

Good afternoon Senator Duff and Senators of the Bank Committee. I am Dr. Henry Backe from Fairfield, CT. I have been practicing orthopedic surgery in Connecticut for 16 years and am a partner of Orthopaedic Specialty Group, a 16 doctor medical practice employing over 130 people. I am on the hospital staffs of St. Vincent's Medical Center and Bridgeport Hospital. I have been a voluntary commissioner in the Town of Fairfield for nine years. My wife and I have four children and we live in district 28 represented by Senator John McKinney.

I am here today to inform you about 140 participants of Orthopaedic Specialty Groups 401K pension plan. These participants come from 14 districts within the state of Connecticut and thus are constituents of Senator Anthony Musto, Senator Edwin Gomes, Senator Toni Boucher, Senator Andrew McDonald, Senator John McKinney, Senator Thomas Colapietro and Senator Rob Kane. These participants include 15 doctors and 125 employees such as nurses, x-ray technicians, medical assistants and administrative personnel.

Orthopaedic Specialty Group has had a retirement plan (the "Plan") for its employees since the 1970's. We currently have 140 participants of which 34 are now employed elsewhere or retired. We have followed all the ERISA rules and regulations governing pension plans and have been diligent in our fiduciary responsibilities. We have hired pension administrators for recordkeeping; our

pension documents have been kept current with appropriate amendments by attorneys, and our accountants have completed every required filing since the Plan's inception.

Sixteen years ago, in 1992, we engaged Bernard Madoff Investment Securities Co. ("Madoff") to be our investment advisor and have invested all the Plan's assets with Madoff. The Plan was funded by employee contributions, individual rollovers, and employer contributions. As of November 30, 2008, the plan had a net capital investment of \$11,581,000 and a statement balance at Madoff of approximately \$33 million. The OSG Plan took comfort in the fact that its plan's assets were invested with a well known and highly respected investment adviser and broker-dealer that was registered with the SEC, and subject to routine examination and oversight by the SEC and FINRA. For over 16 years, the OSG Plan received confirmations from Madoff for thousands of securities transactions, mostly in blue chip stocks of major US corporations and US Treasury securities. We also received from Madoff monthly statements of our account activity, as well as quarterly and annual portfolio management reports. The OSG Plan was audited by the U.S. Department of Labor in 2005 and no concerns were raised. We also had an independent audit conducted in 2008, by a reputable accounting firm in CT and again no concerns were raised. The Partners of OSG have made routine visits to Madoff's offices in New York City since 1992.

The news in early December 2008, that all the investment activity in Madoff was a sham, and that Madoff was in fact the world's largest Ponzi scheme, was devastating to us. We have three senior employees close to retirement who now do not know when or whether they can stop working. This affected OSG's recruitment planning to hire new physicians. We had given two new physicians employment offers that we are now unsure we can honor because senior doctors with plans to retire soon have now decided they need to keep working full time for many more years. Our employees are scared, worried and angry. They express loss of confidence in the federal government and its agencies. Some have declined to have payroll deductions made for their Plan contributions going forward. Some have expressed concerns that they will have to sell their homes when they retire since all their savings have been stolen.

We have had to hire multiple attorneys for OSG, our Plan, and our employees. Our legal bills for this disaster have already climbed to over \$90,000. I personally have spent numerous hours night and day dealing with this tragedy rather than taking care of patients or spending time with my family.

We have heard from the numerous Congressional hearings on Madoff's Ponzi scheme and from the news media, that the SEC had information in 1992 linking Madoff to a Ponzi scheme. We now know that Harry Markopolos regularly advised the SEC of his concerns about Madoff. He even sent them a lengthy written report in 2005. The SEC ignored these warnings. I myself heard from Lori Richards, the Director, Office of Compliance for the SEC, that their exams of Madoff did not find fraud but that they only investigated his broker dealer

business and not his advisory business. Stephen Luperello the interim CEO of FINRA testified that Madoff's Broker Dealer business which was registered in 1960 was investigated by his agency but they had no authority to investigate his advisory business. These agencies failed in uncovering Madoff's fraud and allowed him to continue to take in billions of dollars of victim's funds, including the funds of the OSG plan.

We learned next that it was probable that the Securities Investor Protection Corporation ("SIPC"), which took over Madoff, may take the position that the OSG Plan participants were not individual customers of Madoff, and each not entitled to SIPC coverage. Instead, it is likely that SIPC will treat the plan itself as the only customer of Madoff. In other words, the 140 participants in the plan, with a supposed value of 33 million dollars, would have to share in a maximum \$500,000 recovery. As I said to the U.S. Senate Banking Committee, chaired by our Senator Christopher Dodd, in January "This is not right, this is not just".

In 1978, Congress added Section 401(k) to the Internal Revenue Code allowing employers to add cash or deferred arrangement to their traditional profit sharing plans. This meant that for the first time, employee-participants were allowed to elect to contribute or invest, on a pre-tax or before-tax basis, a portion of their own salary to the 401(k) profit sharing plan. Clearly, the intent of Congress, with respect to its original enactment of 401(k), and its numerous revisions to 401(k) over the years, was to encourage **individual** employee participation in employer

sponsored retirement plans, and maximize the amount of capital set aside for employees' retirement. Although the ERISA rules and regulations are set up to protect the **individual** pension participant and SIPA was created by Congress to protect the investor there is no effective safeguard or guarantee for individuals saving in this vehicle other than SIPC.

The OSG Plan is such a 401(k) plan in which each employee-participant has his or her own individual account, consisting of contributions which determine the amount of a participant's retirement benefit. Although Madoff supposedly traded on behalf of the Plan, pursuant to ERISA he was trading on behalf of the plans **individual** participants.

Senators, the 140 participants in the OSG plan are not wealthy hedge fund investors, nor are they mega rich movie stars or professional sports figures. They are regular working class Americans, most of modest means who annually put aside a substantial percentage of their wages to try to ensure that they could enjoy a dignified retirement in the near or distant future. They were let down by Madoff, the regulators, the SEC and FINRA. We hope and request that you will stand beside your constituents and convince SIPA, which was created to protect small investors from harm, to help us as individuals.

We respectfully request that you, our legislators work with us to convince our Congress and Federal government to ensure that participants in pension plans,

be it ours or any other in Connecticut who invested through Madoff, will be covered by SIPC insurance individually, or that they are recompensed in some other manner by the federal government in light of the SEC's repeated failure to stop Madoff from stealing money. We would like to see our State government demand of the federal government quality oversight through its agencies so that pension plans do not suffer this type of theft loss in the future. This would help to restore the confidence and trust of Connecticut citizens saving for retirement.

Edith Kallas, an attorney who has worked with the Connecticut State Medical Society summed it up for me and I paraphrase:

"Unfortunately, investors like you and the employees in your office -- who have worked years taking care of patients and were saving your hard earned money for retirement -- were in some ways the perfect "mark" for the Ponzi scheme. Individuals saving for retirement supplied a steady stream of funds to Madoff each year, which could not be withdrawn until retirement without paying significant penalties. Now, your entire retirement's savings have disappeared and you can only hope that the government will come to your aid as it has done for the countless financial institutions that have nearly destroyed our economy.

Senators, we need support from our state legislature to urge Congress and the federal government and its agencies to afford protection to its citizens affected by Madoff.

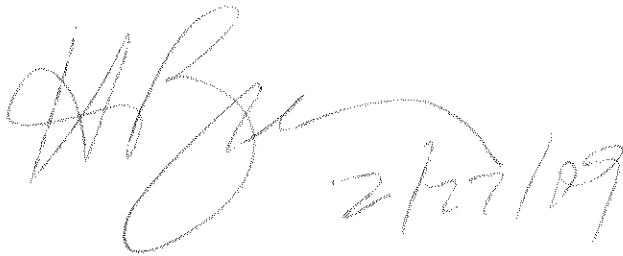
We also need to protect future generations from similar catastrophes. I suggest some ways we can do this are:

1. Implement mandatory fiduciary insurance for a broker-dealer/investment manager who has custody of pension plan assets, insuring the plan against loss where the broker-dealer/investment manager is negligent or imprudent.
- 2.) Mandate an ERISA bond insuring against fraud or embezzlement, to be maintained by the broker-dealer/investment manager, which covers such broker-dealer/investment manager's clients' assets.
- 3.) mandate that accountants performing audits of Broker dealers who handle pension plans must be registered and certified.
- 4.)Mandate that investment advisors of pension plans have independent custodians similar to that of mutual funds.
- 5.) Mandate that Investment advisors must not be able to use their own broker dealer for transactions of pension plan assets.
- 6.)Demand transparency and open access to plan performance and records.

Senators, in my mind Mr. Madoff is an **“Economic Terrorist”** who has significantly affected our globe. Although we can not be and are not responsible for all the world’s victims of Madoff’s ponzi scheme, we can and should work in

what ever capacity we can for our State's citizens. I know of other medical practices in our state who also lost their pensions in Madoff that need your help. I have brought copies of my testimony to the US Senate Banking committee for your committee's review; I have been in contact with Senator Dodd's office for their continued support, I have employees writing letters to their Congressmen. I have had conference calls with people representing pension plans from other states. I believe I have already started your task at hand and I ask this Congress to join me in doing whatever proves necessary. Paraphrasing President Obama's words from his speech to Congress this week, **"Our resolve should be your inspiration"**.

Thank you.

A handwritten signature in cursive script, followed by the date "2/27/09" written in a similar style.

January 27, 2009

U.S. Senate Committee on Banking, Housing, and Urban Affairs

**Hearing: Madoff Investment Securities Fraud: Regulatory and Oversight
Concerns and the Need for Reform**

Witness Statement: Henry A. Backe, Jr., M.D.

Orthopaedic Surgeon, Fairfield, CT

Good morning Senators. Thank you for allowing me to speak on behalf of 140 United States taxpaying citizens from the State of Connecticut. I am an Orthopaedic Surgeon, and a Partner of Orthopaedic Specialty Group ("OSG"), a medical practice located in Fairfield, Connecticut. We care for the medical needs of the insured and uninsured people of the greater Bridgeport, CT, region in New England. OSG, incorporated in 1971, has been in existence for over 75 years. We employ 130 people with annual incomes ranging from \$28,000 to \$130,000. We have some employees who have worked with us for over 30 years. OSG has had a retirement plan (the "Plan") for its employees since the 1970's. We currently have 140 participants of which 34 are now employed elsewhere or retired. We have followed all the ERISA rules and regulations governing pension plans and have been diligent in our fiduciary responsibilities. We have hired pension administrators for recordkeeping; our pension documents have been kept current with appropriate amendments by attorneys, and our accountants have completed every required filing since the Plan's inception.

Sixteen years ago, in 1992, we engaged Bernard Madoff Investment Securities Co. ("Madoff") to be our investment advisor and have invested all the Plan's assets with Madoff. Participants in the Plan include 15 doctors and 125 staff members such as nurses, x-ray technicians, medical assistants and administrative personnel. The Plan was funded by employee contributions, individual rollovers, and employer contributions. As of November 30, 2008, the plan had a net capital investment with Madoff of \$11,581,000 and a statement balance of approximately \$33 million.

The Partners of OSG have made routine visits to Madoff's offices in New York City since 1992. The OSG Plan took comfort in the fact that its assets were invested with a well known and highly respected investment adviser and broker-dealer that was registered with the SEC, and subject to routine examination and oversight by the SEC and FINRA. For over 16 years, the OSG Plan received confirmations from Madoff for thousands of securities transactions, mostly in blue chip stocks of major US corporations and US Treasury securities. We also received from Madoff monthly statements of our account activity, as well as quarterly and annual portfolio management reports.

The OSG Plan was audited by the U.S. Department of Labor in 2005 and no concerns were raised. We also had an independent audit conducted in 2008, by a reputable accounting firm in CT and again no concerns were raised. As recent as October 2008, we sent three of our Partners to Madoff's office to discuss the

volatile markets and check on our investments. One Partner, now 70 years of age, had over 30 years worth of retirement contributions and was interested in self managing his account since he was preparing to retire. We were assured by Madoff that his money was accessible and he could move it to a different type of account that he could manage at any time.

The news in early December 2008, that all the investment activity in Madoff was a sham, and that Madoff was in fact the world's largest Ponzi scheme, was devastating to us. We have three senior employees close to retirement who now do not know when or whether they can stop working. This affected OSG's recruitment planning to hire new physicians. We had given two new physicians employment offers that we are now unsure we can honor because senior doctors with plans to retire soon have now decided they need to keep working full time for many more years. Our employees are scared, worried and angry. They express loss of confidence in the federal government and its agencies. Some have declined to have payroll deductions made for their Plan contributions going forward. Some have expressed concerns that they will have to sell their homes when they retire since all their savings have been stolen. We have seen disagreements and friction among our employees over this matter. We fear we may have a very uncomfortable and unhealthy work environment if this takes years to sort out. This is the last thing a medical practice needs when treating patients. Our physicians are some of the most well trained and highly respected

orthopaedists in the area, but our community's perception of OSG has changed. Partners have told me people ask if we are closing down.

We have had to hire multiple attorneys for OSG, our Plan, and our employees. This month alone we have already incurred legal bills in excess of \$70,000. I personally spend at least two hours of my day dealing with this tragedy rather than taking care of patients.

Then, to add further insult to injury, we learned that the SEC had information linking Madoff to a Ponzi scheme as far back as 1992, and that starting in 1999 a gentleman named Harry Markopolos regularly advised the SEC that Madoff was a giant Ponzi scheme, and in fact provided a roadmap to the SEC as to how to unmask Madoff as a fraud. But the agency allowed Madoff not only to continue in operation, but to continue to take in billions of additional dollars of victim's funds, including the funds of the OSG Plan.

We learned next that it was highly likely that the Securities Investor Protection Corporation ("SIPC"), which took over Madoff, may take the position that the OSG Plan participants were not individual customers of Madoff, and each not entitled to SIPC coverage. Instead, it was likely that SIPC was going to treat the plan itself as the only customer of Madoff. In other words, the 140 participants in the plan, who lost a total of \$11,581,000 capital investment, would have to share in a maximum \$500,000 recovery. This is not right or just. Our pension plan

functioned as an individual retirement savings plan. Each participant received individual statements; each was able to rollover moneys from outside accounts to their own account within the Pension Plan. Each participant was allowed to, and some did, take out loans against their account. The intent was individual accounts and the plan operated in that way. Madoff traded on behalf of the Plan as one account. One of my Partners spoke with an attorney from SIPC who advised him that the initial intent of SIPC was to cover the individual investor.

Senators, the 140 participants in the OSG plan are not wealthy hedge fund investors, nor are they beneficiaries of multimillion dollar offshore trusts. They are regular working class Americans, most of modest means who annually put aside a substantial percentage of their wages to try to ensure that they could enjoy a dignified retirement in the near or distant future. They were let down by Madoff, the regulators, the SEC and FINRA. We hope and request that SIPC, which was created to protect small investors from harm, will help us as individuals.

We respectfully request that our legislators ensure that participants in pension plans, be it ours or any other who invested through Madoff, will be covered by SIPC insurance individually, or that they are recompensed in some other manner by the federal government in light of the SEC's repeated failure to stop Madoff from stealing money. We would like to see the government provide quality oversight through its agencies so that pension plans do not suffer this type of

theft loss in the future. This would help to restore the confidence and trust of Americans saving for retirement.

We would like the IRS to clarify or expand what can be considered a “theft loss” in this situation and/or waive the maximum contribution restrictions for individuals or employers affected by Madoff so they can rebuild their pension plans on an accelerated schedule.

On behalf of OSG, we, as citizens of the United States of America, appreciate your time and work on our behalf. What we need now, more than anything, is quick resolution to this issue so we can get back to our own professions and jobs taking care of the health of our fellow Americans.

Thank you.

Henry A. Backe, Jr., M.D.