber, as the designated person-in-charge of Madison Avenue's Newport Beach branch
5 office, was a managing agent of Madison Avenue. Barber, acting with scienter, knew the above
6 described misrepresentations and omissions of material fact that he made to Mr. Rocca were
7 false and misleading and contained material omissions.

8 By reason of the foregoing misconduct, Barber violated both Section 10(b) of the
9 Exchange Act and Rule 10b-5(b) thereunder. As a proximate cause of Respondent Barber's
10 violations, Claimant sustained out-of-pocket damages of at least \$600,000, and market adjusted
11 damages of at least \$300,000 based upon the investment performance of the Standard & Poor's
12 500 Index during the relevant period. Furthermore, Mr. Rocca suffered an additional \$250,000
13 in out-of-pocket damages as a result of Barber's misconduct that occurred prior to joining
14 Madison Avenue.

15 Pursuant to California Civil Code §3294(a), Barber is liable for punitive damages for the
16 sake of example and by way of punishing him for his misconduct. Under California Civil Code
17 §3294(b), Madison Avenue is similarly liable for these punitive damages if an officer or
18 managing agent authorized or ratified the wrongful conduct. As the designated person-in-
19 charge of the Newport Beach branch office, Barber was a managing agent of Madison Avenue
20 that carried out the misconduct. As such, Madison Avenue is liable for punitive damages. An
21 award of punitive damages against Madison Avenue will serve to deter Madison Avenue and
22 those similarly situated from placing unqualified individuals in management positions and to
23 encourage closer control over its registered representatives.

24 **THIRD CAUSE OF ACTION**

25 **(Negligence/Failure to Diligently Supervise against Respondent Madison Avenue)**

26 Claimant incorporates by reference each and every allegation set forth above as though
27 fully set forth herein.

1 FINRA rules, regulations, and written FINRA guidance to the industry were established
2 as the standard of professional conduct, in order to protect Mr. Rocca from negligent conduct of
3 Madison Avenue. Pursuant to those rules, regulations, and written guidance – as well as
4 applicable common law – Madison Avenue was obligated to provide competent professional
5 securities services to Mr. Rocca, which it repeatedly breached.

6 As a FINRA-registered broker-dealer, Madison Avenue is required to know the essential
7 facts of each of its customers on a continuing basis. It is also required to adopt and implement
8 policies and procedures reasonably designed to detect and prevent violations of the laws, rules
9 and regulations that are designed to protect its clients. To accomplish this, the policies and
10 procedures must be tailored specifically to Madison Avenue’s line of business, which includes
11 holding accounts of customers in remote branch office locations and supervising employees
12 with disciplinary histories for misusing customer funds, such as Barber.

13 Madison Avenue’s supervisory responsibilities include implementing examination
14 procedures for monitoring customer accounts and inspecting branch offices that handle accounts
15 in remote branch offices. A well-designed branch inspection program is a necessary element of
16 Madison Avenue’s compliance and reasonable supervision of its branch office and branch office
17 personnel. Branch office inspection and supervision provide Madison Avenue with the
18 opportunity to validate its surveillance results and to gather on-site intelligence that supplements
19 on-going supervision from a compliance perspective.

20 But Madison Avenue’s system of compliance broke down because the firm’s
21 supervisory principals and compliance officers failed to challenge assumptions about Mr.
22 Rocca’s account, failed to investigate suspicious withdrawals, failed to monitor Barber’s bank
23 accounts failed to question critically the integrity of the branch office controls, and failed to
24 implement heightened supervision where the risk profile of a person placed in charge of a
25 remote branch office is exceptionally high.

26 The “red flags” in Mr. Rocca’s account were numerous. That these red flags remained
27 undetected for so long illustrates that Madison Avenue’s surveillance, inspection and
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1 supervision processes were wholly deficient. Madison Avenue failed to supervise diligently its
2 own adherence to policies and procedures designed to prevent these very types of lapses in
3 compliance, supervision, and internal controls. As described above, Madison Avenue failed and
4 totally disregarded its obligation to diligently supervise Barber and the remote branch office that
5 carried Mr. Rocca's account.

6 As a proximate cause of Respondent Madison Avenue's breach of fiduciary duties as
7 alleged herein, Claimant sustained out-of-pocket damages of at least \$600,000, and market
8 adjusted damages of at least \$300,000 based upon the investment performance of the Standard
9 & Poor's 500 Index during the relevant period.

10 **FOURTH CAUSE OF ACTION**

11 **(Vicarious Liability Against Madison Avenue)**

12 Claimant incorporates by reference each and every allegation set forth above as though
13 fully set forth herein.

14 Under Section 20(a) of the Exchange Act Madison Avenue was a control person of
15 Barber. Therefore, Madison Avenue is liable jointly and severally to the same extent Barber is
16 for violations of the Exchange Act unless Madison Avenue can demonstrate it had maintained
17 and enforced a reasonable and proper supervision and internal controls over Barber.

18 Madison Avenue knew that Barber had been fired from a prior firm and fined and
19 suspended by FINRA for misusing client funds. Instead of placing Barber under heightened
20 supervision, Madison Avenue designated him as the person-in charge of a remote branch office
21 and took a hear-no evil, see-no evil approach to supervision. By ignoring Barber's disciplinary
22 history, Madison Avenue failed to institute an adequate system of supervision. Under the
23 circumstances their neglect constituted an extreme departure from the standards of ordinary
24 care. Therefore, Madison Avenue is jointly and severally liable for Barber's violations of the
25 Exchange Act.

26 Under the principles of *respondeat superior*, a principal may be directly liable to third
27 parties for the actions of its agents while acting within the scope of his agency. Madison
28

1 Avenue employed Barber as a registered representative and designated him as the person-in-
2 charge of a retail brokerage office in Newport Beach. Barber's dealings with Mr. Rocca were
3 characteristic of a retail brokerage enterprise. Madison Avenue benefitted from Barber's
4 commission business. Because Madison Avenue knew Barber had a disciplinary history of
5 misusing customer funds, it created and assumed the inevitable risk of Barber doing it again.
6 Therefore, Madison Avenue is vicariously liable for the losses to Mr. Rocca caused by Barber.
7 Claimant sustained out-of-pocket damages of at least \$600,000, and market adjusted damages of
8 at least \$300,000 based upon the investment performance of the Standard & Poor's 500 Index
9 during the relevant period.

10 **IV. RELIEF REQUESTED**

11 As a result of the conduct set forth above, Claimant requests that a decision be rendered
12 against Respondents, jointly and severally, and that the Panel grant the following relief:

- 13 1. Compensatory damages according to proof;
- 14 2. Punitive damages as provided pursuant to California Civil Code Sections 3294;
- 15 3. Interest on the losses sustained from the date of the loss;
- 16 4. Attorneys' fees and costs, including expert witness fees; and
- 17 5. Such other and further relief as the Panel deems just and appropriate.

18 Respectfully submitted this __ day of April 2018.

19
20 _____
Charles H. Field

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23 **CERTIFICATE OF SERVICE**

24 I HEREBY CERTIFY that Claimant's Statement of Claim was filed by FINRA's online
25 filing system this __ day of April 2018.

Charles H. Field

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