

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

Adv. Pro. No. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

Adv. Pro. No. 10-3268 (BRL)

v.

RICHARD I. STAHL; REED ABEND; THE  
LAUTENBERG FOUNDATION, JOSHUA S.  
LAUTENBERG, ELLEN LAUTENBERG;  
MATIAS ERAUSQUIN, ENRIQUE ERAUSQUIN,  
LILIANA CONTRONE and YOLANDA  
FRISCHKNECHT, on behalf of themselves  
and those they purport to represent;  
NEVILLE SEYMOUR DAVIS, on behalf of  
himself and those he purports to  
represent; EMILIO CHAVEZ, JR.;  
RETIREMENT PROGRAM FOR EMPLOYEES  
OF THE TOWN OF FAIRFIELD, THE  
RETIREMENT PROGRAM FOR POLICE  
OFFICERS AND FIREMEN OF THE TOWN  
OF FAIRFIELD and THE TOWN OF FAIRFIELD;  
FLB FOUNDATION, LTD., JAY WEXLER,  
individually and derivatively on behalf of Rye Select  
Broad Market Prime Fund, L.P.; DANIEL RYAN and  
THERESA RYAN, individually and on behalf of the  
RYAN TRUST; MATTHEW GREENBERG,

WALTER GREENBERG and DORIS GREENBERG,  
individually and on behalf of the Estate of Leon  
Greenberg; and DONNA MCBRIDE, individually and  
derivatively on behalf of Beacon Associates LLC II,

Defendants.

**ORDER TO SHOW CAUSE**

THIS MATTER having been brought to the Court's attention through the application (the "Application") brought by Irving H. Picard, Esq., as trustee (the "Trustee") for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, individually, seeking relief pursuant to 11 U.S.C. §§ 362(a) and 105(a), 15 U.S.C. §§ 78eee(a)(3) and 78eee(b)(2)(B)(i) and Rule 7065 of the Federal Rules of Bankruptcy Procedure for Enforcement of the Automatic Stay and Preliminary Injunction, enjoining and restraining the third party plaintiffs whose names appear in the caption (collectively, the "Third Party Plaintiffs") who have commenced actions (the "Third Party Actions") against Ruth Madoff, Peter Madoff, Andrew Madoff, Mark Madoff and Shana Madoff (collectively, the "Madoff Defendants") from prosecuting those actions as against the Madoff Defendants until the Trustee's actions against the Madoff Defendants have been completed; and

UPON REVIEW AND CONSIDERATION of the Memorandum of Law in Support of the Application, the supporting Affidavit of David J. Sheehan, Esq., sworn to on May 27, 2010, the supporting Affidavit of Matthew Cohen, sworn to on May 26, 2010, the complaint by the Trustee against the Third Party Plaintiffs, dated May 27, 2010 (the "Complaint"), and all of the prior proceedings, pleadings and other submissions in this and related actions,

Now, therefore, IT IS HEREBY:

ORDERED that the Third Party Plaintiffs show cause before this Court, United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New

York, 10004 on the 19<sup>th</sup> day of August, 2010, at 10:00 a.m., as to why the Court should not (1) deem the Third Party Actions to be in violation of the December 15, 2008 stay order and related orders and the automatic stay provisions of § 362 of the Bankruptcy Code and § 78eee(b)(2)(B)(i) of SIPA and, thus, declare the Third Party Actions to be void *ab initio* as against the Madoff Defendants; and (2) issue an injunction, pursuant to 11 U.S.C. §§ 362(a) and 105(a) and Bankruptcy Rule 7065, enjoining the Third Party Plaintiffs and those acting in concert or participation with them, or on their behalf, and all defendants, from proceeding with their litigation of the Third Party Actions as against the Madoff Defendants, and from conducting discovery of the Trustee, until such time as the Trustee has completed his actions against the Madoff Defendants; and it is further

ORDERED that any responses or objections to the relief sought shall be filed and served upon counsel for the Trustee by **June 30, 2010**; and it is further

ORDERED that any replies by the Trustee shall be filed and served upon counsel for the Third Party Plaintiffs by **July 30, 2010**; and it is further

ORDERED that the Trustee shall serve a copy of this Order to Show Cause, the Memorandum of Law in Support of Trustee's Application, the Complaint, the supporting Affidavits of David J. Sheehan, Esq. and Matthew Cohen, and the Proposed Order Enforcing Automatic Stay and Enjoining Defendants on known counsel for the Third Party Plaintiffs and counsel of the Madoff Defendants by 3 p.m. on **May 28, 2010**; and it is further

ORDERED that the Trustee is hereby authorized to serve copies of the Exhibits to the supporting Affidavits of David J. Sheehan, Esq. and Matthew Cohen in compact disc format due to the voluminous nature of the Exhibits by overnight delivery; and it is further

ORDERED that the Trustee shall also serve a copy of this Order to Show Cause, the Memorandum of Law in Support of Trustee's Application, the Complaint, the Supporting

Affidavits of David J. Sheehan, Esq. and Matthew Cohen, and the Proposed Order Enforcing Automatic Stay and Enjoining Defendants by 3 p.m. on **May 28, 2010** on the Securities Investor Protection Corporation, 805 Fifteenth Street, NW, Suite 800, Washington, DC 20005, Attn: Josephine Wang, Esq.; and it is further

ORDERED that all service hereunder shall be made via electronic mail, facsimile, overnight delivery and/or hand delivery, as well as the Court's Electronic Case Filing ("ECF") system.

ORDERED, that the entry of this Order shall in no way preclude the Trustee from seeking a Temporary Restraining Order against any of the Third Party Plaintiffs should the Trustee determine that such relief is necessary or appropriate; and it is further

ORDERED, that this Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

Dated: New York, New York  
May 28, 2010

/s/ Burton R. Lifland  
HONORABLE BURTON R. LIFLAND  
UNITED STATES BANKRUPTCY JUDGE

**Baker & Hostetler LLP**  
45 Rockefeller Plaza  
New York, NY 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Email: [dsheehan@bakerlaw.com](mailto:dsheehan@bakerlaw.com)  
*Attorneys for Irving H. Picard, Esq., Trustee  
for the Substantively Consolidated SIPA Liquidation  
of Bernard L. Madoff Investment Securities LLC  
and Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

RICHARD I. STAHL; REED ABEND; THE  
LAUTENBERG FOUNDATION, JOSHUA S.  
LAUTENBERG, ELLEN LAUTENBERG;  
MATIAS ERAUSQUIN, ENRIQUE ERAUSQUIN,  
LILIANA CONTRONE and YOLANDA  
FRISCHKNECHT, on behalf of themselves  
and those they purport to represent;  
NEVILLE SEYMOUR DAVIS, on behalf of  
himself and those he purports to

Adv. Pro. No. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. \_\_\_\_\_

represent; EMILIO CHAVEZ, JR.;  
RETIREMENT PROGRAM FOR EMPLOYEES  
OF THE TOWN OF FAIRFIELD, THE  
RETIREMENT PROGRAM FOR POLICE  
OFFICERS AND FIREMEN OF THE TOWN  
OF FAIRFIELD and THE TOWN OF FAIRFIELD;  
FLB FOUNDATION, LTD., JAY WEXLER,  
individually and derivatively on behalf of Rye Select  
Broad Market Prime Fund, L.P.; DANIEL RYAN and  
THERESA RYAN, individually and on behalf of the  
RYAN TRUST; MATTHEW GREENBERG,  
WALTER GREENBERG and DORIS GREENBERG,  
individually and on behalf of the estate of Leon  
Greenberg; and DONNA MCBRIDE, individually and  
derivatively on behalf of Beacon Associates LLC II,

**COMPLAINT**

Defendants.

Irving H. Picard, Esq., as trustee (the "Trustee") for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"), and Bernard L. Madoff ("Madoff"), by and through his undersigned counsel, for his Complaint, alleges as follows:

**NATURE OF THE ACTION**

1. The Trustee commences this adversary proceeding to prevent certain third party plaintiffs, whose names appears in the caption above (collectively, the "Third Party Plaintiffs"), from undermining this Court's continuing jurisdiction over the estate of BLMIS and its customers' property. By commencing actions against Ruth Madoff, Peter Madoff, Mark Madoff, Andrew Madoff and Shana Madoff (collectively, the "Madoff Defendants") in various jurisdictions ("Third Party Actions"), the Third Party Plaintiffs have violated the automatic stay provisions of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), section 78eee(b)(2)(B) of SIPA and the other stay orders issued in connection with these proceedings (the "Stay Orders"), threaten the orderly administration of the BLMIS estate and

seek to diminish the pool of assets from which the Trustee must make equitable and *pro rata* distributions to the victims of Madoff's fraud.

2. By protecting this Court's jurisdiction over the administration of the BLMIS estate, the Trustee seeks to ensure that customer property is distributed to the victims of Madoff's massive Ponzi scheme in a fair and efficient manner consistent with SIPA and the Bankruptcy Code.

3. In early December 2008, BLMIS generated statements for its approximately 4,900 customer accounts. When added together, these statements purported to show that clients of BLMIS had approximately \$64.8 billion invested with BLMIS. In reality, BLMIS only had assets on hand worth a small fraction of that amount. On March 12, 2009, Madoff admitted that he "operated a Ponzi scheme through the investment advisory side of [BLMIS]" (Plea Hr'g Tr. At 23:14-17) and pled guilty to an 11 count criminal information filed against him. On June 29, 2009, Madoff was sentenced to serve 150 years in federal prison for his crimes.

4. The Trustee, pursuant to his duties under SIPA, is working to locate, marshal and preserve customer property to maximize recovery for all of BLMIS' defrauded customers. Part of this recovery process involves identifying those individuals and entities who received avoidable transfers from BLMIS and attempting to recover these funds for the statutory *pro rata* distribution to all customers.

5. The Trustee has commenced adversary proceedings against the Madoff Defendants in this Court (the "Trustee's Madoff Actions"), seeking to recover nearly \$200 million that the Madoff Defendants received in fraudulent and unauthorized transfers from BLMIS, which money belongs to BLMIS and its defrauded customers.

6. The Third Party Actions threaten to thwart the Trustee's efforts, as the Third Party Plaintiffs seek to recover fictitious profits and avoidable transfers for themselves directly from the Madoff Defendants, instead of more appropriately through the equitable distribution process in the SIPA proceeding. To allow the Third Party Actions to proceed would frustrate the claims administration process established by this Court, allowing those who filed their own separate lawsuits to potentially recover more than other customers, while at the same time, usurping the Trustee's authority and divesting him of his power to marshal customer property for equitable distribution. The Third Party Actions must be enjoined, as the Third Party Plaintiffs' conduct is an affront to this Court's jurisdiction and willfully disregards the automatic stay provisions of the Bankruptcy Code, SIPA and the Stay Orders.<sup>1</sup>

7. Accordingly, the Trustee respectfully requests that the Court: (i) declare that, as against the Madoff Defendants, the Third Party Actions violate the automatic stay and the Stay Orders and are void *ab initio*; and (ii) issue an injunction prohibiting the Third Party Plaintiffs from pursuing the Third Party Actions as against the Madoff Defendants, or any other actions as against the Madoff Defendants, and prohibiting discovery against the Trustee in connection with the Third Party Actions, until such time as the Trustee has completed the actions he has commenced against the Madoff Defendants.

#### **JURISDICTION AND VENUE**

8. This is an adversary proceeding brought in this Court—the Court in which the main underlying SIPA proceeding, No. 08-01789 (BRL) (Substantively Consolidated) is pending. The SIPA proceeding is a combined proceeding with the Securities and Exchange Commission (the "SEC") and was originally brought in the United States District Court for the

---

<sup>1</sup> As identified in paragraph 15, *infra*.



Southern District of New York as *Securities Exchange Commission v. Bernard L. Madoff Investment Securities LLC et al.*, No. 08 CV 10791 prior to its removal to this Court. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and sections 78eee(b)(2)(A) and (b)(4) of SIPA.

9. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

10. Venue in this district is proper under 28 U.S.C. § 1409.

11. The Third Party Plaintiffs have availed themselves of this Court's jurisdiction by commencing actions seeking to recover customer property. The Third Party Plaintiffs, their claims and their actions are detailed further herein.

#### **BACKGROUND, THE TRUSTEE AND STANDING**

12. On December 11, 2008 (the "Filing Date"), Madoff was arrested by federal agents and criminally charged with a multi-billion dollar securities fraud scheme in violation of 15 U.S.C. §§ 78j(b), 78ff, and 17 C.F.R. 240.10b-5 in the United States District Court for the Southern District of New York (the "District Court"), captioned *United States v. Madoff*, No. 08 MAG 2735.<sup>2</sup> Contemporaneously, the SEC filed a complaint in the District Court against, among others, Madoff and BLMIS (Case No. 09-CV-10791) The SEC complaint alleged that Madoff and BLMIS engaged in fraud through the investment advisor activities of BLMIS.

13. On December 15, 2008, pursuant to section 78eee(a)(4)(A) of SIPA, the SEC consented to a combination of its own action with an application of SIPC. Thereafter, pursuant to section 78eee(a)(4)(B) of SIPA, SIPC filed an application in the District Court alleging, *inter*

---

<sup>2</sup> On March 10, 2009, the criminal case was transferred to Judge Denny Chin in the District Court and was assigned a new docket number, No. 09 CR 213 (DC).

*alia*, that BLMIS was not able to meet its obligations to securities customers as they came due and, accordingly, its customers needed the protections afforded by SIPA.

14. Also on December 15, 2008, the District Court granted the SIPC application and entered a Protective Decree, which was consented to by BLMIS. The Decree, in pertinent part: (i) appointed the Trustee for the liquidation of the business of BLMIS pursuant to section 78eee(b)(3) of SIPA; (ii) appointed Baker & Hostetler LLP as counsel to the Trustee pursuant to section 78eee(b)(3) of SIPA; and (iii) removed the case to this Court pursuant to section 78eee(b)(4) of SIPA.

15. In an order entered on December 15, 2008, the District Court entered an order declaring that “all persons and entities are stayed, enjoined and restrained from directly or indirectly . . . interfering with any assets or property owned, controlled or in the possession of [BLMIS].” *SEC v. Bernard L. Madoff*, 08-CIV-10791 (LLS), Dkt. No. 4 ¶ IV (reinforcing automatic stay); *see also* Order on Consent Imposing Preliminary Injunction Freezing, Assets and Granting Other Relief Against Defendants, Dec. 18, 2008, Dkt. No. 8 at ¶ IX (“no creditor or claimant against [BLMIS], or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession or management of the assets subject to the receivership.”); Partial Judgment on Consent Imposing Permanent Injunction and Continuing Other Relief, Feb. 9, 2009, Dkt. No. 18 at ¶ IV (incorporating and making the December 18, 2008 stay order permanent). (These orders are collectively referred to as the Stay Orders.)

16. By orders dated December 23, 2008 and February 4, 2009, respectively, this Court approved the Trustee’s bond and found that the Trustee was a disinterested person. Accordingly, the Trustee is duly qualified to serve and act on behalf of the estate of BLMIS.

17. On March 12, 2009, Madoff pled guilty to an 11-count criminal information. At the Plea Hearing, Madoff admitted that he “operated a Ponzi scheme through the investment advisory side of [BLMIS].” *See United States v. Madoff*, No. 09 CR 213 (DC), Docket No. 57, Plea Hr’g Tr. at 23:14–17.

18. On April 13, 2009, an involuntary bankruptcy petition was filed against Madoff, and on June 9, 2009, this Court entered an order substantively consolidating the Chapter 7 estate of Madoff into the SIPA Proceeding.

19. Appointed under SIPA, the Trustee is charged with recovering and distributing customer property to BLMIS’s customers, assessing claims, and liquidating any other assets of the firm for the benefit of the estate and its creditors. Consistent with his duties, the Trustee is marshalling BLMIS’s assets, and is well underway in that process.

20. The assets recovered, however, will not be sufficient to reimburse the customers of BLMIS for the billions of dollars that they invested with BLMIS over the years. Consequently, the Trustee must use his authority under SIPA and the Bankruptcy Code to pursue recovery from, among others, those who enabled the Ponzi scheme to operate. Absent these recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of 15 U.S.C. § 78fff-2(c)(1).

21. Pursuant to section 78fff-1(a) of SIPA, the Trustee has the general powers of a bankruptcy trustee in a case under the Bankruptcy Code. Chapters 1, 3, 5 and subchapters I and II of chapter 7 of the Bankruptcy Code are applicable to this case, to the extent consistent with SIPA.

22. In addition to the powers of bankruptcy trustee, the Trustee has broader powers granted by SIPA pursuant to 15 U.S.C. §§ 78aaa *et seq.*

23. The Trustee is a real party in interest and has standing to bring these claims pursuant to 15 U.S.C. § 78fff-1 and the Bankruptcy Code, including sections 323(b) and 704(a)(1), because, among other reasons:

- a. The Third Party Plaintiffs request relief that will affect “customer property” as defined in 15 U.S.C. § 78fff(4).
- b. The Third Party Plaintiffs request relief that may affect the distribution of customer property and the orderly administration of the estate.
- c. BLMIS’s customers could be injured in the absence of the Trustee’s filing of this Complaint.
- d. The Trustee will not be able to fully satisfy all claims.

#### **THE FRAUDULENT PONZI SCHEME**

24. Madoff founded BLMIS in 1960. Until his arrest, Madoff was the sole member and chairman of BLMIS. BLMIS had its principal place of business in New York and engaged in three primary types of business: market making, proprietary trading, and investment advisory services. BLMIS was registered with the SEC as a broker-dealer and then registered in 2006 as an investment adviser. Pursuant to its registration as a broker-dealer, BLMIS was a member of SIPC.

25. Madoff solicited billions of dollars under false pretenses and failed to invest investors’ money as promised. Instead, he deposited investors’ money in a bank account at J.P. Morgan Chase Manhattan Bank. *See* Madoff Allocation at p. 1. Madoff represented to clients and prospective clients that he would invest their money in shares of common stock, options and other securities and would, at their request, return profit and principal. *See id.* As the world is now aware, virtually no securities were purchased by Madoff for his customers.

26. By early December 2008, BLMIS generated statements for its approximately 4,900 active customer accounts. When added together, these statements erroneously showed that the customers of BLMIS had approximately \$64.8 billion invested with BLMIS. In reality, BLMIS had assets on hand worth only a small fraction of that amount. Madoff's massive Ponzi scheme imploded and came to an end on December 11, 2008, the date on which he was arrested.

### **THE COURT-ORDERED CLAIMS ADMINISTRATION PROCESS**

27. The Trustee sought and obtained a Court order to implement a customer claims process in accordance with SIPA.

28. Pursuant to an application of the Trustee dated December 21, 2008 (Dkt. No. 8), this Court entered the Claims Procedures Order (Dkt. No. 12), which directed, among other things, that on or before January 9, 2009: (a) a notice of the commencement of this SIPA Proceeding be published; (b) a notice of the liquidation proceeding and claims procedure be given to persons who appear to have been customers of BLMIS; and (c) notice of the liquidation proceeding and a claim form be mailed to all known general creditors of BLMIS.

29. More than 16,000 potential customers, general creditor and broker-dealer claimants were included in the mailing of the notice.

30. Under the Claims Procedures Order, claimants were directed to mail their claims to the Trustee. All customers and creditors were notified of the mandatory statutory bar date for filing of claims under section 78fff-2(a)(3) of SIPA, which was July 2, 2009 (the "Bar Date"). The Trustee also provided several reminder notices.<sup>3</sup>

---

<sup>3</sup> On May 21, 2009, the Trustee mailed a reminder notice to customers who had not yet filed a claim that the statutory bar date was July 2, 2009. On June 22, 2009, the Trustee mailed a final bar date reminder notice (the "Final Reminder Notice") to 7,766 known past and present customers of BLMIS from whom a claim had not yet been received. In addition, the Trustee posted the Final Reminder Notice on the Trustee's website.

31. By the Bar Date, the Trustee had received 16,239 customer claims.

**THE TRUSTEE'S ACTIONS AGAINST THE MADOFF DEFENDANTS**

32. On July 29, 2009, the Trustee commenced his action against Ruth Madoff, *Picard v. Ruth Madoff*, Adv. Pro. No. 09-1391 (BRL) in this Court, alleging that, although not an employee of BLMIS, she received tens of millions of dollars from BLMIS for no legitimate business purpose or corresponding benefit to BLMIS, and to which she had no good faith basis to believe she was entitled. (Ruth Madoff Cmplt ¶¶ 2, 42.) (Dkt. No. 1.)

33. The Complaint is seeking the return from Ruth Madoff of more than \$44 million of BLMIS customer property under SIPA §§ 78fff(b), 78fff-1(a), and 78fff-2(c)(3), §§ 105(a), 502(d), 541, 542, 544, 548(a), 550(a), and 551 of the Bankruptcy Code, the New York Fraudulent Conveyance Act (N.Y. Debt. & Cred. § 270 *et seq.*), and New York common law. The Trustee's common law claims sound in conversion and unjust enrichment, and the Trustee seeks the imposition of a constructive trust, an accounting, and compensatory and punitive damages. (*Id.* ¶¶ 104-123.)

34. On October 2, 2009, the Trustee commenced an action against Peter Madoff, Andrew Madoff, Mark Madoff and Shana Madoff, *Picard v. Madoff*, Adv. Pro. No. 08-01789 (BRL) alleging, *inter alia*, that, as senior executives of BLMIS, they had a duty to protect BLMIS and its customers from acts of mismanagement, and that they were derelict in their duties. (Trustee's Madoff Complaint ¶¶ 2, 28, 33, 51.) (Dkt. No. 1.)

35. The Trustee's Madoff Complaint alleges that at the same time they disregarded their regulatory and compliance duties, the four Madoff Defendants collectively received almost \$200 million of BLMIS customer funds. (*Id.* ¶ 4.)

36. With respect to Peter Madoff and Shana Madoff, the Trustee's Madoff Complaint alleges that they, who were both responsible for "monitoring BLMIS's operation and ensuring its compliance with federal securities laws and regulations and corresponding FINRA rules and regulations," completely failed to discharge their duties. (*Id.* ¶¶ 37, 43, 44.)

37. The Trustee's Madoff Complaint further alleges that Mark Madoff and Andrew Madoff either knew or should have known that serious violations of the securities laws were taking place in the businesses under their supervision and control, and that they either deliberately ignored or failed to detect and stop these violations. (*See id.* ¶¶ 47-49.) These businesses included not only BLMIS, but also Madoff Securities International Limited ("MSIL"), of which both Mark and Andrew Madoff were co-directors and controllers. (*Id.* at ¶¶ 7-8.)

38. The Trustee's Madoff Complaint seeks the return from the named Madoff Defendants of nearly \$200 million of BLMIS customer property under SIPA §§ 78fff(b), 78fff-1(a), 78fff-2(c)(3), sections 105(a), 502(d), 541, 542, 544, 548(a), 550(a), and 551 of the Bankruptcy Code, the New York Fraudulent Conveyance Act, and New York common law. The Trustee's Madoff Complaint also seeks compensatory and punitive damages for breach of fiduciary duty, conversion, unjust enrichment, negligence, and seeks the imposition of a constructive trust and an accounting. (*Id.* ¶¶ 176-214.)

**THE THIRD PARTY ACTIONS VIOLATE THE EXISTING STAYS AS THEY ARE  
DUPLICATIVE OR DERIVATIVE OF THE TRUSTEE'S COMPLAINTS AND SEEK  
CUSTOMER PROPERTY**

39. There are currently 12 Third Party Actions pending against the Madoff Defendants that the Trustee seeks in this action to enjoin.

40. Each of the Third Party Actions is duplicative or derivative of the Trustee's complaints against the Madoff Defendants.

41. Each of the Third Party Plaintiffs in all 12 Third Party Actions purports to be a customer or other creditor of BLMIS, or a so-called BLMIS feeder fund.

42. As is true of the Trustee's claims against the Madoff Defendants, all of the claims made in the Third Party Actions are based, , on the Madoff Defendants' conduct in their roles at BLMIS, as described below. The Third Party Plaintiffs do not allege any other, independent conduct by the Madoff Defendants.

43. Each of the Third Party Actions seeks customer property in the guise of damages.

42. Three of the Third Party Actions are against Madoff Defendants only, while the remaining nine actions name other defendants as well. At this time, the Trustee seeks an injunction only as to the Madoff Defendants, not other defendants. The Trustee's investigation is ongoing, and he reserves the right to seek injunctive and other relief with respect to other defendants.

### **THE THIRD PARTY ACTIONS**

#### **(1) Currently Active Third Party Actions**

43. The following six Third Party Actions are currently active: *The Lautenberg Foundation v. Madoff*, Case No. 09-cv-00816 (D.N.J.); *Stahl v. Madoff*, Index No. 601862/2009 (Sup. Ct. N.Y. Co.); *Abend v. Madoff*, Index No. 601861/2009 (Sup. Ct. N.Y. Co.); *Erausqin v. Notz, Stucki Management (Bermuda) Limited*, Case No. 09-cv-07846 (S.D.N.Y.); *In re Herald, Primeo and Thema Funds Securities Litig.*, Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.); and *Chavez v. Picard*, Case No. 09-mc-0006 (N.D. Tex.).

#### **(a) *The Lautenberg Foundation v. Madoff*, Case No. 09-cv-00816 (D.N.J.)**

44. All of the plaintiffs in the Lautenberg action have availed themselves of the claims procedures described above and have filed claims with the Trustee.



45. Each of the plaintiffs' allowed claims has been partially satisfied with funds advanced by SIPC, following the execution of assignments and releases.

46. Thus, the Lautenberg Plaintiffs (as defined below) are actively participating in the BLMIS liquidation and have submitted themselves to the jurisdiction of the Bankruptcy Court as BLMIS claimants, as evidenced by the filing of their customer claims.

47. On or about February 24, 2009, the Lautenberg Foundation, Joshua S. Lautenberg and Ellen Lautenberg (collectively, the "Lautenberg Plaintiffs") commenced an action against Peter Madoff in the District Court for the District of New Jersey (the "Lautenberg Action").

48. The Lautenberg Plaintiffs allege violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78 and SEC Rule 10b-5, 17 C.F.R., § 240, 10b-5, breach of fiduciary duty, negligent misrepresentation, negligence, liability under Section 20(a) of the Exchange Act and aiding and abetting breach of fiduciary duty against Peter Madoff. (Lautenberg Cmplt at ¶¶ 35-62.)

49. The Lautenberg Plaintiffs seek compensatory, consequential and punitive damages, attorneys' fees and other expenses and interest. (*Id.* at pp. 22-23.) They estimate their loss at a minimum to be \$8,992,000. (*Id.* ¶ 23.)

50. The Lautenberg Plaintiffs allege nothing other than pieces of what the Trustee alleges in his Madoff Complaint—that Peter Madoff knew or should have known of the Ponzi scheme and ignored obvious "red flags" and acquiesced in BLMIS's false representations. (*See, e.g., id.*, ¶¶ 31-34, 38.) There is absolutely no conduct alleged other than what the Trustee alleges.

51. The damages sought by the Lautenberg Plaintiffs are thus based entirely on their investment through BLMIS—nothing more, and are entirely duplicative of the Trustee’s allegations.

(b) *Stahl v. Madoff*, Index No. 601862/2009 (Sup. Ct. N.Y. Co.)  
*Abend v. Madoff*, Index No. 601861/2009 (Sup. Ct. N.Y. Co.)

52. Both Richard Stahl (“Mr. Stahl”) and Reed Abend (“Mr. Abend”) are former BLMIS employees who worked for the firm’s proprietary trading operations.

53. Both have availed themselves of the claims procedures described above and have filed claims in the BLMIS liquidation proceeding for deferred compensation and back pay.

54. Both claims are still being investigated by the Trustee.

55. Thus, Mr. Stahl and Mr. Abend are actively participating in the BLMIS liquidation and have submitted themselves to the jurisdiction of the Bankruptcy Court as BLMIS claimants, as evidenced by the filing of their customer claims.

56. Notably, among the damages these plaintiffs seek in their state court actions are damages in the exact dollar amounts specified in their creditor claims filed with the Trustee.

57. On or about June 10, 2009, Mr. Stahl and Mr. Abend, represented by the same counsel, filed separate actions in the Supreme Court of the State of New York, against Mark Madoff and Andrew Madoff, seeking the same recovery of deferred compensation and back pay that they seek as creditors of the estate.

58. Mr. Stahl seeks approximately \$1,300,000 in compensatory damages and Mr. Abend seeks \$475,000 in compensatory damages. (Stahl Cmplt ¶¶ 26, 36, 41, p. 9; Abend Cmplt ¶¶ 25, 35, 40, pp. 8-9.)

59. Their causes of action sound in fraud, fraudulent omission and failure to pay wages under New York Labor Law. (*Id.*, ¶¶ 31-47 and 30-46, respectively.)

60. The Stahl and Abend Complaints allege, in essence, that Mark and Andrew Madoff knew or should have known about their father's Ponzi scheme; that they never told BLMIS's employees about it or misrepresented the legitimacy of the Investment Advisory ("IA") business to BLMIS employees, including Stahl and Abend, in order to "perpetuate their father's lawless conduct" and induce the employees to continue to work for the "legitimate" arm of BLMIS. (Stahl Cmplt 7, 22-24); Abend Cmplt 7, 21-23)

61. The Stahl and Abend Complaints further allege that, in connection with the May *Barron's* article entitled "Don't Ask, Don't Tell," where the author questioned Madoff's consistent returns, "the Madoff Sons told the employees of the Trading Business—including Plaintiff—that the suspicions raised by the article were not true. The Madoff Sons went on to state falsely that Madoff's investment advisory business was completely legitimate." (Stahl Cmplt ¶¶ 22, 23; Abend Cmplt ¶¶ 21, 22.)

62. These alleged statements mimic misrepresentations made by Bernard Madoff, including in another May 2001 article, that the IA business was legitimate.

63. Mr. Stahl's and Mr. Abend's claims are based on the same operative facts as the claims by the Trustee, and the conduct alleged is inextricably linked to the Ponzi scheme. Moreover, they seek money from Andrew Madoff and Mark Madoff that they should be seeking—and are seeking—from the BLMIS estate. They allege no injury independent of the Ponzi scheme.

64. Discovery has commenced in both cases. Counsel for Mr. Stahl and Mr. Abend were scheduled to depose Mark Madoff and Andrew Madoff during the week of May 17, 2010, although those depositions now appear to have been delayed.

65. The parties also seek the Trustee's deposition and documents. The document requests to the Trustee are exceedingly broad and onerous. For example, Mr. Stahl seeks: "[a]ll communications sent by the Madoff Sons," "[a]ll documents and communications relating or referring to the legality of BMIS;" "[a]ll documents and communications relating or referring to the roles(s) of the Madoff Sons in the London office of BMIS;" and "[a]ll documents provided by the Madoff Sons to SIPC." Subpoena Duces Tecum, Subpoena Ad Testificandum, *Stahl v. Madoff*, Nos. 2,6,15,18. Meanwhile, Mark Madoff and Andrew Madoff seek, for example: "[a]ll documents concerning the operations of the Investment Advisory Business at BLMIS" and "[a]ll documents concerning Bernard Madoff's Ponzi scheme." Subpoena Duces Tecum, *Abend v. Madoff, Stahl v. Madoff*, Nos. 3 and 8.

(c) ***Erausquin v. Notz, Stucki Management (Bermuda) Limited, Case No. 09-cv-07846 (S.D.N.Y.)***

66. The plaintiffs in this putative class action allege that they were investors in Plaza Investments International Limited ("Plaza Fund"), a feeder fund which invested in BLMIS.

67. Plaza Fund filed a customer claim with the Trustee, which has not yet been determined by the Trustee.

68. On or about September 11, 2009, Matias Erausquin, Enrique Erausquin, Liliana Controne and Yolanda Frischknecht (collectively, the "Erausquin Plaintiffs") commenced a putative class action in the Southern District of New York (the "Erausquin Action") on behalf of themselves and all others similarly situated, against among others, Peter Madoff, Andrew Madoff and Mark Madoff.

69. The Erausquin Plaintiffs allege that the three Madoff defendants, among others, "were active and knowing participants in the fraud." (Erausquin Cmplt ¶ 101.), that obvious red flags should have alerted the defendants of the BLMIS fraud, (*Id.*, ¶¶ 47-56), and that plaintiffs

have suffered damages as a “direct and proximate result of [defendants’] failure to fulfill their duties.” (*Id.*, ¶ 6.)

70. The Erausquin Plaintiffs seek to certify a class, defined as “all persons or entities who owned shares of the Plaza Fund as of December 10, 2008 and were damaged thereby.” (*Id.*, ¶ 7.)

71. Their claims against the named Madoff Defendants are for unjust enrichment and aiding and abetting breach of fiduciary duty, and plaintiffs seek preliminary and permanent injunctive relief, and the imposition of a constructive trust, compensatory, consequential, general and punitive damages, disgorgement and restitution, attorneys’ fees and costs, and interest.

72. The Erausquin complaint against the named Madoff Defendants is based on the same operative facts as those alleged in the Trustee’s Madoff Complaint, and the Erausquin Plaintiffs allege no conduct that is separate or independent from the Madoff Defendants’ roles at BLMIS.

**(d) *In re Herald, Primeo and Thema Funds Securities Litigation,*  
Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.)**

73. Neville Seymour Davis (“Mr. Davis”), the named plaintiff, alleges that he was an investor in Thema International Fund plc (“Thema Fund”), a feeder fund that invested in BLMIS

74. On June 26, 2009, Mr. Davis filed a customer claim with the Trustee. The claim was denied as Mr. Davis had no customer account at BLMIS.

75. On July 2, 2009, Thema Fund filed customer claims with the Trustee, which have not yet been determined by the Trustee.

76. On February 11, 2010, a few months after the Trustee filed his Madoff Complaint, Mr. Davis filed an Amended Class Action Complaint in the Southern District of New York on behalf of himself and all persons and entities who either owned shares of Thema Fund on

December 10, 2008, or purchased shares of Thema between January 12, 2004 and December 14, 2008, inclusive.

77. The Amended Complaint includes claims against Peter Madoff, Andrew Madoff and Mark Madoff for aiding and abetting breach of fiduciary duty, “aiding and abetting gross negligence and negligence” and unjust enrichment. (Davis Cmplt ¶ 577-89.)

78. The Amended Complaint alleges that the named Madoff Defendants knew of the Ponzi scheme and that they “actively participated in perpetrating [it].” (*Id.*, ¶¶ 54-56, 273, 276). Mr. Davis bases these allegations on the Madoff family defendants’ unique knowledge of BLMIS, the “red flags” they were surrounded with on a daily basis, their senior positions at BLMIS and relationships with Madoff. (*Id.* ¶¶ 273-275.)

79. Mr. Davis also alleges, paralleling similar allegations in the Trustee’s Madoff Complaint, that the Madoff Defendants “failed to develop and implement effective internal controls that, had they been implemented, would have prevented Plaintiff’s losses.” (*Id.*, ¶ 276.) Through this conduct, the Madoff family members are alleged to have “substantially assisted the other Defendants’ mismanagement and wrongful conduct . . . causing enormous losses to Plaintiff and the Class.” (*Id.*, ¶ 277.)

80. Mr. Davis seeks, on behalf of himself and the purported class, damages of principal initially invested in Thema, interest and profits that would have been otherwise been earned and punitive damages, and attorneys’ fees and costs.

81. Mr. Davis’s claims against Peter Madoff, Andrew Madoff and Mark Madoff are based on the same operative facts underlying the action filed against them by the Trustee and no independent conduct is alleged.

(e) ***Chavez v. Picard, Case No. 09-mc-00006 (N.D. Tex.)***

82. On February 17, 2009, Emilio Chavez, Jr. (“Mr. Chavez”), an inmate at a Texas correctional facility, filed a customer claim with the Trustee. The Trustee has been unable to link Chavez’ claim to any account at BLMIS.

83. By filing a customer claim, Mr. Chavez is actively participating in the BLMIS liquidation and has submitted himself to the jurisdiction of the Bankruptcy Court as a BLMIS claimant.

84. On or about March 5, 2009, Chavez commenced an action in the District Court for the Northern District of Texas (the “Chavez Action”), on behalf of fourteen entities against, among others, Peter Madoff, Shana Madoff and Andrew Madoff.

85. The Chavez Action alleges violations of the Securities Act of 1933 § 12, 15 U.S.C. § 77, the Exchange Act § 10(b), 15 U.S.C. § 78(b), 17 CFR § 240.10b-5, the Hobbs Act, the Racketeer Influenced and Corrupt Organizations Act, breach of implied contract and fiduciary duties, fraud, misrepresentation, deceptive trade practice, misappropriation of funds, theft, bad faith, mismanagement, deception and extortion.

86. Mr. Chavez alleges that he opened several accounts, that he was misled into believing his investments were bona fide, and that he was issued worthless bonds and non-registered securities to mask the Ponzi Scheme (Chavez Cmplt pp. 6-7). He alleges that, as a result, more than \$750 million was “diverted from the true purchase of securities into a criminal enterprise” and that he suffered losses and damages in excess of that amount. (*Id.* p. 7).

87. No specific allegations are made against the named Madoff Defendants, and no facts are alleged that would distinguish Chavez from any other purported victim of the Madoff Ponzi scheme.

## 2. Currently Stayed Third Party Actions

88. In addition to the six active Third Party Actions described above, there are also six Actions that have been temporarily stayed for which the Trustee also seeks injunctive relief: *Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff*, Case No. cv-09-5011561-5 (Conn. Super. Ct.); *Wexler v. KPMG*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.); *Ryan v. Friehling & Horowitz, P.C.*, Index No. 101616/2009 (Sup. Ct. N.Y. Co.); *Greenberg v. Friehling & Horowitz, P.C.*, Index No. 650633/2009 (Sup. Ct. N.Y. Co.); *McBride v. KPMG Int'l*, Index No. 650632/2009 (Sup. Ct. N.Y. Co.); and *FLB Foundation, Ltd. v. BLMIS*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.).

(a) *Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff*, Case No. cv 09-5011561-S (Conn. Super. Ct)

89. On March 2, 2009, Retirement Program For Employees of the Town of Fairfield and Retirement Program for Police Officers and Firemen of the Town of Fairfield (the “Retirement Programs”) filed a customer claim with the Trustee.<sup>4</sup>

90. The claim was denied as the Retirement Programs did not have customer accounts at BLMIS.

91. The Retirement Programs allege in their Complaint that they were investors in Maxam Absolute Return Fund, L.P. (“Maxam Fund”), a feeder fund that invested in BLMIS. (Retirement Programs Cmpl’t ¶¶ 59-62.)

92. On March 2, 2009, Maxam Fund filed a customer claim with the Trustee, which has not yet been determined by the Trustee.

---

<sup>4</sup> The Town of Fairfield, also a plaintiff in the action, did not file a claim. However, its claim is derivative of the Retirement Programs.



93. On March 30, 2009, the Retirement Programs and the Town of Fairfield (the “Fairfield Plaintiffs”) commenced an action in the Superior Court of Connecticut (the “Fairfield Action”) against, among others, Peter Madoff, Ruth Madoff, Mark Madoff, and Andrew Madoff.

94. With respect to Peter Madoff, the Fairfield Plaintiffs allege that he “intentionally utilized his management authority at BLMIS...to help further defendants’ criminal scheme” and “either knew or willfully refused to know that [Madoff] and the Feeder Fund Defendants were operating an illegal investment services operation...[,]” (*Id.*, ¶¶ 73-74.)

95. The Fairfield Plaintiffs’ claims against Peter Madoff are for statutory theft and aiding and abetting theft. (*Id.*, Fifth Count ¶ 81.)

96. The other Madoff Defendants are alleged to have received fraudulent transfers from Madoff and BLMIS. (*Id.*, 18<sup>th</sup> Count ¶¶ 90-97; 19<sup>th</sup> Count ¶¶ 87-91; 20<sup>th</sup> Count; 21<sup>st</sup> Count.) The claims against the other Madoff Defendants are for unjust enrichment and avoidance of fraudulent conveyance. (*Id.*)

97. The Fairfield Plaintiffs seek to “to recover the multi-million dollar losses the Town’s retirement plans have sustained as a result of defendants’ wrongful participation in the notorious fraudulent investment scheme perpetrated by [Madoff].” (*Id.* p. 1.)

98. The Fairfield Plaintiffs thus seek, as to the named Madoff Defendants, the same relief sought by the Trustee--the avoidance of fraudulent and preferential transfers and conveyances made from BLMIS and Madoff to the Madoff Defendants.

**(b) The Cotchett Law Firm Actions**

99. The following four actions were filed in New York County by the law firm of Cotchett, Pitre & McCarthy (the “Cotchett Law Firm Actions”). Two complaints were filed after the Trustee filed his Madoff Complaint, while the remaining two were amended after that action

was filed. As discussed further below, each complaint, as currently filed or amended, contains substantively the same factual allegations and each is based on the same operative facts as the Trustee's Madoff Complaint.

***Wexler v. KPMG, LLP, et al., Index No. 101615/2009 (Sup. Ct. N.Y. Co.)***

100. Jay Wexler filed a customer claim with the Trustee. However, since Wexler had no customer account with BLMIS, his claim was denied.

101. Mr. Wexler alleges that he was an investor in Rye Select Broad Market Prime Fund, L.P. ("Rye Fund"), which itself invested in the Tremont Fund, a BLMIS customer.

102. The Rye Fund has filed two customer claims, which have not yet been determined by the Trustee.

103. The action brought by Mr. Wexler, both individually and derivatively on behalf of the Rye Fund, was filed on February 5, 2009 (the "Wexler Action") against, among others Mark Madoff, Andrew Madoff and Peter Madoff.

104. The complaint was amended on October 20, 2009, adding defendants and causes of action against the named Madoff Defendants. As discussed below, the allegations in the Amended Wexler Complaint are substantially similar to those in the other Cotchett Law Firm Actions and allege no conduct independent of the Trustee's Madoff Complaint.

***Ryan v. Friehling & Horowitz, P.C., et al., Index No. 101616/2009 (Sup. Ct. N.Y. Co.)***

105. Daniel Ryan filed customer claims with the Trustee. Neither claim has been determined.

106. Theresa Ryan filed four customer claims with the Trustee, including one for the Lawrence J. Ryan By-Pass Trust (the "Ryan Trust"). Two claims have yet to be determined

The others have been allowed and fully satisfied with funds advanced by SIPC, following the execution of releases.

107. Ms. Ryan has filed a claims objection with respect to one of her claims.

108. Daniel Ryan and Theresa Ryan, individually and on behalf of the Ryan Trust (the “Ryan Plaintiffs”), commenced their action on February 5, 2009 (the “Ryan Action”) against, among others, Andrew Madoff, Mark Madoff and Peter Madoff. The Complaint was amended on October 22, 2009.

109. As discussed below, the allegations in the Amended Ryan Complaint are substantially similar to those in the other Cotchett Law Firm actions and allege no conduct independent of the Trustee’s Madoff Complaint.

***Greenberg v. Friehling & Horowitz, P.C., et al., Index No. 650633/2009 (Sup. Ct. N.Y. Co.)***

110. Matthew Greenberg filed customer claims with the Trustee and his allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of a release.

111. Walter Greenberg filed a customer claim with the Trustee and his allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of a release.

112. Doris Greenberg filed a customer claim with the Trustee and her allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of a release.

113. On February 20, 2009, Ms. Greenberg also filed a claim on behalf of the estate of Leon Greenberg (the “Estate”), for which she is the executor. The Estate’s allowed claim was

partially satisfied by the Trustee with funds advanced by SIPC, following the execution of a release.

114. Matthew Greenberg, Walter Greenberg, Doris Greenberg and the Estate, holders of investment accounts at BLMIS (the “Greenberg Plaintiffs”) commenced their action on October 22, 2009 against, among others, Andrew Madoff, Mark Madoff, and Peter Madoff. As discussed below, the allegations in the Greenberg Complaint are substantially similar to those in the other Cotchett Law Firm Actions and allege no conduct independent of the Trustee’s Madoff Complaint.

***McBride v. KPMG International, et al., Index No. 650632/2009 (Sup. Ct. N.Y. Co.)***

115. Donna M. McBride, who alleges that she was a member of Beacon Associates LLC II (“Beacon Fund”), filed two customer claims with the Trustee. Both claims were denied, as Ms. McBride had no customer account at BLMIS

116. Beacon Fund appears to be a subsidiary fund of Beacon Associates LLC, which did file a claim with the Trustee. Beacon Associates LLC’s claim has not yet been determined by the Trustee.

117. On October 22, 2009, Donna M. McBride, individually and derivatively on behalf of Beacon Fund commenced an action against among others, Peter Madoff Andrew Madoff and Mark Madoff.

**The Cotchett Law Firm Complaints**

118. The plaintiffs in the Cotchett Law Firm Actions described above all allege that Peter Madoff, Mark Madoff and Andrew Madoff had actual knowledge of the fraud based on their roles and responsibilities at BLMIS and MSIL and their knowledge of the indications of

fraud. (Wexler Cmplt ¶ 412; Ryan Cmplt ¶ 322; Greenberg Cmplt. ¶ 315; McBride Cmplt ¶ 342.)

119. They further allege that Peter Madoff, Mark Madoff and Andrew Madoff used BLMIS for their personal use, receiving loans and millions of dollars for personal expenses, including vacations, cars and home purchases. (Wexler Cmplt ¶ 300; Ryan Cmplt ¶ 227; Greenberg Cmplt ¶ 224; McBride Cmplt ¶ 241.)

120. The allegations regarding the nature of the misuse of BLMIS funds were not included in the original complaints filed by Wexler and the Ryan Plaintiffs, appearing only in the amended complaints filed after the Trustee filed the Trustee's Madoff Complaint and mimicking the Trustee's allegations.

121. The plaintiffs in the Cotchett Law Firm Actions bring claims against the Madoff Defendants for, across all complaints, aiding and abetting fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, aiding and abetting fraud in the inducement, conversion and unjust enrichment.

**(c) *FLB Foundation, Ltd. v. BLMIS, Index No. 101615/2009 (N.Y. Sup. Ct.)***

122. FLB Foundation, Ltd. ("FLB") filed a customer claim with the Trustee.

123. FLB's claim was denied as the FLB customer account was overdrawn, or in a negative net equity position.

124. On or about February 18, 2009, FLB commenced an action in the Supreme Court of the State of New York, Queens County, which was subsequently transferred to New York County.

125. On August 11, 2009, FLB filed an amended complaint, against, among others, Ruth Madoff, Mark Madoff, Andrew Madoff, Shana Madoff and Peter Madoff.

126. In its Amended Complaint, FLB alleges that the FLB defendants conspired with each other to unlawfully take \$50 billion and withheld information regarding how funds were being maintained (FLB Am. Cmplt ¶¶ 26-27.)

127. The FLB Amended Complaint does little more than list the positions of the Madoff Defendants at BLMIS.

128. In response to motions to dismiss filed by the relevant Madoff Defendants, FLB filed an affirmation in opposition to these motions, which mimics the Trustee's Madoff Complaint, and contains little else.

129. FLB brings causes of action against the Madoff Defendants for conspiracy to hinder, delay and defraud, false representation, wrongful appropriation of funds, negligence, and unjust enrichment and seeks damages.

**THE THIRD PARTY ACTIONS THREATEN THIS COURT'S JURISDICTION  
AND THE ADMINISTRATION OF THE ESTATE AND AN INJUNCTION IS  
NECESSARY TO PRESERVE AND PROTECT THE ESTATE**

130. The Lautenberg, Stahl, Abend, Erausquin, Herald and Chavez actions are each active and currently pending in their respective courts. In addition, the Stahl and Abend Plaintiffs have, as discussed above, served burdensome discovery requests on the Trustee.

131. The remaining six actions have been temporarily stayed, but have not yet been finally discontinued.

132. The Fairfield Action was dismissed as against the Madoff Defendants pursuant to the defendants' motion, but the dismissal was appealed by the Fairfield Plaintiffs on May 3, 2010.

133. The four Cotchett Law Firm Actions have been stayed pending the resolution of motions to dismiss filed by certain non-Madoff defendants in the various actions.

134. The FLB Action was consolidated with the consolidated Wexler Action on October 1, 2009. It therefore has been stayed along with the Wexler Action. The Madoff Defendants have each filed motions to dismiss the FLB Action that are being held in abeyance while the action is stayed.

135. Both the Trustee and the Third Party Plaintiffs allege that the Madoff Defendants owe them money damages for losses related to Madoff's fraud. The Third Party Actions thus are duplicative or derivative of the Trustee's Madoff Actions.

136. Each of the Third Party Actions is an attempt by the Third Party Plaintiffs to satisfy claims relating to their investments in, or dealings with, BLMIS or its feeder funds by circumventing the claims determination and allowance process, of which all of the Third Party Plaintiffs are either direct or indirect participants.

137. The Third Party Plaintiffs seek to take for themselves funds that otherwise would be recoverable by the Trustee and equitably distributed to customers of BLMIS in accordance with this Court's March 1, 2010 Net Equity Decision and March 8, 2010 Net Equity Order.

138. The Third Party Actions all seek to tap into the same pool of money as the Trustee, and the "damages" sought by the Third Party Plaintiffs are nothing more than what they seek as customers, purported customers, or creditors of the estate.

**COUNT ONE  
DECLARATORY RELIEF**

139. The Trustee incorporates by reference the allegations contained in paragraphs 1–138 of this Complaint as if fully realleged herein.

140. The Trustee seeks a declaration that the Third Party Actions violate the automatic stay provisions under 11 U.S.C. § 362(a), 15 U.S.C. § 78eee(b)(2)(B) and the Stay

Orders and are therefore void *ab initio*. This declaratory relief is warranted for, without limitation, the following reasons:

a. By seeking to recover damages from the Madoff Defendants, the Third Party Actions improperly contravene the claims administration process in the SIPA proceeding and side-step the Trustee's exclusive right to seek recovery of fraudulently transferred property in direct violation of 11 U.S.C. § 362(a)(1) and (6).

b. Additionally, the Third Party Actions improperly seek recover on a claim against debtors in violation of 11 U.S.C. § 362(a)(1) and seek to obtain possession of debtor property in direct violation of 11 U.S.C. § 362(a)(3), 15 U.S.C. § 78eee(b)(2)(B) and the Stay Orders.

141. The Court has authority pursuant to sections 105(a) and 362(a) of the Bankruptcy Code to issue declaratory relief because this controversy is actual and justiciable, and the Court has jurisdiction over matters affecting BLMIS property and the effective and equitable administration of the debtors' estate.

## **COUNT TWO PRELIMINARY INJUNCTIVE RELIEF**

142. The Trustee incorporates by reference the allegations contained in paragraphs 1–141 of this Complaint as if fully realleged herein.

143. The Trustee seeks an Order that any further prosecution of the Third Party Actions be enjoined pursuant to section 105(a) of the Bankruptcy Code, made relevant to these proceedings by section 78fff(b) of SIPA, pending the completion of the Trustee's Madoff Actions. Specifically, the Trustee requests that this Court enjoin the prosecution of the Third Party Actions for, without limitation, the following reasons:



a. The Third Party Actions improperly infringe on the jurisdiction of this Court. The issues in the Third Party Actions arise out of the Ponzi scheme and the BLMIS liquidation proceedings, and any funds recovered in those actions have a strong likelihood of consisting of customer property, recoverable by the Trustee pursuant to section 78fff-2(c)(3) of SIPA. As such, the proper forum for the litigation of issues raised in the Third Party Actions is this Court.

b. To the extent that Third Party Plaintiffs are successful in the Third Party Actions, section 78fff-2(c)(1)—which provides for the ratable distribution of customer property to customers—would be violated because the Third Party Plaintiffs would receive more than their proportionate share of customer property to the detriment of other similarly situated customers.

c. There is an inadequate remedy at law to protect and preserve the assets that constitute customer property. The Third Party Actions threaten the administration of the liquidation, and an injunction is necessary to preserve and protect customer property and the Trustee's efforts to gather and collect customer property for the benefit of the victims who have filed claims.

d. An injunction will prevent the substantial confusion of other investors and potential plaintiffs with respect to whether they must file separate actions to protect their interests.

e. An injunction will maximize judicial economy. Instead of having a court in another jurisdiction considering these issues, this Court, which is already familiar with the relevant facts, can most expeditiously resolve the issues raised in the Third Party Actions.

f. An injunction will avoid the possibility of inconsistent decisions and will ensure preservation of uniformity of decision.

g. An injunction will allow the Trustee to avoid appearing in the Third Party Actions and thus prevent the Trustee from incurring needless litigation costs.

h. The injunction will not harm the public interest, and, in fact, is in the best interest of BLMIS customers and the orderly administration of the claims administration process.

144. The Trustee believes that the injunction requested herein is necessary and appropriate to carry out his duties in accordance with the provisions of SIPA and the Bankruptcy Code and that any further prosecution of the Third Party Actions, prior to the completion of the Trustee's Madoff Actions, would seriously impair and potentially defeat this Court's ability to administer the BLMIS proceedings.

**WHEREFORE**, the Trustee respectfully requests that this Court enter judgment in favor of the Trustee and against the Third Party Plaintiffs:

*i.* declaring that the Third Party Actions violate the automatic stay provisions under 11 U.S.C. § 362(a) and section 78eee(b)(2)(B)(i) of SIPA and the Stay Orders and are therefore void *ab initio*;

*ii.* issuing a preliminary injunction, pursuant to section 105(a) of the Bankruptcy Code, prohibiting the Third Party Plaintiffs, and those acting in concert or participation with them, or on their behalf, from pursuing the Third Party Actions as against the Madoff Defendants, or any other actions as against the Madoff Defendants, and prohibiting the Third Party Plaintiffs from seeking discovery as against the Trustee, until such time as the Trustee has completed the actions he has commenced against the Madoff Defendants.; and

iii. granting the Trustee such other relief as the Court deems just and proper.

Dated: New York, New York  
May 27, 2010

/s/ David J. Sheehan  
Baker & Hostetler LLP  
45 Rockefeller Plaza  
New York, New York 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Email: [dsheehan@bakerlaw.com](mailto:dsheehan@bakerlaw.com)  
Marc E. Hirschfield  
Email: [mhirschfield@bakerlaw.com](mailto:mhirschfield@bakerlaw.com)  
Deborah H. Renner  
Email: [drenner@bakerlaw.com](mailto:drenner@bakerlaw.com)  
Tracy L. Cole  
Email: [tcollection@bakerlaw.com](mailto:tcollection@bakerlaw.com)  
Keith R. Murphy  
Email: [kmurphy@bakerlaw.com](mailto:kmurphy@bakerlaw.com)  
Amy E. Vanderwal  
Email: [avanderwal@bakerlaw.com](mailto:avanderwal@bakerlaw.com)  
Sammi Malek  
Email: [smalek@bakerlaw.com](mailto:smalek@bakerlaw.com)  
Ferve Ozturk  
Email: [fozturk@bakerlaw.com](mailto:fozturk@bakerlaw.com)

*Attorneys for Irving H. Picard, Trustee for the  
Substantively Consolidated SIPA Liquidation  
of Bernard L. Madoff Investment Securities  
LLC and Bernard L. Madoff*

**Baker & Hostetler LLP**

45 Rockefeller Plaza

New York, NY 10111

Telephone: (212) 589-4200

Facsimile: (212) 589-4201

David J. Sheehan

Email: [dsheehan@bakerlaw.com](mailto:dsheehan@bakerlaw.com)

Marc E. Hirschfield

Email: [mhirschfield@bakerlaw.com](mailto:mhirschfield@bakerlaw.com)

Deborah H. Renner

Email: [drenner@bakerlaw.com](mailto:drenner@bakerlaw.com)

Tracy L. Cole

Email: [tcoll@bakerlaw.com](mailto:tcoll@bakerlaw.com)

Keith R. Murphy

Email: [kmurphy@bakerlaw.com](mailto:kmurphy@bakerlaw.com)

Amy Vanderwal

Email: [avanderwal@bakerlaw.com](mailto:avanderwal@bakerlaw.com)

Sammi Malek

Email: [smalek@bakerlaw.com](mailto:smalek@bakerlaw.com)

Ferve Ozturk

Email: [fozturk@bakerlaw.com](mailto:fozturk@bakerlaw.com)

*Attorneys for Irving H. Picard, Esq., Trustee  
for the Substantively Consolidated SIPA Liquidation  
of Bernard L. Madoff Investment Securities LLC  
and Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Adv. Pro. No. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. \_\_\_\_\_

Plaintiff,

v.

RICHARD I. STAHL; REED ABEND; THE LAUTENBERG FOUNDATION, JOSHUA S. LAUTENBERG, ELLEN LAUTENBERG; MATIAS ERAUSQUIN, ENRIQUE ERAUSQUIN, LILIANA CONTRONE and YOLANDA FRISCHKNECHT, on behalf of themselves and those they purport to represent; NEVILLE SEYMOUR DAVIS, on behalf of himself and those he purports to represent; EMILIO CHAVEZ, JR.; RETIREMENT PROGRAM FOR EMPLOYEES OF THE TOWN OF FAIRFIELD, THE RETIREMENT PROGRAM FOR POLICE OFFICERS AND FIREMEN OF THE TOWN OF FAIRFIELD, and THE TOWN OF FAIRFIELD; FLB FOUNDATION LTD.; JAY WEXLER, individually and derivatively on behalf of Rye Select Broad Market Prime Fund, L.P.; DANIEL RYAN and THERESA RYAN, individually and on behalf of the Lawrence J. Ryan By-Pass Trust; MATTHEW GREENBERG, WALTER GREENBERG and DORIS GREENBERG, individually and on behalf of the estate of Leon Greenberg; and DONNA MCBRIDE, individually and derivatively on behalf of Beacon Associates LLC II,

Defendants.

---

**MEMORANDUM OF LAW IN SUPPORT OF TRUSTEE'S APPLICATION FOR ENFORCEMENT OF AUTOMATIC STAY AND PRELIMINARY INJUNCTION**

---

## TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	4
A.    The SIPA Trustee’s Authority .....	4
B.    The Court-Ordered Claims Administration Process .....	4
C.    The Trustee’s Proceedings Against the Madoff Defendants .....	5
D.    The Third Party Actions Are Duplicative or Derivative of the Trustee’s Complaints, and Seek Customer Property .....	10
1.    Currently Active Third Party Actions .....	10
a. <i>The Lautenberg Foundation v. Madoff</i> , Case No. 09-cv- 00816 (D.N.J.) .....	11
b. <i>Stahl v. Madoff</i> , Index No. 601862/2009 (Sup. Ct. N.Y. Co.) <i>Abend v. Madoff</i> , Index No. 601861/2009 (Sup. Ct. N.Y. Co.) .....	13
c. <i>Erausquin v. Notz, Stucki Management (Bermuda) Limited</i> , Case No. 09-cv-07846 (S.D.N.Y.) .....	16
d. <i>In re Herald, Primeo and Thema Funds Securities</i> <i>Litigation</i> , Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.) .....	18
e. <i>Chavez v. Picard</i> , Case No. 09-mc-00006 (N.D. Tex.) .....	19
2.    Currently Stayed Third Party Actions .....	21
a. <i>Retirement Program for Employees of the Town of</i> <i>Fairfield v. Bernard L. Madoff</i> , Case No. cv 09-5011561-S (Conn. Super. Ct) .....	21
b.    The Cotchett Actions .....	23
c. <i>FLB Foundation, Ltd. v. BLMIS</i> (Index No. 101615/2009 (N.Y. Sup. Ct.)) .....	29
ARGUMENT: THE THIRD PARTY ACTIONS VIOLATE THE EXISTING STAYS AND SHOULD OTHERWISE BE PRELIMINARILY ENJOINED .....	30
I.    THE THIRD PARTY ACTIONS VIOLATE THE STAY ORDERS AND AUTOMATIC STAY .....	30
A.    The Automatic Stay Applies .....	30

**TABLE OF CONTENTS**  
*(Cont'd)*

	<b>Page</b>
B. The Stay Orders Apply .....	31
C. The Trustee Has Exclusive Standing to Bring the Claims Brought in the Third Party Actions.....	32
D. The Third Party Actions Threaten to Undermine the Claims Administration Process .....	34
E. The Third Party Plaintiffs Seek the Recovery of Fraudulent Transfers Made to the Madoff Defendants .....	36
F. The Third Party Actions Seek to Obtain Customer Property in Violation of the Automatic Stay .....	38
G. The Third Party Actions Are Void <i>Ab Initio</i> .....	41
II. THE COURT SHOULD ENJOIN THE THIRD PARTY PLAINTIFFS PURSUANT TO SECTION 105(A) OF THE BANKRUPTCY CODE TO ALLOW FOR THE FAIR AND EQUITABLE ADMINISTRATION OF THE BLMIS ESTATE.....	42
A. The Court Has Jurisdiction to Enjoin the Third Party Plaintiffs .....	43
B. Standards for a Section 105(a) Injunction .....	45
C. The Third Party Actions Threaten the Court’s Jurisdiction and the Administration of the Estate and an Injunction is Necessary to Preserve and Protect the Estate.....	46
D. The Trustee Would Pursue Any Transfers of Customer Property From the Madoff Defendants to the Third Party Plaintiffs .....	51
CONCLUSION.....	51

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th Street Steakhouse, Inc.)</i> , 835 F.2d 427 (2d Cir. 1987).....	41
<i>Abend v. Madoff</i> , Index No. 601861/2009 (Sup. Ct. N.Y. Co.).....	passim
<i>Adelphia Commc 'ns Corp. v. Rigas (In re Adelphia Commc 'ns Corp.)</i> , 294 B.R. 39 (Bankr. S.D.N.Y. 2003).....	50
<i>Baldwin-United Corp. v. Paine Webber Group, Inc. (In re Baldwin-United Corp.)</i> , 57 B.R. 759 (S.D. Ohio 1985).....	46
<i>Bihari v. DDJ Capital Management, LLC</i> , 306 B.R. 336 (E.D. Cal. 2004).....	33
<i>Buena Vista Television v. Adelphia Commc 'ns Corp. (In re Adelphia Commc 'ns Corp.)</i> , 307 B.R. 404 (Bankr. S.D.N.Y. 2004).....	44
<i>C &amp; J Clark Am., Inc. v. Carol Ruth, Inc. (In re Wingspread Corp.)</i> , 92 B.R. 87 (Bankr. S.D.N.Y. 1988).....	45
<i>Celotex Corp. v. Edwards</i> , 514 U.S. 300 (1995).....	43
<i>Chavez v. Picard</i> , Case No. 09-mc-00006 (N.D. Tex.).....	passim
<i>City of New York v. Exxon Corp.</i> , 932 F.2d 1020 (2d Cir. 1991).....	50
<i>Crysen/Montenay Energy Co. v. Esselsen Assocs. Inc. (In re Crysen/Montenay Energy Co.)</i> , 902 F.2d 1098 (2d Cir. 1990).....	36, 37
<i>Eastern Refractories Co. v. Forty Eight Insulations</i> , 157 F.3d 169 (2d Cir. 1998).....	41
<i>Erausquin v. Notz, Stucki Management (Bermuda) Limited</i> , Case No. 09-cv-07846 (S.D.N.Y.).....	passim
<i>FDIC v. Hirsch (In re Colonial Realty Co.)</i> , 980 F.2d 125 (2d Cir. 1992).....	37, 41
<i>Ferris, Baker, Watts, Inc. v. Stephenson (In re MJK Clearing)</i> , 286 B.R. 109 (Bankr. D. Minn. 2002).....	38
<i>Fisher v. Apostolou</i> , 155 F. 3d 876 (7th Cir. 1998).....	passim
<i>FLB Foundation Ltd. v. BLMIS</i> , Index No. 101615/2009 (Sup. Ct. N.Y. Co.).....	passim



**TABLE OF AUTHORITIES**  
*(Cont'd)*

	<b>Page</b>
<i>Garrity v. Leffler (In re Neuman)</i> , 71 B.R. 567 (S.D.N.Y. 1987) .....	45
<i>Granfinanciera S.A. v. Nordberg</i> , 492 U.S. 33 (1989) .....	44
<i>Greenberg v. Friehling &amp; Horowitz, P.C.</i> , Index No. 650633/2009 (Sup. Ct. N.Y. Co.) .....	passim
<i>Hill v. Spencer Savs. &amp; Loan Ass'n (In re Bevill, Bresler &amp; Schulman, Inc.)</i> , 83 B.R. 880 (D.N.J. 1988) .....	39
<i>Hill v. Spencer Savs. &amp; Loan Ass'n (In the Matter of Bevill, Bresler &amp; Schulman, Inc.)</i> , 94 B.R. 817 (D.N.J. 1989) .....	39
<i>In re Adelphia Commc'ns Corp.</i> , 2006 WL 1529357 (Bankr. S.D.N.Y. June 5, 2006) .....	passim
<i>In re Adelphia Commc'ns Corp.</i> , 298 B.R. 49 (S.D.N.Y. 2003) .....	45
<i>In re AP Indus., Inc.</i> , 117 B.R. 798 (Bankr. S.D.N.Y. 1990) .....	passim
<i>In re Burgess</i> , 234 B.R. 793 (D. Nev. 1999) .....	31
<i>In re Calpine Corp.</i> , 354 B.R. 45 (Bankr. S.D.N.Y. 2006), <i>aff'd</i> , 365 B.R. 401 (S.D.N.Y. 2007) .....	45
<i>In re Enron Corp.</i> , 314 B.R. 524 (Bankr. S.D.N.Y. 2004) .....	42
<i>In re Herald, Primeo and Thema Funds Securities Litig.</i> , Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.) .....	passim
<i>In re HSM Kennewick, L.P.</i> , 347 B.R. 569 (Bankr. N.D. Tex. 2006) .....	31
<i>In re Ionosphere Clubs, Inc.</i> , 111 B.R. 423 (Bankr. S.D.N.Y. 1990), <i>aff'd in part</i> , 124 B.R. 635 (S.D.N.Y. 1991) .....	45
<i>In re Johns-Manville Corp.</i> , 91 B.R. 225 (Bankr. S.D.N.Y. 1988) .....	46
<i>In re Keene Corp.</i> , 162 B.R. 935 (Bankr. S.D.N.Y. 1994) .....	45
<i>In re Keene Corp.</i> , 164 B.R. 844 (Bankr. S.D.N.Y. 1994) .....	passim
<i>In re Klein, Maus &amp; Shire, Inc.</i> , 301 B.R. 408 (Bankr. S.D.N.Y. 2003) .....	40

**TABLE OF AUTHORITIES**  
(*Cont'd*)

	<b>Page</b>
<i>In re Lyondell Chem. Co.</i> , 402 B.R. 571 (Bankr. S.D.N.Y. 2009) .....	45
<i>In re MCEG Prods., Inc.</i> , 133 B.R. 232 (Bankr. C.D. Cal. 1991) .....	40
<i>In re Philadelphia Newspapers LLC</i> , 410 B.R. 404 (Bankr. E.D. Penn. 2009), <i>aff'd</i> , 423 B.R. 98 (E.D. Penn. 2010) .....	51
<i>In re Probulk Inc.</i> , 407 B.R. 56 (Bankr. S.D.N.Y. 2009) .....	45
<i>In re Rubin</i> , 160 B.R. 269 (Bankr. S.D.N.Y. 1993) .....	49
<i>In re Russo</i> , 18 B.R. 257 (Bankr. E.D.N.Y. 1982) .....	49
<i>In re Shea &amp; Gould</i> , 214 B.R. 739 (Bankr. S.D.N.Y. 1997) .....	49
<i>In re Singer Co. N.V.</i> , 2000 WL 33716976 (Bankr. S.D.N.Y. Nov. 3, 2000) .....	42, 46, 48
<i>In re The 1031 Tax Group, LLC</i> , 397 B.R. 670 (Bankr. S.D.N.Y. 2008) .....	33, 34, 46
<i>In re The Prudential Ins. Co. of Am. Sales Practices Litig.</i> , 261 F.3d 355 (3rd Cir. 2001) .....	51
<i>In re Tremont Securities Law, State Law &amp; Insurance Litigation</i> , S.D.N.Y., Case No. 08-cv-11117 (TPG) .....	28
<i>In the Matter of Sayeh R.</i> , 91 N.Y.2d 306 (1997) .....	44
<i>Jackson v. Mishkin (In re Adler Coleman Clearing Corp.)</i> , 263 B.R. 406 (S.D.N.Y. 2001) .....	38
<i>Keller v. Blinder (In re Blinder Robinson &amp; Co., Inc.)</i> , 135 B.R. 892 (D. Col. 1991) .....	44
<i>Lautenberg Foundation v. Madoff</i> , D.N.J., Case No. 09-cv-00816 .....	passim
<i>Leonhardt v. Madoff, et al.</i> , S.D.N.Y., Case No. 09-cv-2032 .....	18
<i>Liberty Mut. Ins. Co. v. Off. Unsecured Creditors' Comm. of Spaulding Composite Co., Inc. (In re Spaulding Composites Co., Inc.)</i> , 207 B.R. 899 (9th Cir. BAP 1997) .....	31

**TABLE OF AUTHORITIES**  
(*Cont'd*)

	<b>Page</b>
<i>LTV Corp. v. Back (In re Chateaugay Corp.)</i> , 201 B.R. 48 (Bankr. S.D.N.Y. 1996) .....	44
<i>LTV Corp. v. Miller (In re Chateaugay Corp.)</i> , 109 B.R. 613 (S.D.N.Y. 1990).....	51
<i>LTV Steel Co., Inc. v. Bd. of Educ. (In re Chateaugay Corp.)</i> , 93 B.R. 26 (S.D.N.Y. 1988).....	45
<i>Lynch v. Austin</i> , 96 N.Y.S.2d 228 (3d Dep't 1983).....	44
<i>MacArthur Co. v. Johns-Manville Corp.</i> , 837 F.2d 89 (2d Cir. 1988).....	44
<i>McBride v. KPMG Int'l</i> , Index No. 650632/2009 (Sup. Ct. N.Y. Co.) .....	passim
<i>MLSMK Investments Co. v. JP Morgan Chase &amp; Co. and JP Morgan Bank, NA</i> , 09-cv-4049 (BSJ).....	28
<i>Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Indus. Corp.)</i> , 132 B.R. 504 (D.Me. 1991).....	44
<i>Perrone, et al. v. Benbassat, et al.</i> , S.D.N.Y., Case No. 09-cv-2558 .....	18
<i>Picard v. Fox</i> , 2010 WL 1740885 (Bankr. S.D.N.Y. May 3, 2010).....	passim
<i>Picard v. Fox</i> , Ad. Pro. No. 09-03114 (Bankr. S.D.N.Y. March 31, 2010) .....	4
<i>Picard v. Madoff, et al.</i> , Bankr. S.D.N.Y., Adv. Pro. No. 09-1503 (BRL) .....	5, 7
<i>Picard v. Merkin</i> , Ad. Pro. No. 09-1182 (Bankr. S.D.N.Y. May 7, 2010).....	38
<i>Picard v. Ruth Madoff</i> , Bankr. S.D.N.Y. Adv. Pro. No. 09-1391 (BRL).....	5, 6
<i>Publicker Indus. Inc. v. U.S. (In re Cuyahoga Equip. Corp.)</i> , 980 F.2d 110 (2d Cir. 1992).....	43
<i>Repex Ventures S.A. v. Madoff, et al.</i> , S.D.N.Y., Case No. 09-cv-289.....	18
<i>Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff</i> , Case No. cv-09-5011561-S (Conn. Super. Ct.).....	passim
<i>Rios v. Altamount Farms</i> , 64 N.Y.2d 792 (1985) .....	44
<i>Ryan v. Friehling &amp; Horowitz, P.C.</i> , Index No. 101616/2009 (Sup. Ct. N.Y. Co.).....	passim

**TABLE OF AUTHORITIES**  
(*Cont'd*)

	<b>Page</b>
<i>SEC v. Bernard L. Madoff</i> , Case No. 08-cv-10791 (LLS).....	32
<i>Secs. Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC</i> ( <i>In re Bernard L. Madoff Investment Securities LLC</i> ), 424 B.R. 122 (Bankr. S.D.N.Y. 2010) .....	4, 35, 46
<i>Secs. Investor Protection Corp. v. Blinder, Robinson &amp; Co., Inc.</i> , 962 F.2d 960 (10th Cir. 1992).....	49
<i>St. Paul Fire &amp; Marine Ins. Co. v. Pepsi Co. Inc.</i> , 884 F.2d 688 (2d Cir. 1989).....	33
<i>Stahl v. Madoff</i> , Index No. 601862/2009 (Sup. Ct. N.Y. Co.).....	passim
<i>Wexler v. KPMG, LLP</i> , Index No. 101615/2009 (Sup. Ct. N.Y. Co.).....	passim
<i>Winkler v. Eli Lili &amp; Co.</i> , 101 F.3d 1196 (7th Cir. 1997).....	52

**STATUTES**

11 U.S.C. § 105(a) .....	passim
11 U.S.C. § 362.....	48
11 U.S.C. § 362(a) .....	1
11 U.S.C. § 362(a)(1).....	37
11 U.S.C. § 362(a)(3).....	30, 31
11 U.S.C. § 502(d).....	6, 9
11 U.S.C. § 541 .....	6, 9, 38, 43
11 U.S.C. § 541(a) .....	38
11 U.S.C. § 542.....	6, 9
11 U.S.C. § 544.....	6, 9
11 U.S.C. § 548.....	51
11 U.S.C. § 548(a) .....	6, 9

**TABLE OF AUTHORITIES**  
*(Cont'd)*

	<b>Page</b>
11 U.S.C. § 549.....	51
11 U.S.C. § 550.....	51
11 U.S.C. § 550(a).....	6, 9
11 U.S.C. § 551.....	6, 9
15 U.S.C. § 77l.....	20
15 U.S.C. § 78(b).....	20
15 U.S.C. § 78aaa .....	1
15 U.S.C. § 78cee(a)(3) .....	1, 30
15 U.S.C. § 78eee(b)(2).....	41
15 U.S.C. § 78eee(b)(2)(B).....	1, 31
15 U.S.C. § 78eee(b)(4).....	41
15 U.S.C. § 78fff(b).....	passim
15 U.S.C. § 78fff-1(a).....	4, 6, 9, 38
15 U.S.C. § 78fff-2(a)(3) .....	5
15 U.S.C. § 78fff-2(c)(1) .....	38
15 U.S.C. § 78fff-2(c)(3) .....	passim
15 U.S.C. § 78lll(4).....	39
28 U.S.C. § 1334.....	44
28 U.S.C. § 1334(b).....	43
28 U.S.C. § 1334(e)(1).....	41
28 U.S.C. § 157(a).....	43
28 U.S.C. § 157(b)(1) .....	43

**TABLE OF AUTHORITIES**  
(*Cont'd*)

	<b>Page</b>
28 U.S.C. § 157(b)(2)(A).....	43
28 U.S.C. 1651.....	51
N.Y. Debtor & Creditor Law § 270 (McKinney 2010).....	6
Securities Exchange Act of 1934 § 10(b).....	11
Securities Exchange Act of 1934 § 10(b).....	20
Securities Exchange Act of 1934 § 20(a).....	11
<b>OTHER AUTHORITIES</b>	
H.R. REP. NO. 1613, 91st Cong. 2d Sess. (1970).....	49
H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977).....	31
Plea Hearing Transcript, <i>United States v. Madoff</i> , Case No. 09-CR-213(DC) (S.D.N.Y. Mar. 12, 2010).....	40
S. REP. NO. 989, 95th Cong. 2d Sess. 49 (1978).....	31
<b>RULES</b>	
17 CFR § 240.10b-5.....	20
Federal Rules of Bankruptcy Procedure Rule 7065.....	1, 45
New York Labor Law § 190.....	15
Securities Exchange Commission Rule 10b-5.....	11

Irving H. Picard, Esq., as trustee (the “Trustee”) for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.* (“SIPA”) and Bernard L. Madoff, individually (“Madoff” and together with BLMIS, the “Debtors”), by and through his undersigned counsel, respectfully submits this memorandum of law in support of his application (“Application”) pursuant to Bankruptcy Code § 362(a) and § 105(a), SIPA § 78eee(a)(3) and § 78eee(b)(2)(B) and Rule 7065 of the Federal Rules of Bankruptcy Procedure to: (i) enforce the December 15, 2008 stay order and related orders (the “Stay Orders”) of the United States District Court for the Southern District of New York (the “District Court”) and the automatic stay in this proceeding and declare that the competing actions brought by certain third party plaintiffs whose names appear in the caption above (the “Third Party Plaintiffs”) against Ruth Madoff, Peter Madoff, Andrew Madoff, Mark Madoff and Shana Madoff (collectively, the “Madoff Defendants”) in various jurisdictions (collectively, the “Third Party Actions”) violate the Stay Orders and the automatic stay and are void *ab initio* as against the Madoff Defendants; and (ii) preliminarily enjoin the Third Party Plaintiffs from litigating the Third Party Actions or any other actions as against the Madoff Defendants, pending the completion of the Trustee’s actions against the Madoff Defendants (the “Trustee’s Madoff Actions”).<sup>1</sup>

### **PRELIMINARY STATEMENT**

Knowing full well that they could not sue BLMIS or Bernard L. Madoff because actions against them have been stayed, the Third Party Plaintiffs instead sued Madoff family members in an obvious attempt to circumvent the applicable stays. These competing Third Party Actions,

---

<sup>1</sup> The Trustee’s investigation is continuing, and he reserves the right to seek injunctive and other relief with respect to other defendants.

however, threaten to impede the orderly administration of the BLMIS liquidation and usurp this Court's jurisdiction no less than had they been commenced against BLMIS or Madoff himself.

Significantly, the Third Party Actions are duplicative or derivative of the Trustee's Madoff Actions, all arising out of the Ponzi scheme. Every single one of the Third Party Actions alleges little more than that a Madoff family member knew or should have known of the fraud, missed obvious "red flag" indicia of fraud, and acted to perpetuate the Ponzi scheme.<sup>2</sup> Worse yet, the Third Party Actions do not even allege the full story of Madoff family members' complicity, instead quilting together an incomplete patchwork of allegations.

Not only are the Third Party Actions poor substitutes for the Trustee's allegations, but the Third Party Plaintiffs are either customers or creditors of the estate, or customers of so-called "feeder funds" who will share in recoveries made on account of feeder fund claims. As this Court recently recognized in *Picard v. Fox*, 2010 WL 1740885, at \*10 (Bankr. S.D.N.Y. May 3, 2010), to allow such competing actions to proceed would frustrate the claims administration process established by this Court, permitting those who filed their own separate lawsuits potentially to recover more than other stakeholders of BLMIS, while at the same time divesting the Trustee of his power to marshal customer property for equitable distribution. There is only one pool of customer property, and the Third Party Plaintiffs should not be allowed to obtain preferential recoveries, leapfrogging over other stakeholders. *See id.* at \*5. Nothing could be more anathema to this Court's jurisdiction.

The claims made by the Trustee and the Third Party Plaintiffs are based on the Madoff Defendants' conduct in their roles at BLMIS—there is no other, independent conduct alleged by the Third Party Plaintiffs. The Trustee has exclusive standing to bring such claims. *Id.* at \*5–\*8.



As the Trustee will prove in his actions against the Madoff Defendants, virtually every cent held by the Madoff Defendants ultimately emanates from BLMIS—there is no other money. Thus, any money the Third Party Plaintiffs could recover from the Madoff Defendants belongs to BLMIS’s customers. Indeed, if the Third Party Plaintiffs were to recover any money from the Madoff Defendants in their Actions, the Trustee would bring avoidance claims against them as subsequent transferees.

There are currently 12 Third Party Actions pending against Madoff Defendants, which are the subject of this Application<sup>3</sup> As to these 12 Actions, the Trustee respectfully requests that the Court: (i) declare that the Third Party Actions, to the extent they bring claims against the Madoff Defendants, violate the Stay Orders, section § 78eee(b)(2)(B) of SIPA and the automatic stay and are void *ab initio*; and (ii) issue a preliminary injunction prohibiting the Third Party Plaintiffs from pursuing the Third Party Actions, or any other actions as against the Madoff Defendants, and prohibiting the Third Party Plaintiffs from pursuing discovery against the Trustee, pending the completion of the Trustee’s Madoff Actions.

---

<sup>2</sup> See generally Affidavit of David J. Sheehan, sworn to on May 27, 2010 (the “Sheehan Aff.”), Exs. A-VV.

<sup>3</sup> The Third Party Actions are: *The Lautenberg Foundation v. Madoff*, Case No. 09-cv-00816 (D.N.J.); *Stahl v. Madoff*, Index No. 601862/2009 (Sup. Ct. N.Y. Co.); *Abend v. Madoff*, Index No. 601861/2009 (Sup. Ct. N.Y. Co.); *Erausquin v. Notz, Stucki Management (Bermuda) Limited*, Case No. 09-cv-07846 (S.D.N.Y.); *In re Herald, Primeo and Thema Funds Securities Litig.*, Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.); *Chavez v. Picard*, Case No. 09-mc-00006 (N.D. Tex.); *Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff*, Case No. cv-09-5011561-S (Conn. Super. Ct.); *Wexler v. KPMG, LLP*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.); *Ryan v. Friehling & Horowitz, P.C.*, Index No. 101616/2009 (Sup. Ct. N.Y. Co.); *Greenberg v. Friehling & Horowitz, P.C.*, Index No. 650633/2009 (Sup. Ct. N.Y. Co.); *McBride v. KPMG Int’l*, Index No. 650632/2009 (Sup. Ct. N.Y. Co.); and *FLB Foundation Ltd. v. BLMIS*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.). For the Court’s reference, documents relating to the Third Party Actions are attached as Exhibits A through VV to the Sheehan Affidavit.

## STATEMENT OF FACTS

The facts and procedural history relevant to the Madoff Ponzi scheme have been set forth numerous times and need not be repeated here.<sup>4</sup>

### **A. The SIPA Trustee's Authority**

Under SIPA, the Trustee is charged with recovering and distributing customer property to BLMIS's customers, assessing claims and liquidating any other assets of the firm for the benefit of the estate and its creditors. Pursuant to section 78fff-1(a) of SIPA, the Trustee has the general powers of a bankruptcy trustee in addition to the powers granted by SIPA.<sup>5</sup>

The Trustee has thus far collected over \$1.5 billion for victims of the Madoff Ponzi scheme. (Sheehan Aff. ¶ 3.) The Trustee's recovery process involves identifying those individuals and entities who received avoidable transfers from BLMIS and recovering these moneys for *pro rata* distribution to all customers.

### **B. The Court-Ordered Claims Administration Process<sup>6</sup>**

The Trustee sought and obtained an order from this Court to implement a customer claims process in accordance with SIPA. Pursuant to an application of the Trustee dated December 21, 2008 (Dkt. No. 8), this Court entered the Claims Procedures Order (Dkt. No. 12), which directed, among other things, that on or before January 9, 2009: (a) a notice of the commencement of this SIPA proceeding be published; (b) notice of the liquidation proceeding

---

<sup>4</sup> See *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC (In re Bernard L. Madoff Investment Securities LLC)*, 424 B.R. 122, 125-33 (Bankr. S.D.N.Y. 2010); Memorandum of Law in Support of Trustee's Application for Temporary Restraining Order, Enforcement of Automatic Stay and Preliminary Injunction, *Picard v. Fox*, Ad. Pro. No. 09-03114 (Bankr. S.D.N.Y. March 31, 2010), Dkt. No. 2 at 4-7.

<sup>5</sup> Further, pursuant to section 78fff(b) of SIPA, chapters 1, 3, 5 and subchapters I and II of Chapter 7 of the Bankruptcy Code are applicable to this case.

<sup>6</sup> The facts in this section are drawn from the Trustee's Third Interim Report. (Dkt. No. 2207.)

and claims procedure be given to persons who appear to have been customers of BLMIS; and (c) notice of the liquidation proceeding and a claim form be mailed to all known general creditors of the Debtor.

More than 16,000 potential customer, general creditor and broker-dealer claimants were included in the mailing of the Notice. The Trustee published the Notice in all editions of *The New York Times*, *The Wall Street Journal*, *The Financial Times*, *USA Today*, *Jerusalem Post* and *Ye-diot Achronot*. The Trustee also posted claim forms and claims filing information on the Trustee's website ("Trustee Website"), and SIPC's website.

Under the Claims Procedures Order, claimants were directed to mail their claims to the Trustee. All customers and creditors were notified of the mandatory statutory bar date for filing of claims under section 78fff-2(a)(3) of SIPA, which was July 2, 2009 (the "Bar Date"). The Trustee also provided several reminder notices.<sup>7</sup> By the Bar Date, the Trustee had received 16,239 customer claims. In accordance with the Claims Procedures Order, the Trustee has developed a comprehensive claims administration process for the intake, reconciliation, and resolution of these customer claims.

### **C. The Trustee's Proceedings Against the Madoff Defendants**

The Trustee has commenced two actions against the Madoff Defendants, one asserting claims against Ruth Madoff, *Picard v. Ruth Madoff*, Bankr. S.D.N.Y. Adv. Pro. No. 09-1391 (BRL), and another asserting claims against Peter Madoff, Andrew Madoff and Mark Madoff and Shana Madoff, *Picard v. Madoff, et al.*, Bankr. S.D.N.Y., Adv. Pro. No. 09-1503 (BRL).

---

<sup>7</sup> On May 21, 2009, the Trustee mailed a reminder notice to customers who had not yet filed a claim that the statutory bar date was July 2, 2009. On June 22, 2009, the Trustee mailed a final bar date reminder notice (the "Final Reminder Notice") to 7,766 known past and present customers of BLMIS from whom a claim had not yet been received. In addition, the Trustee posted the Final Reminder Notice on the Trustee Website.

(Dkt. Nos. 1 and 1, respectively.) The Trustee seeks to recover customer property held by the Madoff Defendants for equitable distribution to the victims of the Ponzi scheme.

***Picard v. Ruth Madoff*, Adv. Pro No. 09-1391 (BRL)**

On July 29, 2009, the Trustee commenced an action against Ruth Madoff in this Court (the “Ruth Madoff Complaint”), alleging that, although not an employee of BLMIS,<sup>8</sup> she received tens of millions of dollars from BLMIS for no legitimate business purpose or corresponding benefit to BLMIS, and to which she had no good faith basis to believe she was entitled.<sup>9</sup> (Ruth Madoff Cmplt ¶¶ 2, 4, 42.) (Dkt. No. 1.) These amounts are subject to recapture, regardless of Mrs. Madoff’s awareness of her husband’s fraud. (*See id.* ¶¶ 2, 4.)

The Trustee is seeking the return from Ruth Madoff of more than \$44 million of BLMIS customer property under SIPA §§ 78fff(b), 78fff-1(a), and 78fff-2(c)(3), §§ 105(a), 502(d), 541, 542, 544, 548(a), 550(a), and 551 of the Bankruptcy Code, the New York Fraudulent Conveyance Act (N.Y. Debt. & Cred. § 270 *et seq.*), and New York common law. The Trustee’s common law claims sound in conversion and unjust enrichment, and the Trustee seeks the imposition of a constructive trust, an accounting, and compensatory and punitive damages. (*Id.* ¶¶ 104-123.)

---

<sup>8</sup> The complaint against Ruth Madoff alleges that Mrs. Madoff was a controller at Madoff Securities International Ltd. (“MSIL”), a British affiliated entity of BLMIS, in which she personally held an interest, and had responsibilities for account reconciliation within the Investment Advisory (“IA”) business. (Ruth Madoff Cmplt ¶ 6.)

<sup>9</sup> Mrs. Madoff received substantial transfers from BLMIS in the form of direct payments as well as payments to entities in which she had an interest, including at least \$23,765,534 in the two years prior to the Filing Date, and, in the six year period prior to the Filing Date (exclusive of the transfers in the two years prior to the Filing Date), an additional \$21,116,820. (*Id.* ¶¶ 23, 33.) These transfers included, *inter alia*, an \$11 million payment to finance Mrs. Madoff’s ownership stake in DWD Associates, LLC, direct transfers of funds from BLMIS or related entities to Mrs. Madoff’s bank accounts, receipt of funds for the purchase of a yacht for Mrs. Madoff’s personal enjoyment, use of BLMIS funds pay approximately \$3,189,088 in personal expenses charged to Mrs. Madoff’s American Express card over the six years prior to the Filing Date. (*Id.* ¶¶ 24, 25, 29, 35, 28, 41.)

Mrs. Madoff's answer to the complaint is due by June 4, 2010 and a pre-trial conference is currently scheduled for June 24, 2010. (Dkt. No. 12.)

***Picard v. Madoff, et al.*, Adv. Pro. No. 09-1503 (BRL)**

On October 2, 2009, the Trustee commenced an action in this Court against Peter, Andrew, Mark and Shana Madoff (the "Trustee's Madoff Complaint"), alleging, *inter alia*, that, as senior executives of BLMIS, they had a duty to protect BLMIS and its customers from acts of mismanagement, and that they were derelict in their duties. (*See* Tr. Madoff Cmpl't, Ad. Pro. No. 09-1503, Dkt. No. 1, ¶¶ 2, 28, 33, 51.) At the same time that they disregarded their regulatory and compliance duties, the four Madoff Defendants collectively took almost \$200 million of BLMIS customer funds. (*Id.* ¶ 4.)

Other than Ruth Madoff, each of the Madoff Defendants held senior supervisory or compliance roles at BLMIS. Peter Madoff was the Company's Senior Managing Director and Chief Compliance Officer, Mark and Andrew Madoff were Co-Directors of Trading, and Shana Madoff at various times held herself out as Compliance Counsel, in-house Counsel, and Compliance Director of BLMIS. (*Id.* ¶¶ 6-9.) Further, Mark Madoff "at times, managed both the Firm's proprietary trading desk and its market-making operations," and Andrew Madoff "supervised trading at the Company, managed the trading floor, and directed many audit and compliance projects for the Company, including the confirmation and reporting of trades." (*Id.* ¶¶ 7, 8.) The Trustee's Madoff Complaint alleges that, in their senior management positions, each of these Madoff Defendants was entrusted with compliance and supervisory responsibilities for BLMIS and each failed to carry out his or her responsibilities, for his or her own profit and to the detriment of BLMIS and its customers. (*See, e.g., id.* ¶¶ 37-49.)

Specifically, the Trustee's Madoff Complaint alleges, *inter alia*, that Shana and Peter Madoff, who were both responsible for "monitoring BLMIS's operation and ensuring its compliance with federal securities laws and regulations and corresponding FINRA rules and regulations," completely failed to discharge their duties. (*Id.* ¶¶ 37, 43, 44.) The Trustee's Madoff Complaint further alleges that Mark and Andrew Madoff either knew or should have known that serious violations of the securities laws were taking place in the businesses under their supervision and control, and that they either deliberately ignored or failed to detect and stop these violations. (*See id.* ¶¶ 47-49.) These businesses included not only BLMIS, but also MSIL, of which both Mark and Andrew Madoff were co-directors and controllers. (*Id.* at ¶¶ 7-8.) As the Trustee alleges in the Madoff Complaint, Bernard L. Madoff used MSIL to create the false impression that BLMIS actively traded shares in its customers' investment accounts. (*Id.* ¶ 7; *see also* ¶¶ 50-58.)

Each of the Madoff Defendants benefited enormously from the Ponzi scheme. And each of them failed to sufficiently perform any of the regulatory, supervisory, or compliance duties required of him or her, yet each was compensated in excessive amounts and received huge sums of money from BLMIS.<sup>10</sup> (*Id.* ¶¶ 28, 59-64.)

---

<sup>10</sup> As alleged in the Trustee's Madoff Complaint, Peter Madoff received at least \$60,631,292 in improper transfers from BLMIS as of the filing of the Trustee's Madoff Complaint, which include, *inter alia*, \$20,067,920 in salary and bonus between 2001 and 2008, and \$3.5 million as "draws" from BLMIS's bank accounts, fabricated returns from his BLMIS accounts (Peter Madoff withdrew over \$16 million, while only depositing \$32,146 into one of his accounts), a \$4.45 million transfer in connection with payment for an apartment, and \$747,046 to pay for personal expenses charged to Peter Madoff's American Express cards. (*See* Tr. Madoff Cmplt ¶¶ 64, 65, 56, 66-71, 73.) As of the date of the filing of the Trustee's Madoff Complaint, the Trustee had identified at least \$66,859,311 that Mark Madoff received improperly from BLMIS, including, *inter alia*, compensation of \$29,320,830 between 2001 and 2008 (including bonuses of \$4.8 million in 2006 and over \$9 million in 2007, all while the business units under his direct supervisory control were losing money), fabricated "returns" from his IA account, and millions of dollars of transfers for purchases of vacation homes, business interests, and personal charges made on the firm's American Express card. (*See id.* ¶¶ 74, 52-58, 75-84.) Andrew Madoff also benefited from the Ponzi scheme to the tune of at least \$60,644,821 as of the date of the filing of the Trustee's Madoff Complaint, which includes, *inter alia*, \$31,105,505 in salary and bonuses between 2001 and 2008 (this amount includes bonuses of over \$4.8 million

The Trustee's Madoff Complaint seeks the return from the named Madoff Defendants of nearly \$200 million of BLMIS customer property under SIPA §§ 78fff(b), 78fff-1(a), 78fff-2(c)(3), sections 105(a), 502(d), 541, 542, 544, 548(a), 550(a), and 551 of the Bankruptcy Code, the New York Fraudulent Conveyance Act, and New York common law. The Trustee seeks compensatory and punitive damages for breach of fiduciary duty, conversion, unjust enrichment, negligence, and seeks the imposition of a constructive trust and an accounting. (*Id.* ¶¶ 176-214.)

On March 15, 2010, the four Madoff Defendants moved to dismiss the Complaint, which motions the Trustee has opposed. (Dkt. Nos. 13, 16, 19, 25.) The hearing on the motions to dismiss is currently scheduled for July 22, 2010. (Dkt. No. 24.)

\* \* \*

Based on the Trustee's investigation to date, all assets held by the Madoff Defendants are related to BLMIS customer property. Andrew, Mark, and Shana Madoff worked at BLMIS since graduating with undergraduate or professional degrees and Peter Madoff worked at BLMIS since 1965 (Tr. Madoff Cmplt ¶¶ 6-9), with no apparent sources of income other than BLMIS and related entities. Similarly, Ruth Madoff appears to have had no significant source of income other than from BLMIS or related entities.<sup>11</sup> Thus, a money judgment in a Third Party Action

---

in 2006, and over \$9 million in 2007 when IA money was being used to keep the market-making and proprietary trading business units afloat), fabricated "returns" from his IA account, and transfers for the purchase of homes and business interests, entertainment expenses, and other personal charges on his company-issued credit card. (*See id.*, ¶¶ 85, 52-58, 86-87, 94.) As of the date of the Trustee's Madoff Complaint, the Trustee had identified at least \$10,607,876 that Shana Madoff received from BLMIS, including, *inter alia*, \$3,832,878 in salary and bonus between 2001 and 2008, fabricated "returns" in her IA account, a transfer of almost \$2.9 million to purchase a home, and \$379,342 in payment of personal expenses charged to her American Express card. (*See id.* ¶¶ 96-98.)

<sup>11</sup> The Trustee's investigation into the source of the Madoff Defendants' income and assets is ongoing. To the extent that the Madoff Defendants may have received income from entities other than BLMIS or its affiliates, the Trustee's investigation to date has shown that the Madoff Defendants' interests in these entities were largely purchased using BLMIS funds. (*See, e.g.*, Tr. Madoff Cmplt ¶¶ 73, 84, 94, 98; Ruth Madoff Cmplt ¶¶ 38-40.) To the extent that the Madoff Defendants may have earned income from other sources (*e.g.*, dividends from investments), the Trustee believes these amounts to be *de minimis*.

rendered against any of the Madoff Defendants would necessarily implicate property that belongs to the BLMIS estate and ultimately to BLMIS's customers.

**D. The Third Party Actions Are Duplicative or Derivative of the Trustee's Complaints, and Seek Customer Property**

There are currently twelve Third Party Actions pending against Madoff family members which the Trustee believes seek customer property in the guise of damages. Of those twelve actions, three are against Madoff Defendants only<sup>12</sup> and the remaining nine sue other defendants as well.<sup>13</sup> At this time, the Trustee seeks an injunction only as to the Madoff Defendants, not other defendants. As set forth below, half of these Actions are active, while the other half have been temporarily stayed.

**1. Currently Active Third Party Actions**

The following six Third Party Actions are currently active: *The Lautenberg Foundation v. Madoff*, Case No. 09-cv-00816 (D.N.J.); *Stahl v. Madoff*, Index No. 601862/2009 (Sup. Ct. N.Y. Co.); *Abend v. Madoff*, Index No. 601861/2009 (Sup. Ct. N.Y. Co.); *Erausquin v. Notz, Stucki Management (Bermuda) Limited*, Case No. 09-cv-07846 (S.D.N.Y.); *In re Herald, Primeo and Thema Funds Securities Litig.*, Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.); and *Chavez v. Picard*, Case No. 09-mc-0006 (N.D. Tex.).

---

<sup>12</sup> *The Lautenberg Foundation v. Madoff*, Case No. 09-cv-00816 (D.N.J.); *Stahl v. Madoff*, Index No. 601862/2009 (Sup. Ct. N.Y. Co.); and *Abend v. Madoff*, Index No. 601861/2009 (Sup. Ct. N.Y. Co.)

<sup>13</sup> *Erausquin v. Notz, Stucki Management (Bermuda) Limited*, Case No. 09-cv-07846 (S.D.N.Y.); *In re Herald, Primeo and Thema Funds Securities Litig.*, Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.); *Chavez v. Picard*, Case No. 09-mc-00006 (N.D. Tex.); *Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff*, Case No. cv-09-5011561-S (Conn. Super. Ct.); *Wexler v. KPMG, LLP*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.); *Ryan v. Friehling & Horowitz, P.C.*, Index No. 101616/2009 (Sup. Ct. N.Y. Co.); *Greenberg v. Friehling & Horowitz, P.C.*, Index No. 650633/2009 (Sup. Ct. N.Y. Co.); *McBride v. KPMG Int'l*, Index No. 650632/2009 (Sup. Ct. N.Y. Co.); and *FLB Foundation Ltd. v. BLMIS*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.).



a. ***The Lautenberg Foundation v. Madoff,***  
**Case No. 09-cv-00816 (D.N.J.)**

i. **Claim Status**

All of the plaintiffs in this proceeding have availed themselves of the claims procedures described above and have filed claims with the Trustee. On March 2, 2009, the Lautenberg Foundation filed a customer claim with the Trustee (Claim No. 004698). (Affidavit of Matthew Cohen in Support of Trustee’s Application for Enforcement of Automatic Stay and Preliminary Injunction, sworn to on May 26, 2010 (the “Cohen Aff.”), Ex. A.) The Lautenberg Foundation’s allowed claim was partially satisfied with funds advanced by SIPC, following the execution of an assignment and release. (*Id.*, Ex. B.) On March 4, 2009, Joshua S. Lautenberg filed a customer claim with the Trustee (Claim No. 005650). (*Id.*, Ex. C.) His allowed claim was partially satisfied with funds advanced by SIPC, following the execution of an assignment and release. (*Id.*, Ex. D.) On March 2, 2009, Ellen Lautenberg filed a customer claim with the Trustee (Claim No. 004511). (*Id.*, Ex. E.) Her allowed claim was partially satisfied with funds advanced by SIPC, following the execution of an assignment and release. (*Id.*, Ex. F.)

ii. ***Lautenberg Allegations and Procedural History***

On or about February 24, 2009, the Lautenberg Foundation, Joshua S. Lautenberg and Ellen Lautenberg (collectively, the “*Lautenberg Plaintiffs*”) commenced an action against Peter Madoff in the District Court for the District of New Jersey (the “*Lautenberg Action*”). (Sheehan Aff., Ex. A.) The *Lautenberg Plaintiffs* allege violations of Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78; and Securities and Exchange Commission (“SEC”) Rule 10b-5, 17 C.F.R., § 240, 10b-5, breach of fiduciary duty, negligent misrepresentation, negligence, liability under Section 20(a) of the Exchange Act and aiding and abetting breach of fiduciary duty against Peter Madoff. (*Id.*, Ex. A ¶¶ 35-62.) The *Lautenberg*

Plaintiffs seek compensatory, consequential and punitive damages, attorneys' fees and other expenses and interest. (*Id.*, Ex. A at pp. 22-23.) They base their alleged losses on a claimed investment of \$8,992,000. (*Id.*, Ex. A ¶ 23.)

The *Lautenberg* Plaintiffs allege that they invested \$8,922,000 with BLMIS, "in reliance on the purported superior knowledge, training, skill, honesty, ethics, and integrity of BMIS, its members, officers, directors and employees . . ." (*Id.*, Ex. A ¶¶ 16-23.) Significantly, they do not allege anything other than pieces of what the Trustee alleges in his Madoff Complaint—that Peter Madoff knew or should have known of the Ponzi scheme, ignored obvious "red flags" and acquiesced in BLMIS's false representations. (*See, e.g., id.*, Ex. A ¶¶ 31-34, 38.) There is absolutely no conduct alleged other than what the Trustee alleges in his Complaint. (*Cf. Tr. Madoff Cmplt* ¶¶ 30, 37-42, 65-73, 100-111). The damages sought by the *Lautenberg* Plaintiffs are thus based entirely on their investment through BLMIS—nothing more, and are entirely duplicative of the Trustee's allegations.

On September 9, 2009, the Court dismissed the *Lautenberg* Plaintiffs' claim for violation of Section 10(b) of the Exchange Act insofar as it was premised on affirmative misrepresentations<sup>14</sup> and their negligent misrepresentation claim, without prejudice. (Sheehan Aff., Ex. B). On March 12, 2010, the *Lautenberg* Plaintiffs filed a motion for summary judgment as to count three of their complaint: liability under Section 20(a) of the Exchange Act, 15 U.S.C. § 78(a) (the "Summary Judgment Motion") (*Id.*, Ex. C.) On April 27, 2010, Peter Madoff filed an opposition to the *Lautenberg* Plaintiffs' Summary Judgment Motion and a cross motion to stay the litigation for nine months because of, among other things, the pending

---

<sup>14</sup> However, the *Lautenberg* Plaintiffs' section 10(b) and Rule 10b-5(b) claims based on omissions of a material fact survived the motion to dismiss. (Sheehan Aff., Ex. B, Opinion on Motion to Dismiss, at 34-35.)

criminal investigation by the United States Attorney's Office and difficulties in preparing a defense due to lack of access to evidence (the "Cross-Motion"). (*Id.*, Ex. D, at 50-58.) On May 20, 2010, the *Lautenberg* Plaintiffs filed their reply to Peter Madoff's Opposition to their Summary Judgment Motion and opposed Peter Madoff's Cross-Motion. (*Id.*, Ex. E.)

Counsel for the Trustee has written to counsel for the Lautenbergs explaining the impropriety of the Lautenberg's lawsuit from the Trustee's perspective and asking the Lautenbergs not to proceed. (*Id.*, Ex. F.) Counsel declined the request and expressed their intent to continue prosecution. (*Id.*, Ex. F.)

**b. *Stahl v. Madoff*, Index No. 601862/2009 (Sup. Ct. N.Y. Co.)  
*Abend v. Madoff*, Index No. 601861/2009 (Sup. Ct. N.Y. Co.)**

**i. Claim Status**

Both Richard Stahl ("Mr. Stahl") and Reed Abend ("Mr. Abend") are former BLMIS employees who worked for the firm's proprietary trading operations. (Sheehan Aff., Ex. G ¶¶ 2, 4; Ex. H ¶¶ 2, 4; *see also* Cohen Aff. ¶ 3.) Both have availed themselves of the claims procedures described above and have filed claims in the BLMIS liquidation proceeding for deferred compensation and back pay. On February 24, 2009, Mr. Abend filed a general creditor claim with the Trustee (Claim No. 100039). (Cohen Aff., Ex. G.) On May 22, 2009, Mr. Stahl filed a general creditor claim with the Trustee (Claim No. 100111). (*Id.*, Ex. H.) Both claims are still being investigated by the Trustee. (*Id.* ¶ 5.) Notably, among the damages these plaintiffs seek in their state court actions are damages in the exact dollar amounts specified in their creditor claims filed with the Trustee. (Sheehan Aff., Ex. G ¶¶ 25, 35, 40, pp. 8-9; Sheehan Aff., Ex. H ¶¶ 26, 36, 41, p. 9.)

**ii. Stahl and Abend Allegations and Procedural History**

On or about June 10, 2009, Mr. Stahl and Mr. Abend, represented by the same law firm, filed separate actions in the Supreme Court of the State of New York against Mark and Andrew Madoff (the “*Stahl* Action” and the “*Abend* Action”), seeking the same recovery of deferred compensation and back pay that they seek as creditors of the estate. (*Cf.* Sheehan Aff., Exs. G, H *with* Cohen Aff., Exs. G, H.) Among other relief, Mr. Stahl seeks approximately \$1.3 million in compensatory damages and Mr. Abend seeks approximately \$475,000 in compensatory damages. (Sheehan Aff., Ex. G ¶¶ 25, 35, 40, pp. 8-9; Sheehan Aff., Ex. H ¶¶ 26, 36, 41, p. 9.) Their causes of action sound in fraud, fraudulent omission and failure to pay wages under New York Labor Law. (*Id.* Ex. G, ¶¶ 30-46; *Id.* Ex. H, ¶¶ 31-47.)

The essence of their allegations is that Mark and Andrew Madoff knew or should have known about their father’s Ponzi scheme, but never told BLMIS’s employees about it, or misrepresented the legitimacy of the Investment Advisory (“IA”) business to BLMIS employees, including Mr. Stahl and Mr. Abend, in order to “perpetuate their father’s lawless conduct” and induce the employees to continue to work for the “legitimate” arm of BLMIS. (*Id.*, Ex. H ¶¶ 7, 22-24); *Id.*, Ex. G ¶¶ 7, 21-23.) The *Stahl* and *Abend* complaints allege that, in connection with the May 2001 *Barron’s* article entitled “Don’t Ask, Don’t Tell,” in which the author questioned Madoff’s consistent returns, “the Madoff Sons told the employees of the Trading Business—including Plaintiff—that the suspicions raised by the article were not true. The Madoff Sons went on to state falsely that Madoff’s investment advisory business was completely legitimate.” (Sheehan Aff. Ex. H, ¶¶ 22, 23; Sheehan Aff. Ex. G, ¶¶ 21, 22.)<sup>15</sup>

---

<sup>15</sup> In the same month of May 2001, Madoff himself publicly responded to those questions about BLMIS’s legitimacy. In an article published in *MAR/Hedge*, Madoff stated, among other things, that his firm’s success was

Mr. Stahl's and Mr. Abend's claims are based on the same operative facts as the Trustee's claims. (*See, e.g.*, Tr. Madoff Cmplt ¶¶ 47-49.) Moreover, they seek money from Andrew and Mark Madoff that they should be seeking—and are seeking—from the BLMIS estate.

On July 27, 2009, Mark and Andrew Madoff filed motions to dismiss both the Stahl and Abend Complaints for failure to state a cause of action. (Sheehan Aff., Ex. J.) On March 9, 2010, Plaintiffs' claims for failure to pay wages under New York Labor Law § 190 *et seq.* were dismissed, while the remaining claims were permitted to go forward. (*Id.*, Ex. K.) Both sides have appealed the partial grant of the motion. (*Id.*, Exs. L, M.)

Importantly, because the actions were not dismissed in their entirety, discovery has commenced in both cases. The plaintiffs were scheduled to depose Mark and Andrew Madoff during the week of May 17, 2010, although those depositions now appear to be delayed. (*Id.* Ex. N.) The parties also seek the Trustee's deposition and documents. (*Id.*, Ex. O.) The document requests to the Trustee are exceedingly broad and onerous. For example, Mr. Stahl seeks: “[a]ll communications sent by the Madoff Sons;” “[a]ll documents and communications relating or referring to the legality of BMIS;” “[a]ll documents and communications relating or referring to the roles(s) of the Madoff Sons in the London office of BMIS;” and “[a]ll documents provided by the Madoff Sons to SIPC.” (*Id.* Ex. O, Nos. 2, 6, 15, 18.) Meanwhile, Mark and Andrew Madoff seek, for example: “[a]ll documents concerning the operations of the Investment Advisory Business at BLMIS” and “[a]ll documents concerning Bernard Madoff's Ponzi scheme.” (*Id.*, Ex. O, Nos. 3 and 8.)

---

attributable “to its highly regarded operational infrastructure” and “suggest[ed] that those who believe there is something more to it . . . are wasting their time.” (*Id.*, Ex. I at 18.)

The notion that Mr. Stahl's \$1.3 million employment lawsuit and Mr. Abend's \$475,000 employment lawsuit should be driving the discovery on Andrew and Mark Madoff's alleged complicity in the Ponzi scheme—ahead of the Trustee's discovery—speaks volumes of the impropriety of these actions at this time. The Trustee has informed Mr. Stahl's and Mr. Abend's counsel of his belief that their actions are void *ab initio* and violate the stay order in this proceeding for the same reasons articulated by this Court in *Picard v. Fox*, 2010 WL 1740885 (Bankr. S.D.N.Y. May 3, 2010). (*Id.*, Ex. P.) Nonetheless, their counsel has insisted that they will continue to seek to depose Mark and Andrew Madoff and otherwise proceed with their action unless enjoined by this Court. (*Id.*, Ex. P.)

c. ***Erausquin v. Notz, Stucki Management (Bermuda) Limited,*  
Case No. 09-cv-07846 (S.D.N.Y.)**

i. **Claim Status**

The plaintiffs in this putative class action allege that they were investors in Plaza Investments International Limited (the "Plaza Fund"), a feeder fund which invested in BLMIS. (Sheehan Aff., Ex. Q, *Erausquin* Complaint, ¶ 3.) On March 3, 2009, Plaza Fund filed a customer claim with the Trustee (Claim No. 006187), to which it later filed an addendum. (Cohen Aff. Ex. I.) Plaza Fund's claim has not yet been determined by the Trustee. (Cohen Aff. ¶ 5.)

ii. **Erausquin Allegations and Procedural History**

On or about September 11, 2009, Matias Erausquin, Enrique Erausquin, Liliana Controne and Yolanda Frischknecht (collectively, the "*Erausquin* Plaintiffs") commenced a putative class action in the Southern District of New York (the "*Erausquin* Action"), on behalf of themselves and all others similarly-situated, against Notz, Stucki Management (Bermuda) Limited, Notz, Stucki & Cie, S.A., Marc Hoegger, Theo Limpach, BDO Compagnie Fiduciaire, Luxembourg;

UBS (Luxembourg) S.A., PricewaterhouseCoopers Luxembourg, Frank DiPascali, Peter Madoff, Andrew and Mark Madoff. (Sheehan Aff. Ex. Q.) Only their claims against Peter, Andrew and Mark Madoff are relevant to the Trustee's requested relief at this time.

The *Erausquin* Complaint against the three Madoff Defendants is based on the same operative facts as those alleged in the Trustee's Madoff Complaint. The *Erausquin* Plaintiffs allege that the three Madoff Defendants, among others, "were active and knowing participants in the fraud" (*Id.*, Ex. Q ¶ 101), that obvious red flags should have alerted the defendants of the BLMIS fraud (*id.*, Ex. Q ¶¶ 47-56) and that plaintiffs have suffered damages as a "direct and proximate result of [defendants'] failure to fulfill their duties" (*id.*, Ex. Q ¶ 6.) The *Erausquin* Plaintiffs seek to certify a class, defined as "all persons or entities who owned shares of the Plaza Fund as of December 10, 2008 and were damaged thereby." (*Id.*, Ex. Q ¶ 7.) Their claims against the three Madoff Defendants are for unjust enrichment and aiding and abetting breach of fiduciary duty. (*Id.*, Ex. Q ¶¶ 6, 89-92, 99-102.) As against the Madoff Defendants, plaintiffs seek preliminary and permanent injunctive relief, the imposition of a constructive trust in order to preserve the assets "wrongfully taken from Plaintiffs and the Class," compensatory, consequential, general and punitive damages, disgorgement and restitution, attorneys' fees and costs and interest. (*Id.*, Ex. Q at pp. 30-31.)

As to procedural status, the *Erausquin* Plaintiffs and certain non-Madoff family member defendants appear to be in the midst of briefing jurisdictional issues. (*Id.*, Ex. R.)

**d. *In re Herald, Primeo and Thema Funds Securities Litigation,*  
Case Nos. 09-cv-0289/09-cv-2558 (S.D.N.Y.)<sup>16</sup>**

**i. Claim Status**

Neville Seymour Davis (“Mr. Davis”), the named plaintiff,<sup>17</sup> alleges that he was an investor in Thema International Fund plc (“Thema Fund”), a feeder fund that invested in BLMIS. (*Id.*, Ex. T ¶¶ 4, 16.) On June 26, 2009, Mr. Davis filed a customer claim with the Trustee (Claim No. 011789). (Cohen Aff. Ex. J.) The claim was denied as Mr. Davis had no customer account at BLMIS. (*Id.*, Ex. K.) On July 2, 2009, Thema Fund filed two customer claims with the Trustee (Claim Nos. 014687, 015236), which appear to be identical. (*Id.*, Ex. L.) Thema Fund’s claims have not yet been determined by the Trustee. (Cohen Aff. ¶ 5.)

**ii. Herald Allegations and Procedural History**

On February 11, 2009, a few months after the Trustee filed his Madoff Complaint, Mr. Davis filed an Amended Class Action Complaint in the Southern District of New York on behalf of himself and all persons and entities who either owned shares of Thema Fund on December 10, 2008, or purchased shares of Thema between January 12, 2004 and December 14, 2008, inclusive. (Sheehan Aff. Ex. T.) The complaint was amended in order to include claims against Peter, Andrew, and Mark Madoff for aiding and abetting breach of fiduciary duty, “aiding and abetting gross negligence and negligence,” and unjust enrichment. (*See id.*, Ex. T ¶¶ 577–89.)

---

<sup>16</sup> On October 5, 2009, this action was consolidated for pretrial purposes only with *Leonhardt v. Madoff, et al.*, S.D.N.Y., Case No. 09-cv-2032 and *Repex Ventures S.A. v. Madoff, et al.*, S.D.N.Y., Case No. 09-cv-289, as *In re Herald, Primeo and Thema Funds Securities Litigation*, under the proceeding number 09-cv-289. (Sheehan Aff., Ex. S at 17-18.)

<sup>17</sup> On or about March 19, 2009, Fabian Perrone (“Perrone”) and Chia-Hung Kao (“Kao”) commenced an action in the United States District Court for the Southern District of New York on behalf of themselves and those similarly situated, which action was initially styled *Perrone, et al. v. Benbassat, et al.*, S.D.N.Y., Case No. 09-cv-2558 (Sheehan Aff., Ex. S at 2.) However, in an order dated October 5, 2009, the court determined that Davis was the appropriate lead plaintiff in the action. (*Id.*, Ex. S at 17-18.)



Mr. Davis's claims against Peter, Andrew and Mark Madoff are based on the same operative facts underlying the action filed against them by the Trustee. The Amended Complaint alleges that these Madoff family members knew of the Ponzi scheme and that they "actively participated in perpetrating [it]." (*Id.*, Ex. T ¶¶ 54-56, 273, 276). Mr. Davis bases these allegations on the three Madoff Defendants' unique knowledge of BLMIS, the "red flags" they were surrounded with on a daily basis, their senior positions at BLMIS and their relationships with Madoff. (*Id.*, Ex. T ¶¶ 273-75.) Mr. Davis also alleges, paralleling similar allegations in the Trustee's Madoff Complaint, that these Madoff Defendants "failed to develop and implement effective internal controls that, had they been implemented, would have prevented Plaintiff's losses." (*Id.*, Ex. T ¶ 276; *cf.* Tr. Madoff Cmplt ¶¶ 28-38 (alleging that Madoff Defendants failed to properly implement internal risk management controls at BLMIS).) Through this conduct, the Madoff family members are alleged to have "substantially assisted the other Defendants' mismanagement and wrongful conduct . . . causing enormous losses to Plaintiff and the Class." (*Id.*, Ex. T ¶ 277.)

Mr. Davis seeks, on behalf of himself and the purported class, damages of principal initially invested in Thema, interest and profit that would have been "earned had their money been prudently invested," punitive damages, an injunction, attorneys' fees, and costs. (*Id.*, Ex. T at p. 181.)

e. **Chavez v. Picard, Case No. 09-mc-00006 (N.D. Tex.)**

i. **Claim Status**

On February 17, 2009, Emilio Chavez, Jr. ("Mr. Chavez"), an inmate at a Texas correctional facility (*Id.*, Ex. U, Chavez Complaint), filed a customer claim with the Trustee

(Claim No. 002329). (Cohen Aff. Ex. M.) The claim was denied as Mr. Chavez had no customer account at BLMIS. (*Id.* Ex. N.)

**ii. Chavez Allegations and Procedural History**

On or about March 5, 2009, Mr. Chavez commenced an action in the District Court for the Northern District of Texas (the “*Chavez Action*”), on behalf of fourteen entities with an address at 2302 36th St., Lubbock, Texas. (Sheehan Aff., Ex. U at 2-3.) The *Chavez Action* alleges violations of the Securities Act of 1933 § 12, 15 U.S.C. § 77,<sup>18</sup> the Exchange Act, § 10(b), 15 U.S.C. § 78(b), 17 CFR § 240.10b-5, the Hobbs Act, the Racketeer Influenced and Corrupt Organizations Act, breach of implied contract and fiduciary duties, fraud, misrepresentation, deceptive trade practice, misappropriation of funds, theft, bad faith, mismanagement, deception and extortion against defendants Madoff, BLMIS (through the Trustee), Peter, Shana and Andrew Madoff, as well as Banco Santander, Manuel Echevegria, Robert Jaffe, Cohmad Securities, Fairfield Greenwich Group, Optimal Investments Services, S.P., Richard Piccoli, Gen-see Capital Corp., PricewaterhouseCoopers, HSBC Holding PLC, and Bank Medici (the “*Chavez Defendants*”). (*Id.*, Ex. U at pp. 3-5.)

Mr. Chavez alleges that he opened several accounts, that he was misled into believing that his investments were bona fide, and that he was issued worthless bonds and non-registered securities to mask the Ponzi scheme. (*Id.*, Ex. U at pp. 6-7.) Mr. Chavez alleges that, as a result, more than \$750 million was “diverted from the true purchase of securities into a criminal enterprise” and that he suffered losses and damages in excess of that amount. (*Id.*, Ex. U at pp. 7.) No specific allegations are made against the three Madoff Defendants, and no facts are

---

<sup>18</sup> It appears that Mr. Chavez is referencing 15 U.S.C. § 77*l*, at which Section 12 of the Securities Act of 1933 is codified.

alleged that would distinguish Mr. Chavez from any other purported victim of the Madoff Ponzi scheme.

There appears to have been no proceedings in this matter following the filing of the Complaint and a motion to proceed *in forma pauperis*. (Sheehan Aff., Ex. U (docket).)

**2. Currently Stayed Third Party Actions**

In addition to the six active Third Party Actions described above, the Trustee also seeks injunctive relief with respect to six actions that have been temporarily stayed: *Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff*, Case No. cv-09-5011561-S (Conn. Super. Ct.); *Wexler v. KPMG*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.); *Ryan v. Friehling & Horowitz, P.C.*, Index No. 101616/2009 (Sup. Ct. N.Y. Co.); *Greenberg v. Friehling & Horowitz, P.C.*, Index No. 650633/2009 (Sup. Ct. N.Y. Co.); *McBride v. KPMG Int'l*, Index No. 650632/2009 (Sup. Ct. N.Y. Co.); and *FLB Foundation Ltd. v. BLMIS*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.).

**a. *Retirement Program for Employees of the Town of Fairfield v. Bernard L. Madoff, Case No. cv 09-5011561-S (Conn. Super. Ct)***

**i. Claim Status**

On March 2, 2009, Retirement Program For Employees of the Town of Fairfield and Retirement Program for Police Officers and Firemen of the Town of Fairfield (the “Retirement Programs”) filed a customer claim with the Trustee (Claim No. 005614). (Cohen Aff., Ex. O.) The claim was denied as the Retirement Programs did not have customer accounts at BLMIS. (*Id.*, Ex. P.) The Town of Fairfield, also a plaintiff in the action, did not file a claim. (*See id.* ¶ 6.) However, its claim is derivative of that of the Retirement Programs, as the Town alleges that it “is responsible, pursuant to the Fairfield Town Charter, for funding the retirement benefits payable to members of the [Retirement Programs].” (Sheehan Aff. Ex. V ¶ 2.) Further, the

Retirement Programs allege in their Complaint that they were investors in Maxam Absolute Return Fund, L.P. (“Maxam Fund”), a feeder fund that invested in BLMIS. (*Id.*, Ex. V ¶ 59-62.). On March 2, 2009, Maxam Fund filed a customer claim with the Trustee (Claim No. 004554). (Cohen Aff. Ex. Q.) Maxam Fund’s claim has not yet been determined by the Trustee. (*See* Cohen Aff. ¶ 5.)

**ii. *Fairfield* Allegations and Procedural History**

On March 30, 2009, the Retirement Programs and the Town of Fairfield (collectively, the “*Fairfield* Plaintiffs”) commenced an action in the Superior Court of Connecticut<sup>19</sup> (the “*Fairfield* Action”) against Bernard L. Madoff,<sup>20</sup> certain Tremont entities, Oppenheimer Acquisition Corp., certain Maxam Capital entities, certain principals of Tremont and Maxam, Robert I. Schulman,<sup>21</sup> Walter M. Noel, Jr., Jeffrey H. Tucker, Andres Piedrahita, Peter Madoff, Ruth Madoff, Mark Madoff, and Andrew Madoff. (Sheehan Aff., Ex. V, ¶¶ 3-17.)

With respect to Peter Madoff, the *Fairfield* Plaintiffs allege that he “either knew or willfully refused to know that [Madoff] and the Feeder Fund Defendants were operating an illegal investment services operation. . . [.]”; “intentionally utilized his management authority at BLMIS . . . to help further defendants’ criminal scheme”; and “intentionally assist[ed]” Madoff to perpetuate the scheme. (*Id.*, Ex. V ¶¶ 73-74.) Plaintiffs’ claims against Peter Madoff are for statutory theft and aiding and abetting theft. (*Id.*, Ex. V, Fifth Count ¶ 81.) The other named Madoff Defendants are alleged to have received fraudulent transfers from Madoff and BLMIS.

---

<sup>19</sup> The action was commenced in the Judicial District of Fairfield at Bridgeport (Proceeding No. FBT-CV09-5023735-S), but was subsequently transferred to Stamford on or about May 14, 2009. (Sheehan Aff., Ex. W.)

<sup>20</sup> The action with respect to Bernard L. Madoff is stayed due to the liquidation proceeding. (*See id.*, Ex. X at 5.)

<sup>21</sup> The claims against Tremont Partners, Inc., Tremont Group Holdings, Inc., Oppenheimer Acquisition Corp., and Robert I. Schulman were withdrawn. (*Id.*, Ex. X at 2 n.2.)

(*Id.*, Ex. V, 18th Count ¶¶ 90-97; 19th Count ¶¶ 87-91; 20th Count; 21st Count.) The claims against the other named Madoff Defendants are for unjust enrichment and avoidance of fraudulent conveyance. (*Id.*, Ex. V) The Fairfield Plaintiffs thus seek, as to the Madoff Defendants, the same relief sought by the Trustee—constructive trust, and the avoidance of fraudulent and preferential transfers made from BLMIS and Madoff to these Madoff Defendants. (*Cf. Id.*, Ex V with Tr. Madoff Cmpl ¶¶ 1,5.)

The *Fairfield* Plaintiffs seek, in addition to compensatory and punitive damages, statutory damages and attorneys’ fees and costs, as well as the imposition of a constructive trust in favor of the *Fairfield* Plaintiffs over “the illicit proceeds and assets” received by the named Madoff Defendants, entry of an order avoiding the fraudulent transfers made by Madoff, and entry of an order authorizing plaintiffs to execute on assets transferred to the named Madoff Defendants. (Sheehan Aff., Ex. V at p. 69).

Peter, Mark, Andrew, and Ruth Madoff filed motions to dismiss, which were granted in a memorandum decision on April 16, 2010, wherein the court concluded that the *Fairfield* Plaintiffs lacked standing to bring the claims.<sup>22</sup> (*Id.*, Ex. X at p. 28.) On May 3, 2010, the *Fairfield* Plaintiffs appealed the decision, including that section dismissing their claims against the relevant Madoff Defendants. (*Id.*, Ex. Y.)

**b. The Cotchett Actions**<sup>23</sup>

*Wexler v. KPMG, LLP*, Index No. 101615/2009 (Sup. Ct. N.Y. Co.);

*Ryan v. Friehling & Horowitz, P.C.*, Index No. 101616/2009 (Sup. Ct. N.Y. Co.);

---

<sup>22</sup> The plaintiffs withdrew the claims against Ruth Madoff in July 2009. (*Id.* Ex. X, at 3 n.3.)

<sup>23</sup> The law firm of Cotchett, Pitre & McCarthy filed each of the following actions.

*Greenberg v. Friehling & Horowitz, P.C.*, Index No. 650633/2009 (Sup. Ct. N.Y. Co.);

*McBride v. KPMG International*, Index No. 650632/2009 (Sup. Ct. N.Y. Co.).

**i. Claim Status**

**Wexler**

On February 6, 2009, Jay Wexler filed a customer claim with the Trustee (Claim No. 001693). (Cohen Aff. Ex. R.) Mr. Wexler alleges that he was an investor in Rye Select Broad Market Prime Fund, L.P. (“Rye Fund”), which invested in the Tremont Fund, a BLMIS customer. Since Mr. Wexler had no customer account with BLMIS, the Trustee denied his claim. (*Id.* Ex. S.) On June 24 and June 29, 2009, Rye Fund filed two customer claims with the Trustee (Claim Nos. 011041 and 013043, respectively). (*Id.* Ex. T.) Rye Fund’s claims have not yet been determined by the Trustee. (*Id.*, ¶ 5.)

**Ryan**

On January 21, 2009 and June 29, 2009, Daniel Ryan filed two customer claims with the Trustee (Claim Nos. 000857 and 012717). (Cohen Aff. Ex. U.) Neither claim has yet been determined. (*Id.* ¶ 5.) On January 21, 2009, Theresa Ryan filed four customer claims with the Trustee (Claim Nos. 000814, 000820, 000852, 000856), including one for the Lawrence J. Ryan By-Pass Trust (the “Ryan Trust”). (*Id.* Ex. V.) Two claims have yet to be determined (Claim Nos. 000852, 000856). (*Id.* ¶ 5.) The others have been allowed and fully satisfied with funds advanced by SIPC, following the execution of assignments and releases. (*Id.* Ex. W.) With respect to the determination of claim number 000814, Theresa Ryan filed an objection on September 14, 2009. (Dkt. No. 429.)

### **Greenberg**

On January 23, 2009 and February 2, 2009, Matthew Greenberg filed customer claims with the Trustee (Claim No. 000974, 001492). (Cohen Aff. Ex. X.) Mr. Matthew Greenberg's allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of an assignment and release. (*Id.*, Ex. Y.) On February 6, 2009, Walter Greenberg filed a customer claim with the Trustee (Claim No. 001708). (*Id.* Ex. Z.) Mr. Walter Greenberg's allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of an assignment and release. (*Id.* Ex. AA.) On February 20, 2009, Doris Greenberg filed a customer claim with the Trustee (Claim No. 002929). (*Id.* Ex. BB.) Ms. Greenberg's allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of an assignment and release. (*Id.* Ex. CC.) On February 20, 2009, Ms. Greenberg also filed a claim on behalf of the estate of Leon Greenberg (the "Estate"), for which she is the executor (Claim No. 002941). (*Id.* Ex. DD.) The Estate's allowed claim was partially satisfied by the Trustee with funds advanced by SIPC, following the execution of an assignment and release. (*Id.* Ex. EE.)

### **McBride**

On March 3, 2009, Donna M. McBride, who alleges that she was a member of Beacon Associates LLC II ("Beacon Fund"), (Sheehan Aff. Ex. Z ¶ 27), filed two customer claims with the Trustee (Claim Nos. 005434 and 5435). (Cohen Aff. Ex. FF.) Both claims were denied, as Ms. McBride had no customer account at BLMIS. (Cohen Aff. Ex. GG.) Beacon Fund appears to be a subsidiary fund of Beacon Associates LLC, which did file a claim (Claim No. 008318) with the Trustee on April 3, 2009. (*Id.* Ex. HH.) The Beacon Associates LLC's claim has not yet been determined by the Trustee. (*Id.* ¶ 5)

## ii. Action Status

Mr. Wexler, both individually and derivatively on behalf of the Rye Fund, commenced an action on February 5, 2009 (the “Wexler Action”). (Sheehan Aff. Ex. AA.) The complaint was amended on October 20, 2009, adding defendants and adding causes of action against three of the Madoff Defendants. (*Id.*, Ex. BB.) In addition to Mark, Andrew, and Peter Madoff, the *Wexler* defendants include Tremont Partners, Inc. and certain related entities, several KPMG entities, JP Morgan, Bank of New York Mellon, Oppenheimer Acquisition Corp., Massachusetts Mutual Life Insurance, Sandra L. Manzke, Robert I. Schulman, Paul Konigsberg, Annette Bongiorno, and Frank DiPascali.<sup>24</sup> (*Id.*, Ex. BB.)

Daniel Ryan and Theresa Ryan, individually and on behalf of the Ryan Trust (the “*Ryan* Plaintiffs”), commenced an action on February 5, 2009 (the “*Ryan* Action”). (*Id.*, Ex. DD.) The *Ryan* Plaintiffs amended the Complaint on October 22, 2009, adding defendants and adding claims for breach of fiduciary duty and aiding and abetting fraud against Andrew, Mark and Peter Madoff.<sup>25</sup> (*Id.*, Ex. EE.) In addition to Andrew, Mark, and Peter Madoff, the defendants include various KPMG entities, Friebling & Horowitz, P.C., JP Morgan, Bank of New York Mellon, Paul Konigsberg, Frank Avellino, Annette Bongiorno, and Frank DiPascali. (*Id.*, Ex. EE.)

Mr. Matthew Greenberg, Mr. Walter Greenberg, Ms. Greenberg, and the Estate, which each held investment accounts at BLMIS (the “*Greenberg* Plaintiffs”), commenced an action on

---

<sup>24</sup> The action was discontinued with prejudice against Ruth Madoff on or around August 17, 2009. (Sheehan Aff., Ex. CC.)

<sup>25</sup> The original complaint named only Friebling & Horowitz, P.C., DiPascali, Frank Avellino, Andrew Madoff, Mark Madoff, Peter Madoff, Ruth Madoff, and John Does. As against the Madoff family member defendants, the complaint alleged causes of action for fraud, negligent misrepresentation, unjust enrichment, and conversion. (Sheehan Aff., Ex. DD ¶¶ 76-98.)



October 22, 2009. (*Id.* Ex. FF.) In addition to Andrew, Mark and Peter Madoff, the defendants in the *Greenberg* action include Friebling & Horowitz, P.C., various KPMG entities, JP Morgan, Bank of New York Mellon, Paul Konigsberg, Annette Bongiorno, and Frank DiPascali. (*Id.*, Ex. FF.)

On October 22, 2009, Ms. McBride, individually and derivatively on behalf of Beacon Associates LLC II, commenced an action against various KPMG entities, JP Morgan, Bank of New York Mellon, Beacon Associates Management Corp., Ivy Asset Management Corp., Joel Danziger, Harris Markhoff, Friedberg, Smith & Co. P.C., Paul Konigsberg, Annette Bongiorno, Frank DiPascali, and Andrew, Peter and Mark Madoff. (*Id.*, Ex. Z.)

The plaintiffs in the *Wexler*, *Ryan*, *Greenberg*, and *McBride* actions (the “Cotchett Actions”), allege that Peter, Mark, and Andrew Madoff “had actual knowledge of . . . the [BLMIS] fraud based on their roles and responsibilities at [BLMIS] and MSIL and their knowledge of the indications of fraud . . . .” (*Id.*, Ex. BB ¶ 412, *see also id.*, Ex. EE ¶ 322, Ex. FF ¶ 315, Ex. Z ¶ 342.) They further allege that Peter, Mark, and Andrew Madoff used BLMIS for their personal use, receiving loans and millions of dollars for personal expenses, including vacations, cars, and home purchases. (*Id.*, Ex. BB ¶ 300; Ex. EE ¶ 227; Ex. FF ¶ 224; Ex. Z ¶ 241.) The allegations regarding the nature of the misuse of BLMIS funds were not included in the original complaints filed by *Wexler* and the *Ryan* plaintiffs, appearing only in the amended complaints filed after the Trustee filed the Trustee’s Madoff Complaint and mimicking the Trustee’s allegations. (*Cf.* Tr. Madoff Cmplt ¶ 3 (“Each of the Family Defendants took huge sums of money out of BLMIS to fund personal business ventures and personal expenses such as homes, cars, and boats.”))

Based on these allegations, the plaintiffs in the Cotchett Actions bring claims against the named Madoff Defendants for, across all complaints, aiding and abetting fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, aiding and abetting fraud in the inducement, conversion and unjust enrichment. (*Id.*, Ex. BB ¶¶ 408-428, 437-457, 482-501, 506-516; Ex. EE, ¶¶ 319-342, 377-387; Ex. FF ¶¶ 312-335; 368-378; Ex. Z ¶¶ 338-357, 366-384, 404-424.)<sup>26</sup> Plaintiffs seek compensatory and punitive damages, disgorgement, and restitution for all earnings, profits, compensation, and benefits received as a result of the defendants' unlawful acts and practices and attorneys' fees and costs. (*Id.*, Ex. BB pp. 261-262, Ex. EE pp. at 191-192, Ex. FF at pp. 189-190, Ex. Z at pp. 215-216.)

On December 1, 2009, JP Morgan sought to stay the *Wexler*, *Ryan*, *Greenberg*, and *McBride* actions, pending a decision by the District Court on a motion to dismiss filed by JP Morgan in *MLSMK Investments Co. v. JP Morgan Chase & Co. and JP Morgan Bank, NA*, 09-cv-4049 (BSJ) (the "SDNY JP Morgan Action"). (*Id.*, Exs. GG, HH, II.) On the record on January 25, 2010 and February 1, 2010, and in orders entered the same days, the court stayed the actions pending resolution of the motion to dismiss filed in the SDNY JP Morgan Action.<sup>27</sup> (*Id.*, Exs. JJ, KK, LL.)

---

<sup>26</sup> In particular, each of the Cotchett Actions plead aiding and abetting fraud, conversion, and unjust enrichment; the *Wexler* and *McBride* actions alone plead aiding and abetting breach of fiduciary duty and aiding and abetting fraud in the inducement; and the *Ryan* and *Greenberg* actions alone plead breach of fiduciary duty.

<sup>27</sup> On November 19, 2009, the Tremont entity defendants and certain other defendants filed motions to stay the *Wexler* action pending the outcome of certain motions to dismiss filed in *In re Tremont Securities Law, State Law & Insurance Litigation*, S.D.N.Y., Case No. 08-cv-11117 (TPG), pending in the Southern District of New York (the "SDNY Tremont Action"). (Sheehan Aff. Exs. MM, NN.) At a hearing on January 25, 2010 and in subsequent orders, the court granted the requested relief and stayed the *Wexler* action pending resolution of the motions to dismiss filed in the SDNY Tremont Action. (Sheehan Aff. JJ, OO.) The relevant motions to dismiss were denied as moot on March 30, 2009 in the SDNY Tremont Actions (*id.*, Ex. PP.); however, given that the *Wexler* action was also stayed pending the resolution of the SDNY JP Morgan Action, this denial appears to have had no impact on whether the actions will proceed at this juncture.

c. ***FLB Foundation, Ltd. v. BLMIS***  
**(Index No. 101615/2009 (N.Y. Sup. Ct.))**

i. **Claim Status**

On January 21, 2009, FLB Foundation, Ltd. (“FLB”) filed a customer claim with the Trustee (Claim No. 000849). (Cohen Aff. Ex. II.) On October 19, 2009, this claim was denied as the FLB customer account was overdrawn, or in a negative net equity position. (*Id.*, Ex. JJ.)

ii. **FLB Allegations and Procedural History**

On or about February 18, 2009, FLB commenced an action in the Supreme Court of the State of New York, Queens County, which was subsequently transferred to New York County and consolidated with the *Ryan* Action and *Wexler* Action for pretrial purposes (the “*FLB* Action”). (Sheehan Aff., Exs. QQ, RR.) On August 11, 2009, FLB filed an amended complaint, against BLMIS, Bernard L. Madoff, Ruth, Mark, Andrew, Shana and Peter Madoff, Charles Madoff,<sup>28</sup> Frank DiPascali, David Gary Friebling, Eli Bruce Horowitz, John Does, Jane Does, Madoff International and Madoff, Ltd. (the “*FLB* Defendants”). (*Id.*, Ex. SS.) In the eleven-page Amended Complaint, FLB alleges that the FLB Defendants conspired with each other “to accomplish the loss and the unlawfulness of taking of [\$50 billion]” and “withheld the information as to the method of maintaining funds and the use of the funds . . . .”, (*id.*, Ex. SS ¶¶ 26-27), but otherwise the complaint does little more than list the positions of the Madoff Defendants at BLMIS (*Id.*, Ex. SS.) FLB brings causes of action for conspiracy to hinder, delay and defraud, false representation, wrongful appropriation of funds, negligence, and unjust enrichment. (*Id.*, Ex. SS.) FLB seeks damages and punitive damages in the amount of \$10

---

<sup>28</sup> BLMIS did not employ, and Bernard Madoff does not appear to be related to, anyone by the name of “Charles Madoff.” It appears that the plaintiffs intended to name Charles Wiener, who was Bernard Madoff’s nephew and a long-time BLMIS employee.

million. (*Id.*, Ex. SS at 11). In response to motions to dismiss filed by the relevant Madoff Defendants, (*id.* Ex. TT), FLB filed an affirmation in opposition to these motions, which mimics the Trustee's Madoff Complaint, but does little more. (*Cf. id.* Ex. UU ¶¶ 9-11, 12-89 with Tr. Madoff Cmpl ¶¶ 23-25 and 28-103.)

As noted above, the court consolidated, for pretrial purposes, the *FLB* Action with the *Wexler* and *Ryan* actions, which were subsequently stayed. (*Id.*, Ex. RR.) The motions to dismiss the *FLB* Action have been held in abeyance. (*Id.*, Exs. VV.)

## ARGUMENT

### **THE THIRD PARTY ACTIONS VIOLATE THE EXISTING STAYS AND SHOULD OTHERWISE BE PRELIMINARILY ENJOINED**

#### **I. THE THIRD PARTY ACTIONS VIOLATE THE STAY ORDERS AND AUTOMATIC STAY**

Both the Trustee and the Third Party Plaintiffs allege that the Madoff Defendants owe them money damages for losses related to Madoff's fraud. The Third Party Actions are thus duplicative or derivative of the Trustee's Madoff Actions and violate the automatic stay, as well as the Stay Orders, as the Third Party Plaintiffs seek to satisfy indirectly their claims against the estate and to tap into the same pool of money as the Trustee. Accordingly, the Third Party Actions cannot be allowed to continue and should be declared void *ab initio*.

##### **A. The Automatic Stay Applies**

Section 362(a)(3) of the Bankruptcy Code provides that the filing of an application for the entry of a protective decree under Section 5(a)(3) of SIPA (15 U.S.C. § 78eee(a)(3)) operates as a stay, applicable to all persons and entities of, *inter alia*, any act to exercise control over

property of the estate. See 11 U.S.C. § 362(a)(3).<sup>29</sup> Section 362(a)(3) is designed to prevent the dismemberment of the bankruptcy estate through interference, either directly or indirectly, with the trustee's control over estate property. See, e.g., *Liberty Mut. Ins. Co. v. Off. Unsecured Creditors' Comm. of Spaulding Composite Co., Inc. (In re Spaulding Composites Co., Inc.)*, 207 B.R. 899, 908 (9th Cir. BAP 1997); *In re Burgess*, 234 B.R. 793, 799 (D. Nev. 1999); *In re HSM Kennewick, L.P.*, 347 B.R. 569, 572 (Bankr. N.D. Tex. 2006).

The automatic stay provision is broad, and “prevents creditors from reaching the assets of the debtor’s estate piecemeal and preserves the debtor’s estate so that all creditors and their claims can be assembled in the bankruptcy court for a single organized proceeding.” *In re AP Indus., Inc.*, 117 B.R. 798, 798 (Bankr. S.D.N.Y. 1990) (citations omitted). Similarly, in the SIPA context, the automatic stay prevents third parties from seizing customer property and ensures its distribution in accord with the statutory framework. The automatic stay is intended precisely to prevent those creditors who are able to act first from obtaining payment “in preference to and to the detriment of other creditors . . . [,]” which would be the exact result if any of the Third Party Actions were successfully prosecuted. See *In re AP Indus.*, 117 B.R. at 799 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977); S. REP. NO. 989, 95th Cong. 2d Sess. 49 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5835, 5963, 6296-97); *In re Keene Corp.*, 164 B.R. 844, 849 (Bankr. S.D.N.Y. 1994) (“equality . . . is the governing principle”).

## **B. The Stay Orders Apply**

In an order entered on December 15, 2008, the District Court declared that “all persons and entities are stayed, enjoined and restrained from directly or indirectly . . . interfering with

---

<sup>29</sup> Furthermore, SIPA § 78eee(b)(2)(B) also provides for stay protection as to, *inter alia*, any suit against the Debtor’s property.

any assets or property owned, controlled or in the possession of [BLMIS].” *SEC v. Bernard L. Madoff*, 08-CIV-10791 (LLS), Dkt. No. 4 ¶ IV (reinforcing automatic stay); *see also* Order on Consent Imposing Preliminary Injunction Freezing, Assets and Granting Other Relief Against Defendants, Dec. 18, 2008, Dkt. No. 8 at ¶ IX (“no creditor or claimant against [BLMIS], or any person acting on behalf of such creditor or claimant, shall take any action to interfere with the control, possession or management of the assets subject to the receivership.”); Partial Judgment on Consent Imposing Permanent Injunction and Continuing Other Relief, Feb. 9, 2009, Dkt. No. 18 at ¶ IV (incorporating and making the December 18, 2008 stay order permanent).

At a minimum, Stay Orders are clearly applicable here, as the Third Party Plaintiffs are interfering with estate assets. *See Picard v. Fox*, 2010 WL 1740885, at \*11.

**C. The Trustee Has Exclusive Standing to Bring the Claims Brought in the Third Party Actions**

As to the Madoff Defendants, the *Lautenberg*, *Erausquin*, *Herald*, *Chavez*, *Fairfield*, *Wexler*, *Ryan*, *Greenberg*, *McBride*, and *FLB* Actions are completely duplicative of the Trustee’s Madoff Complaint. There is not a scintilla of difference in any of them—they all allege that the Madoff Defendants ignored red flags and knew or should have known, based on their roles at BLMIS, of the fraud.<sup>30</sup> This is precisely what the Trustee has pled. (Tr. Madoff Cmplt ¶¶ 64, 103.) As this Court recently held in *Picard v. Fox*, the Trustee has exclusive standing to assert causes of action that belong to the estate. 2010 WL 1740885, at \*5. As this Court stated:

The Second Circuit has held that “[i]f a claim is a general one, with no particularized injury arising from it, and if that claim can be

---

<sup>30</sup> *See* Sheehan Aff., Ex. A ¶¶ 31-34, 38 (Peter Madoff ignored “red flags”); Ex. Q ¶¶ 47-56 (“Obvious Red Flags Should Have Alerted the Defendants”); Ex. T ¶¶ 273-76 (“Moreover, the BMIS Defendants were uniquely situated because they were presented with and ignored red flags every day.”); Ex. V ¶¶ 73-74 (alleging willful blindness by Peter Madoff); Ex. BB ¶ 412 (named Madoff defendants “had actual knowledge of . . . the [BLMIS] fraud based on their roles and responsibilities at [BLMIS] and MSIL and their knowledge of the indications of fraud . . . .”; *see also id.*, Ex. EE ¶ 322, Ex. FF ¶ 315, Ex. Z ¶ 342).

brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action.'

*Id.* (citing *St. Paul Fire & Marine Ins. Co. v. Pepsi Co. Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)). Moreover, "[t]o determine standing, the Court must look to the underlying wrongs as pleaded in the complaint and whether the plaintiff alleges a particularized injury." *Fox*, 2010 WL 1740885, at \*5 (citing *In re The 1031 Tax Group, LLC*, 397 B.R. 670, 679 (Bankr. S.D.N.Y. 2008)). Here, without question, these ten actions allege the same wrongdoing as to the Madoff Defendants, and allege no injury other than the common injury to all customers stemming from the Ponzi scheme.

As to the remaining Third Party Actions—*Stahl* and *Abend*—these, too, are duplicative and derivative of the Trustee's claims, and are perhaps the most egregious attempt to end-run the automatic stay. Instead of suing BLMIS—because they cannot—they sue Mark and Andrew Madoff for their roles as supervisors at BLMIS and "employers" standing in the shoes of BLMIS. (See *e.g.* Sheehan Aff. Exs. G ¶¶ 2, 4, 43; Ex. H ¶¶ 2, 4, 44.) This is no different from suing BLMIS itself. See *Bihari v. DDJ Capital Management, LLC*, 306 B.R. 336, 338 (E.D. Cal. 2004) (action against debtor's shareholders, officers, and directors for overtime compensation violated the automatic stay because debtor would "necessarily be a major participant" in the action). Moreover, given that Mark and Andrew Madoff's money is BLMIS's money, these actions are all the more detrimental to its customers.

Mr. Stahl and Mr. Abend will, no doubt, argue that Mark and Andrew Madoff's alleged omissions and misrepresentations constitute "independent conduct" that allows them to continue prosecuting their lawsuits. However, the conduct alleged in the *Stahl* and *Abend* complaints is inextricably linked to the Ponzi scheme. Tellingly, the Trustee has alleged that Mark and Andrew Madoff knew or should have known of the fraud and had the ability to put an end to it.

(See, e.g., Tr. Madoff Cmplt ¶¶ 83, 93, 2, 28). In addition, the alleged misrepresentations made by Mark and Andrew Madoff mimic their father's misrepresentations—that the IA business was legitimate. (See Sheehan Aff., Ex. I.) Finally, neither Mr. Abend nor Mr. Stahl can allege any injury independent of the Ponzi scheme.<sup>31</sup> See, e.g., *1031 Tax Group*, 397 B.R. at 679.

Further, to the extent any Third Party Plaintiff contends that his or her complaint differs from that of the Trustee because the causes of action differ, that distinction is irrelevant. *Fox*, 2010 WL 1740885, at \*5 (enjoining claims for conversion, unjust enrichment, conspiracy and violations of state RICO statute as violative of the automatic stay). As this Court held in *Fox*: “[a] trustee’s exclusive ability to bring causes of action that generally affect all creditors fosters the goals of the automatic stay by promoting orderly resolution of claims and preventing single creditors from achieving preferential recoveries.” *Id.*; see *In re Keene Corp.*, 164 B.R. at 854; see also *In re AP Indus., Inc.*, 117 B.R. at 799 (because the trustee represents both the rights of the debtor and the interests of creditors of the debtor, the trustee has the duty to marshal the debtor’s property for the benefit of the estate and the right to sue parties for recovery of all property available under state law). The causes of action asserted, “whether sounding in bankruptcy, state law or common law . . . seek to redress a harm common to all BLMIS customer claimants and, consistent with the purposes of the automatic stay, belong exclusively to the Trustee.” *Fox*, 2010 WL 1740885, at \*6.

**D. The Third Party Actions Threaten to Undermine the Claims Administration Process**

This Court already has approved a claims process and determined how customers’ and other creditors’ claims are to be valued and administered. As described above, this Court

---

<sup>31</sup> It is worth noting that 39 other former BLMIS employees have filed general creditor claims against the



instituted the Claims Procedures Order, which sets forth a framework for the filing, determination and adjudication of claims. *SIPC v. BLMIS*, 424 B.R. at 126.

The Third Party Actions essentially are attempts by the Third Party Plaintiffs to satisfy claims relating to their investments in, or dealings with, BLMIS or BLMIS's feeder funds by circumventing the claims determination and allowance process, of which all of the Third Party Plaintiffs are either direct or indirect participants, and to take for themselves funds that otherwise would be recoverable by the Trustee and equitably distributed to customers and creditors of BLMIS in accordance with this Court's Net Equity Decision and the Net Equity Order. (*SIPC v. BLMIS*, 424 B.R. 122; Dkt. No. 2020.) For example, in the *Fairfield* Action, plaintiffs seek "to recover the multi-million dollar losses the Town's retirement plans have sustained as a result of defendants' wrongful participation in the notorious fraudulent investment scheme perpetrated by [Madoff]." (Sheehan Aff. Ex. V at 1.) Similarly, the Lautenbergs seek to recover their losses from the Ponzi scheme from Peter Madoff, as do the *Erausquin*, *Herald*, *Chavez*, *Wexler*, *Ryan*, *Greenberg*, *McBride* and *FLB* Plaintiffs with respect to other Madoff Defendants. (See Sheehan Aff., Ex. A at pp. 22-23; Ex. Q at pp. 30-31; Ex. T at p. 181; Ex. U at p. 5; Ex. BB at pp. 261-63; Ex. EE at pp. 191-92; Ex. FF at pp. 189-90; Ex. Z at pp. 216-27; Ex. SS at p. 11.) The *Stahl* and *Abend* Actions, while seeking plaintiffs' compensation as employees of BLMIS, are no different. Mr. Stahl and Mr. Abend, too, seek recovery based on money they were denied as a result of the Ponzi scheme. (*Id.*, Ex. H at p. 9; Ex. G at pp. 8-9.)

---

estate, all but one seeking deferred compensation. (Cohen Aff. ¶ 3.)

The Third Party Actions all seek to tap into the same pool of money as the Trustee. The “damages” the Third Party Plaintiffs seek are nothing more than what they seek as customers,<sup>32</sup> purported customers,<sup>33</sup> or creditors of the estate. This Court has already held that separate actions are not appropriate when a third party “seeks to redress the depletion of the BLMIS customer property funds, a harm that derivatively injures all customer claimants in the BLMIS liquidation.” *Fox*, 2010 WL 1740885, at \*6. The Third Party Actions constitute nothing more than an attempt by general creditors to leapfrog over other creditors to obtain a greater share of their claims against BLMIS than they would otherwise receive. Their continued prosecution is detrimental to the equitable distribution of customer property mandated by SIPA and this Court.

**E. The Third Party Plaintiffs Seek the Recovery of Fraudulent Transfers Made to the Madoff Defendants**

Significantly, the Third Party Plaintiffs’ purported standing to sue the Madoff Defendants depends on their relationships, whether direct or indirect, with BLMIS and their causes of action arise directly and entirely out of Madoff’s Ponzi scheme. On these facts, they should not be able to sidestep the automatic stay for their personal benefit. *See, e.g., Crysen/Montenay Energy Co. v. Esselsen Assocs. Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1103 (2d Cir. 1990) (unsecured creditor should not be able to obtain priority over other unsecured creditors, and action by such creditor to recover against third party was a violation of automatic stay).

---

<sup>32</sup> The investment funds through which the *Erausquin* Plaintiffs, the Retirement Programs, Davis, Wexler, and McBride invested in BLMIS each filed claims in their own names (or a possibly related entity filed a claim in the case of McBride). Further, the Town of Fairfield’s interest in the estate, if any, is derivative of the Retirement Programs’ interest.

<sup>33</sup> Davis, the Retirement Programs, Wexler and McBride all filed claims with the Trustee, but none of them had an account with BLMIS; rather, each invested in BLMIS through various feeder funds. Likewise, the Trustee has been unable to locate any record of Mr. Chavez’s purported investment directly in BLMIS or otherwise.

The *Fairfield* Plaintiffs explicitly seek recovery based on fraudulent transfer claims. (Sheehan Aff. Ex. V, 19th Count ¶ 90, 21st Count ¶ 102.) The other Third Party Actions implicitly seek the recovery of funds fraudulently transferred by BLMIS to the Madoff Defendants through conversion, disgorgement, restitution, unjust enrichment, misappropriation or constructive trust claims, for example. (*Id.*, Ex. Q ¶¶ 89-92; Ex. T ¶¶ 585-89; Ex. U at pp. 3-5; Ex. BB ¶¶ 506-16; Ex. FF ¶¶ 368-78; Ex. EE ¶¶ 377-87; Ex. Z ¶¶ 429-39; Ex. SS ¶¶ 40-41, 53-54.) *Lautenberg, Stahl and Abend* also seek fraudulently transferred money, because that is virtually the only money Peter, Mark and Andrew Madoff have. (*Id.*, Ex. A ¶¶ 35-62; Ex. H ¶¶ 31-47; Ex. G ¶¶ 30-46.)

The automatic stay prohibits such actions: “a third-party action to recover fraudulently transferred property is properly regarded as undertaken ‘to recover a claim against the debtor’ and subject to the automatic stay pursuant to § 362(a)(1).” *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131–32 (2d Cir. 1992); *Fox*, 2010 WL 1740885, at \*8. Such claims by creditors based on the fraudulent transfer of the debtor’s assets are foreclosed by the seminal *Colonial Realty* decision. *See id.* at 132; *see also In re Keene Corp.*, 164 B.R. at 850 (“Where a [debtor’s] creditor seeks to recover his or her claim from a transferee of [the debtor’s] property, the creditor’s action is stayed by Section 362(a)(1)”; *Crysen/Montenay Energy Co. v. Esselen Assocs. Inc., (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1103 (2d Cir. 1990) (unsecured creditor should not be able to obtain priority over other unsecured creditors, and action by such creditor to recover its claim against third party defendant found to be in violation of stay).

**F. The Third Party Actions Seek to Obtain Customer Property in Violation of the Automatic Stay**

The Third Party Plaintiffs seek to obtain property of the estate in violation of Bankruptcy Code § 362(a)(3),<sup>34</sup> which operates as a stay of any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. *See* 11 U.S.C. § 362(a)(3). “Property of the estate” is defined in Bankruptcy Code section 541(a) to include “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a); *see also AP Indus. Inc.*, 117 B.R. at 799. While this definition is broad, SIPA goes beyond section 541 in granting a SIPA trustee the power to assemble customer property wherever it is located. SIPA § 78fff-2(c)(3). SIPA authorizes the Trustee to recover customer property wherever it lies, reassemble and restore all cash, securities and proceeds that would have been customer property but for wrongful transfer, misappropriation or conversion, and distribute that property to the debtor’s customers. *See* SIPA §§ 78fff-1(a), 78fff-2(c)(1) and 78fff-2(c)(3). The powers granted to the Trustee by SIPA are not dependent upon the statutory definition of “customer property” or on bankruptcy law, and thus are notably broader than the powers of a bankruptcy trustee.<sup>35</sup>

Section 78fff-2(c)(3) of SIPA expressly grants the Trustee additional powers, and provides:

---

<sup>34</sup> This section is drawn from the Trustee’s Supplemental Memorandum of Law in Opposition To Defendants’ J. Ezra Merkin, Gabriel Capital Corporation, Gabriel Capital, L.P., And Ariel Fund Ltd. Motions To Dismiss Count I of the Trustee’s Second Amended Complaint, Dkt. No. 80, *Picard v. Merkin*, Ad. Pro. No. 09-1182 (Bankr. S.D.N.Y. May 7, 2010), which is fully incorporated herein by reference.

<sup>35</sup> SIPA is a hybrid statute based largely on bankruptcy principles, but tailored to fit the special circumstances of stock brokerage failures. The Bankruptcy Code applies to SIPA liquidations but only to the extent that its provisions thereof are consistent with SIPA. *See* SIPA § 78fff(b); *Jackson v. Mishkin (In re Adler Coleman Clearing Corp.)*, 263 B.R. 406, 484 (S.D.N.Y. 2001). To the extent they are inconsistent, the relevant SIPA provision controls. *See Ferris, Baker, Watts, Inc. v. Stephenson (In re MJK Clearing)*, 286 B.R. 109, 129 (Bankr. D. Minn. 2002).

Whenever customer property is not sufficient to pay in full the claims . . . the trustee may recover any property transferred by the debtor which, except for such transfer, *would have been customer property if and to the extent that such transfer is voidable or void under the provisions of title 11*. Such recovered property shall be treated as customer property. *For purposes of such recovery, the property so transferred shall be deemed to have been property of the debtor* and, if such transfer was made to a customer or for his benefit, such customer shall be deemed to have been a creditor, the laws of any State to the contrary notwithstanding.

Section 78fff-2(c)(3) (emphasis added).

This section creates a legal fiction—namely, that transferred assets are treated as estate property. *See, e.g., Hill v. Spencer Savs. & Loan Ass'n (In re Bevill, Bresler & Schulman, Inc.)*, 83 B.R. 880, 893-96 (D.N.J. 1988). “This fiction relieves the Trustee from having to prove (as he might have to if proceeding solely under section 549 [of the Bankruptcy Code]) that the securities in question are property of the estate,” and “the trustee need only prove that the property in question was ‘customer property’ as defined by SIPA.” *Hill v. Spencer Savs. & Loan Ass'n (In the Matter of Bevill, Bresler & Schulman, Inc.)*, 94 B.R. 817, 826 (D.N.J. 1989). Thus, under the legal fiction of section 78fff-2(c)(3), transfers can be recovered as though they were “property of the estate” and distributed as though they were customer property. *Hill I*, 83 B.R. at 894. This enables a trustee “to recover securities that would have been part of the fund of customer property but for a prior transfer to a customer,” and “enable[s] the trustee to fit the transfer into the provisions of the avoidance sections of the Code.” *Id.* at 893-94 (internal quotations omitted).

Under Section 78lll(4) of SIPA, “customer property” is defined as “cash and securities . . . at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the

debtor, including property unlawfully converted.” In this Ponzi scheme case, where all assets that were transferred were the property of other customers, ownership in such property can never be attributed to the debtor. All property was “unlawfully converted” by BLMIS and is, by definition, customer property.<sup>36</sup> In addition, to the extent BLMIS transferred any property to a third party as “proceeds,” such property is customer property. SIPA § 78fff(4). As such, the customer property retained its character, notwithstanding the transfer to the Madoff Defendants, and is therefore subject to recovery by the Trustee under SIPA Section 78fff-2(c)(3).<sup>37</sup>

Actions which have the effect of exercising control over property of the estate or customer property, or where the actions “necessarily implicate” a debtor’s property interests, violate Bankruptcy Code § 362(a)(3). *Adelphia*, 2006 WL 1529357, at \*3 (Bankr. S.D.N.Y. June 5, 2006) (granting TRO because third-party suit threatened to interfere with debtor’s realization of value of its assets and its reorganization); *In re MCEG Prods., Inc.*, 133 B.R. 232, 235 (Bankr. C.D. Cal. 1991). Indeed,

Code section 362(a)(3) protects the *in rem* jurisdiction of the Court, and prohibits interference with the disposition of the assets that are under the Court’s wing, whether or not the Debtor is named as a defendant as part of that effort. And that is so without distinction as to the form the interference takes.

*Adelphia*, 2006 WL 1529357, at \*3. Critically, courts will look to the substance and not the form of the purported action. *See 48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th*

---

<sup>36</sup> The fact that Madoff unlawfully converted all of BLMIS’s customers’ property is indisputable. *See* Plea Hearing Transcript, *United States v. Madoff*, Case No. 09-CR-213(DC) (S.D.N.Y. Mar. 12, 2010); *see also In re Klein, Maus & Shire, Inc.*, 301 B.R. 408, 420 (Bankr. S.D.N.Y. 2003) (unlawful conversion includes misappropriation and misuse of customer property by the debtor).

<sup>37</sup> Section 78fff-2(c)(3) of SIPA became operative when the United States District Court for the Southern District of New York entered a protective order pursuant to SIPA Section 78eee(b)(1) decreeing that the customers of BLMIS were in need of the protection afforded by SIPA. From that date, it was abundantly clear that there was insufficient customer property to pay all the claims in full, and therefore the Trustee began to seek recovery of all

*Street Steakhouse, Inc.*), 835 F.2d 427, 431 (2d Cir. 1987) (“If action taken against the non-bankrupt party would inevitably have an adverse impact on property of the bankrupt estate, then such action should be barred by the automatic stay.”).

The Third Party Plaintiffs, in essence, seek to recover from the pool of customer property that was improperly transferred to the Madoff Defendants—funds which the Trustee seeks to recover in connection with his lawsuits against the Madoff Defendants. The Third Party Actions will “inevitably have an adverse impact on the property of the estate,” and constitute a clear violation of the automatic stay. Furthermore, because the transferred property is deemed property of the debtor, the Third Party Plaintiffs also should be enjoined from proceeding with the Third Party Actions because this Court has exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of the case, and of property of the estate. *See* 28 U.S.C. § 1334(e)(1), §§ 78eee(b)(2), (b)(4); Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). The Third Party Plaintiffs are attempting to end run the automatic stay and the Stay Orders to avoid the jurisdiction of this Court and the processes this Court has put into place. They must be enjoined.

**G. The Third Party Actions Are Void *Ab Initio***

The Second Circuit has consistently held that actions taken in violation of the automatic stay are void and without effect. *See, e.g., Eastern Refractories Co. v. Forty Eight Insulations*, 157 F.3d 169, 172 (2d Cir. 1998); *In re Colonial Realty*, 980 F.2d at 137 (citing *48th Street Steakhouse*, 835 F.3d at 431); *In re Singer Co. N.V.*, 2000 WL 33716976 at \*5 (Bankr. S.D.N.Y.

---

customer property wherever it may lie. As of such date, therefore, Section 78fff-2(c)(3) deems transferred customer property to be the property of BLMIS.

Nov. 3, 2000). As this Court has recently held in *Picard v. Fox*, such actions “are directly violative of the extant stay and, specifically the automatic stay under section 362(a) and at least one of the District Court Stay Orders and, as a result, are void *ab initio*.” *Fox*, 2010 WL 1740885, at \*11.

*In re Singer* is also instructive. In *Singer*, the court determined that an action brought by a non-debtor in violation of the automatic stay was void *ab initio*. The court found that the action was a “clear attempt to exercise control” over property of the estate, and was therefore void and of no effect. *In re Singer Co. N.V.*, 2000 WL 33716976 at \*5; *see also In re Enron Corp.*, 314 B.R. 524, 536, 541 (Bankr. S.D.N.Y. 2004) (claims alleged for purpose of obtaining a “different pot” of money were void *ab initio*).

Similarly, here the Third Party Plaintiffs have acted in violation of the automatic stay by seeking money—based on the same operative facts and the same limited resources—as the Trustee to circumvent the claims procedures established by this Court. Thus, the Third Party Actions should be held void *ab initio*.

## **II. THE COURT SHOULD ENJOIN THE THIRD PARTY PLAINTIFFS PURSUANT TO SECTION 105(A) OF THE BANKRUPTCY CODE TO ALLOW FOR THE FAIR AND EQUITABLE ADMINISTRATION OF THE BLMIS ESTATE**

This Court is empowered to extend the automatic stay to the Madoff Defendants under section 105(a) of the Bankruptcy Code given, among other things, the adverse economic impact on the estate if the Third Party Actions are allowed to continue. *See, e.g., Fox*, 2010 WL 1740885, at \*8. As the Trustee set forth in his Madoff Complaint and the Ruth Madoff Complaint, the Madoff Defendants’ money derives from BLMIS—it is customer property that must be marshaled and equitably distributed by the Trustee. (*See e.g. Tr. Madoff Cmplt* ¶¶ 1-4;



Ruth Madoff Cmplt ¶¶ 1-4.) Moreover, allowing the Third Party Actions to continue will deplete assets that ultimately belong to the estate.

**A. The Court Has Jurisdiction to Enjoin the Third Party Plaintiffs**

This Court has subject matter jurisdiction to enjoin the Third Party Plaintiffs pursuant to 28 U.S.C. § 1334(b) and 157(a) and the Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York dated July 10, 1984 (Ward, Acting C.J.).

Pursuant to 28 U.S.C. § 1334(b), district courts (and hence bankruptcy courts) have original jurisdiction of civil proceedings “arising under” and “arising in” and “related to” cases under title 11. *See In re Adelpia Commc’ns Corp.*, 2006 WL 1529357, \*6 (Bankr. S.D.N.Y. June 5, 2006). Furthermore, bankruptcy courts have jurisdiction to “hear and determine . . . all core proceedings arising under title 11, or arising in a case under title 11 . . . .” 28 U.S.C. § 157(b)(1). *See also* SIPA § 78eee(b)(4). Section 157(b)(2)(A) and (B) provide that core proceedings include, but are not limited to, “matters concerning the administration of the estate . . .” and the “allowance or disallowance of claims against the estate.” In the Second Circuit, the test for determining whether “related to” jurisdiction exists is whether the outcome of a proceeding “might have any ‘conceivable effect’ on the bankrupt estate,” or if the proceeding has a “significant connection” with the bankrupt estate. *See Adelpia*, 2006 WL 1529357, at \*4; *Publicker Indus. Inc. v. U.S. (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 114 (2d Cir. 1992); *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998).<sup>38</sup>

---

<sup>38</sup> “Proceedings ‘related to’ the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, n.5 (1995). The Trustee’s Actions against the Madoff Defendants and the Third Party Actions all relate to and are based on Madoff’s fraud, and the prosecution of the Third Party Actions will have a significant effect on the administration of the bankruptcy estate.

The fact that the Third Party Actions would undermine the orderly administration of the liquidation of BLMIS and the Trustee's efforts to recover customer property and satisfy claims against BLMIS, provides "arising under," "arising in" and "related to" jurisdiction to this Court. *See, e.g., MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91, 92 (2d Cir. 1988); *Adelphia*, 2006 WL 1529357, at \*6-7; *In re AP Indus., Inc.*, 117 B.R. at 798.

In addition, this Court has inherent ancillary jurisdiction concerning the Third Party Actions beyond the statutory grant of authority in order to interpret and enforce this Court's orders:

Bankruptcy courts have inherent or ancillary jurisdiction to interpret and enforce their own orders wholly independent of the statutory grant of jurisdiction under 28 U.S.C. § 1334. (Citations omitted.) "Bankruptcy Courts must have the ability to enforce prior orders and 'secure or preserve the fruits and advantages of a judgment or decree rendered therein' . . . . The proceeding being ancillary and dependent, the jurisdiction of the Court follows that of the original cause...".

*LTV Corp. v. Back (In re Chateaugay Corp.)*, 201 B.R. 48, 62 (Bankr. S.D.N.Y. 1996) (Lifland, J.), *aff'd in part*, 213 B.R. 633 (S.D.N.Y. 1997) (quoting *Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Indus. Corp.)*, 132 B.R. 504, 508 (D.Me. 1991)).<sup>39</sup>

---

<sup>39</sup> This Court also has personal jurisdiction over the Third Party Plaintiffs. Certain of the Third Party Plaintiffs have filed customer or general creditor claims in the BLMIS liquidation. (Cohen Aff. ¶ 4). By filing a proof of claim, a creditor consents to the bankruptcy court's equitable jurisdiction regarding the adjudication of matters related to that claim, including avoidance actions. *See, e.g., Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 58-59 (1989); *Buena Vista Television v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 307 B.R. 404, 418 (Bankr. S.D.N.Y. 2004) ("when the [creditors] filed proofs of claim in the bankruptcy court, they submitted to the equitable jurisdiction of th[at] [c]ourt . . ."). A customer claim filed in a SIPA action is the equivalent to a proof of claim for purposes of submission to jurisdiction. *Keller v. Blinder (In re Blinder Robinson & Co., Inc.)*, 135 B.R. 892, 896-97 (D. Col. 1991). Further, to the extent that the Third Party Plaintiffs have, in commencing the Third Party Actions, availed themselves of the courts in New York, this is sufficient to establish personal jurisdiction. *In the Matter of Sayeh R.*, 91 N.Y.2d 306 (1997) ("[u]se of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident." *Id.* at 315 (citing *Rios v. Altamount Farms*, 64 N.Y.2d 792 (1985); *Lynch v. Austin*, 96 N.Y.S.2d 228 (3d Dep't 1983) (court had personal jurisdiction under New York's long-arm statute over nonresident defendant concerning contract rights to be enforced in New York courts)). Finally, the Third Party Plaintiffs seek to recover customer property in violation of the automatic stay and the Stay Orders, also providing this Court with jurisdiction.

## B. Standards for a Section 105(a) Injunction

Section 105(a) of the Bankruptcy Code, applicable here pursuant to section 78fff(b) of SIPA, bestows on bankruptcy courts broad discretion to “issue any order ‘necessary or appropriate to carry out the provisions of [the Bankruptcy Code]’ . . . .” 11 § U.S.C. 105(a). Courts in this Circuit have held that Section 105(a) authorizes bankruptcy courts to issue injunctions and, when the court does so, the standard for Rule 7065 injunctions is inapplicable. *In re Probulk Inc.*, 407 B.R. 56, 63 (Bankr. S.D.N.Y. 2009). The Court may enjoin suits if (i) a third party suit would impair the court’s jurisdiction with respect to a case before it or (ii) the third party suits threaten to thwart or frustrate the debtor’s reorganization efforts and the stay is necessary to preserve or protect the debtor’s estate.<sup>40</sup> See *In re Calpine Corp.*, 354 B.R. 45, 48 (Bankr. S.D.N.Y. 2006), *aff’d*, 365 B.R. 401 (S.D.N.Y. 2007); *In re Adelpia Commc’ns Corp.*, 298 B.R. 49, 54 (S.D.N.Y. 2003) (internal citation omitted); *In re Lyondell Chem. Co.*, 402 B.R. 571, 588 n.37 (Bankr. S.D.N.Y. 2009); *In re Keene Corp.*, 162 B.R. 935, 944 (Bankr. S.D.N.Y. 1994); *In re Ionosphere Clubs, Inc.*, 111 B.R. 423, 431 (Bankr. S.D.N.Y. 1990), *aff’d in part*, 124 B.R. 635 (S.D.N.Y. 1991); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567, 571–72 (S.D.N.Y. 1987); *C & J Clark Am., Inc. v. Carol Ruth, Inc. (In re Wingspread Corp.)*, 92 B.R. 87, 92 (Bankr. S.D.N.Y. 1988); *LTV Steel Co., Inc. v. Bd. of Educ. (In re Chateaugay Corp.)*, 93 B.R. 26, 29 (S.D.N.Y. 1988); *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998).

---

<sup>40</sup> Notwithstanding that the Rule 7065 standard need not be satisfied here, it easily is. There is no question that an infringement on this Court’s jurisdiction constitutes “irreparable harm.” *Adelpia*, 2006 WL 1529357, at \*5. Moreover, the Trustee is likely to succeed on the merits of his complaint and demonstrate that the Third Party Plaintiffs have violated the automatic stay, as demonstrated herein. See *id.* at \*4–5.

**C. The Third Party Actions Threaten the Court's Jurisdiction and the Administration of the Estate and an Injunction is Necessary to Preserve and Protect the Estate**

As described above, the Third Party Actions threaten to allow certain creditors of BLMIS to recover more than their fair share of the BLMIS estate. Such an outcome would compromise the equitable distribution of customer property through the estate, a process recently sanctioned by this Court in its Net Equity Decision. *See SIPC v. BLMIS*, 424 B.R. 122.

The Third Party Plaintiffs' conduct is just the sort of behavior courts in this and other jurisdictions have prohibited time after time. *See, e.g., In re Keene Corp.*, 164 B.R. at 849, 854; *In re AP Indus., Inc.*, 117 B.R. at 801–802; *In re Johns-Manville Corp.*, 91 B.R. 225, 228 (Bankr. S.D.N.Y. 1988); *In re The 1031 Tax Group, LLC*, 397 B.R. 670 at 684–85; *In re Singer Co. N.V.*, 2000 WL 33716976 at \*5–7; *Apostolou*, 155 F.3d 876; *Baldwin-United Corp. v. Paine Webber Group, Inc. (In re Baldwin-United Corp.)*, 57 B.R. 759 (S.D. Ohio 1985).

This Court already has held that a section 105(a) injunction was necessary to protect the court's jurisdiction and the administration of the liquidation. In *Picard v. Fox*, this Court granted the Trustee's application for a preliminary injunction, enjoining the defendants therein from prosecuting actions in Federal Court in Florida against the estate of Jeffrey Picower and certain related parties:

The [defendants'] claims arise out of the same wrongs alleged in the Trustee's Complaint, committed by the same defendants, in connection with the same Ponzi scheme . . . . Both the Trustee and the [defendants] target the same limited pool of funds originating with BLMIS . . . . The [defendants' actions] thus threaten the Trustee's ability to collect on any judgment that may be awarded in connection with his pending adversary proceeding, to the detriment of the BLMIS estate.

*Fox*, 2010 WL 1740885 at \*9. This Court issued a section 105(a) injunction in *Fox*. The Third Party Actions are no different and should be enjoined pursuant to section 105(a).

As this Court discussed in *Fox*, the Seventh Circuit, faced with a similar scenario, also found the use of a section 105(a) injunction appropriate. *Fox*, 2010 WL 1740885 at \*8-9. In *Apostolou*, which was a liquidation proceeding, the Seventh Circuit upheld the bankruptcy court's issuance of an injunction under § 105(a) to protect the trustee's ability to marshal assets on behalf of the debtor's estate, even when the enjoined action did not directly seek property of the debtor's estate. *Apostolou*, 155 F.3d at 877–88. The debtor, Lake States, was a corporation that had been used by Thomas W. Collins (“Collins”) to run a bucket shop—a fraud scheme similar to that of a Ponzi. *Id.* After the bucket shop was discovered, Collins disappeared, and several investors in Lake States filed involuntary bankruptcy petitions, commencing a liquidation proceeding against the debtor corporation. *Id.* at 878. While the debtor was in bankruptcy, several of the debtor's investors brought a competing action in district court against Collins' accomplices to recover their losses, asserting various fraud causes of action. *Id.* In reaction to this lawsuit, the trustee of the debtor's estate filed an adversary proceeding against the investor plaintiffs in the bankruptcy court, requesting that the bankruptcy court enjoin the competing action. *Id.* at 878–89. The bankruptcy court issued an injunction pursuant to § 105(a), which the District Court reversed. The Seventh Circuit reversed the District Court's determination that the bankruptcy court had exceeded its authority in issuing the injunction, stating that:

While the [investor plaintiffs]' claims are not “property of” the Lakes States estate, it is difficult to imagine how those claims could be more closely “related to” it. They are claims to the same limited pool of money, in the possession of the same defendants, as a result of the same acts, performed by the same individuals, as part of the same conspiracy. We can think of no hypothetical change to this case which would bring it closer to a “property of” case without converting it into one. Even if the “related to” jurisdiction is not as broad in Chapter 7 cases as it is in Chapter 11 cases [internal citation omitted], it reaches at least this far, for to conclude that the “related to” jurisdiction under Chapter 7 does not

extend to the circumstances of this case would be to amend the Bankruptcy Code to eliminate § 105 from Chapter 7 proceedings.

*Id.* at 882. Furthermore, the Seventh Circuit reasoned that the claims of both the debtor and creditors against the third party defendants were “so closely related that allowing the creditors to convert the bankruptcy proceeding into a race to the courthouse would derail the bankruptcy proceedings.” *Id.* at 883. The court held that the investors who were the plaintiffs in those actions “must wait their turn behind the trustee, who has the responsibility to recover assets of the estate on behalf of creditors as a whole . . . .” *Id.* at 881.

Similarly, in *In re AP Industries, Inc.*, this Court noted that a bankruptcy court has “authority under § 105 broader than the automatic stay provisions of § 362 and may use its equitable powers to assure the orderly conduct of the reorganization proceedings.” *In re AP Indus., Inc.*, 117 B.R. at 801 (citations omitted). In *In re AP Industries*, the debtor sought to stay or enjoin actions commenced by a creditor against the debtor’s directors and other third parties that were brought because the creditor objected to a transaction entered into by the debtor. This Court found that it was appropriate to use section 105(a) to enjoin the creditor’s action, stating:

this Court finds that it is also appropriate to issue an injunction pursuant to § 105 of the Code to stay the [creditor’s] Actions in order to preserve and protect the Debtor’s estate and reorganization prospects. Not only may the outcome of the [creditor’s] Actions affect the administration of this case, but the possibility of inconsistent judgments warrants the issuance of an injunction . . . .

*Id.*, 117 B.R. at 802; *see also In re Singer Co. N.V.*, 2000 WL 33716976 at \*7.

Finally, in enjoining approximately 1,600 lawsuits commenced by a debtor’s creditors seeking to challenge certain asset transfers, the *Keene* court observed:

[t]he Court cannot sanction a practice which permits creditors to assert general, indirect claims in order to achieve a greater distribution on a first come, first serve basis from assets which the

trustee has standing to recover, and which, if recovered, will be available to satisfy the claims of all creditors.

*In re Keene Corp.*, 164 B.R. at 854.

Akin to the claims the debtor's investors asserted in *Fox, Apostolou, AP Industries*, and *Keene*, the Third Party Plaintiffs' claims are so inextricably intertwined and related to the underlying SIPA proceeding that it is clear that the continued prosecution of the Third Party Actions will impair this Court's jurisdiction over this proceeding and the Trustee's ability to marshal assets on behalf of the estate.

Moreover, allowing the Third Party Actions to continue will create confusion among other BLMIS investors and creditors who will feel compelled to initiate their own self-help proceedings and which could create a "race to the courthouse" environment, threatening the orderly administration of the estate. The statutory schemes created by SIPA and the Bankruptcy Code are specifically aimed at trying to avoid such a result. *See Secs. Investor Protection Corp. v. Blinder, Robinson & Co., Inc.*, 962 F.2d 960, 965 (10th Cir. 1992) (quoting H.R. REP. NO. 1613, 91st Cong. 2d Sess. (1970) *reprinted in* 1970 U.S.C.C.A.N. 5254, 5262: SIPA "establishes procedures for the prompt and orderly liquidation of SIPC members . . ."); *see also In re Shea & Gould*, 214 B.R. 739, 750 (Bankr. S.D.N.Y. 1997) (Bankruptcy Code seeks to prevent "race to the courthouse"); *In re Rubin*, 160 B.R. 269, 281 (Bankr. S.D.N.Y. 1993) (same); *In re Russo*, 18 B.R. 257, 265 (Bankr. E.D.N.Y. 1982) (same).

An injunction will avoid the possibility of inconsistent decisions, ensuring uniformity of decision, and will allow the Trustee to avoid appearing in the Third Party Actions and incurring needless litigation costs. Principles of judicial economy further support the Trustee's request for a preliminary injunction. *See, e.g., City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (relying on principles of judicial economy to enjoin plaintiff from pursuing a similar

action in bankruptcy court). Instead of having a court in another jurisdiction consider these issues, this Court, which is already familiar with the relevant facts, can most expeditiously resolve the issues relating to customer property.

Furthermore, the Trustee has already been served with broad and burdensome discovery in the *Stahl* and *Abend* actions. (Sheehan Aff. Ex. O.) Requiring the Trustee to respond to document and deposition requests in some or all of the Third Party Actions would place a clear burden on his ability to administer the liquidation of BLMIS. In *Stahl* and *Abend*, both sides also seek to depose the Trustee. (*Id.*, Ex. O.) Mr. Stahl and Mr. Abend further plan to depose Andrew Madoff and Mark Madoff—ahead of the Trustee’s depositions of them, for cases worth about \$1.3 million and \$475,000, respectively—in contrast to the Trustee’s case for hundreds of millions of dollars to benefit the victims of the Ponzi scheme. Allowing Mr. Stahl and Mr. Abend to take such depositions first, and worse yet, insisting on voluminous discovery from the Trustee as preparation for those depositions, is the proverbial “tail wagging the dog” posture that is anathema to the Trustee’s task of expeditiously marshaling customer property for equitable distribution.

If the Third Party Actions are not enjoined, this likely will only be the beginning of an avalanche of discovery that will be demanded from the Trustee. Courts have stayed discovery pursuant to section 105(a) in similar situations. *See, e.g., Adelpia Commc’ns Corp. v. Rigas (In re Adelpia Commc’ns Corp.)*, 294 B.R. 39 (Bankr. S.D.N.Y. 2003) (staying discovery in state-court action); *In re Philadelphia Newspapers LLC*, 410 B.R. 404 (Bankr. E.D. Penn. 2009),



*aff'd*, 423 B.R. 98 (E.D. Penn. 2010) (staying non-debtor third parties from participating in discovery).<sup>41</sup>

**D. The Trustee Would Pursue Any Transfers of Customer Property From the Madoff Defendants to the Third Party Plaintiffs**

As further grounds for the requested relief, the Trustee seeks an injunction to avoid unnecessary proceedings in connection with property that is under this Court's jurisdiction. In the event that any of the Third Party Plaintiffs were to recover customer property from the Madoff Defendants through the Third Party Actions, the Trustee would then have to seek to avoid the transfer of such funds on the grounds that the Third Party Plaintiffs, as subsequent transferees, took without value and with knowledge of the voidability of the transfers. *See* 11 U.S.C. §§ 548, 549, 550.

Accordingly, the Court should preliminarily enjoin the Third Party Plaintiffs from litigating against the Madoff Defendants, pending the completion of the Trustee's Actions.

**CONCLUSION**

The Trustee respectfully requests that the Court: (i) declare that the Third Party Actions violate the Stay Orders, section 78eee(b)(2)(B) of SIPA and the automatic stay and are void *ab initio* with respect to the Madoff Defendants; and (ii) issue an injunction prohibiting the Third Party Plaintiffs from pursuing the Third Party Action, as against the Madoff Defendants, or any other actions as against the Madoff Defendants, and from pursuing discovery from the Trustee,

---

<sup>41</sup> Section 105(a) has been described as the "All Writs" provision of the Bankruptcy Code. *See, e.g., The LTV Corp. v. Miller (In re Chateaugay Corp.)*, 109 B.R. 613, 621 (S.D.N.Y. 1990) ("Section 105(a), the All Writs provision of the Code, is the current enactment of the statutory foundation for the Bankruptcy Court's equitable power...."). Courts have used the All Writs Act, 28 U.S.C. 1651, to stay discovery in similar situations, though courts acting under the All Writs Act are subject to additional constraints in certain situations not faced by bankruptcy courts when acting under § 105(a). *See, e.g., In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 261 F.3d 355, 368 (3rd Cir. 2001) (All-Writs Act extends to allow federal court injunction against state-court discovery to protect integrity of federal court order); *Winkler v. Eli Lili & Co.*, 101 F.3d 1196, 1202 (7th Cir. 1997) (injunction barring discovery to protect integrity of prior discovery rulings proper under All Writs Act).

until such time as the Trustee has completed the actions he has commenced against the Madoff Defendants.

Dated: New York, New York  
May 27, 2010

/s/ David Sheehan

Baker & Hostetler LLP  
45 Rockefeller Plaza  
New York, New York 10111  
Telephone: (212) 589-4200  
Facsimile: (212) 589-4201  
David J. Sheehan  
Email: [dsheehan@bakerlaw.com](mailto:dsheehan@bakerlaw.com)  
Marc E. Hirschfield  
Email: [mhirschfield@bakerlaw.com](mailto:mhirschfield@bakerlaw.com)  
Deborah H. Renner  
Email: [drenner@bakerlaw.com](mailto:drenner@bakerlaw.com)  
Tracy L. Cole  
Email: [tcollection@bakerlaw.com](mailto:tcollection@bakerlaw.com)  
Keith R. Murphy  
Email: [kmurphy@bakerlaw.com](mailto:kmurphy@bakerlaw.com)  
Amy Vanderwal  
Email: [avanderwal@bakerlaw.com](mailto:avanderwal@bakerlaw.com)  
Sammi Malek  
Email: [smalek@bakerlaw.com](mailto:smalek@bakerlaw.com)  
Ferve Ozturk  
Email: [fozturk@bakerlaw.com](mailto:fozturk@bakerlaw.com)

*Attorneys for Irving H. Picard, Trustee for the  
Substantively Consolidated SIPA Liquidation  
of Bernard L. Madoff Investment Securities  
LLC and Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Defendant.

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

RICHARD I. STAHL; REED ABEND; THE  
LAUTENBERG FOUNDATION, JOSHUA S.  
LAUTENBERG, ELLEN LAUTENBERG;  
MATIAS ERAUSQUIN, ENRIQUE ERAUSQUIN,  
LILIANA CONTRONE and YOLANDA  
FRISCHKNECHT, on behalf of themselves  
and those they purport to represent;  
NEVILLE SEYMOUR DAVIS, on behalf of  
himself and those he purports to  
represent; EMILIO CHAVEZ, JR.;  
RETIREMENT PROGRAM FOR EMPLOYEES  
OF THE TOWN OF FAIRFIELD, THE  
RETIREMENT PROGRAM FOR POLICE  
OFFICERS AND FIREMEN OF THE TOWN  
OF FAIRFIELD and THE TOWN OF FAIRFIELD;  
FLB FOUNDATION, LTD., JAY WEXLER,  
individually and derivatively on behalf of Rye Select  
Broad Market Prime Fund, L.P.; DANIEL RYAN and  
THERESA RYAN, individually and on behalf of the

Adv. Pro. No. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

Adv. Pro. No. \_\_\_\_\_

RYAN TRUST; MATTHEW GREENBERG,  
WALTER GREENBERG and DORIS GREENBERG,  
individually and on behalf of the Estate of Leon  
Greenberg; and DONNA MCBRIDE, individually and  
derivatively on behalf of Beacon Associates LLC II,

Defendants.

**[PROPOSED] ORDER ENFORCING AUTOMATIC STAY AND ENJOINING  
THE THIRD PARTY PLAINTIFFS FROM ANY FURTHER  
PROSECUTION OF THE THIRD PARTY ACTIONS**

Upon consideration of the Application for Enforcement of the Automatic Stay, and Injunction (the "Application") in the above-captioned adversary proceeding of Irving H. Picard (the "Trustee"), Trustee for the substantively consolidated liquidation of the business of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, individually, pursuant to 11 U.S.C. §§ 362(a) and 105(a), 15 U.S.C. §§ 78eee(a)(3) and 78eee(b)(2)(B)(i) and Rule 7065 of the Federal Rules of Bankruptcy Procedure, enjoining the third party plaintiffs whose names appear in the above caption (the "Third Party Plaintiffs") who have commenced actions (the "Third Party Actions") against Ruth Madoff, Peter Madoff, Andrew Madoff, Mark Madoff and Shana Madoff (collectively, the "Madoff Defendants"), from proceeding with the Third Party Actions as against the Madoff Defendants, until such time as the Trustee has completed his actions against the Madoff Defendants; and upon the Memorandum of Law, the Affidavit of David J. Sheehan, Esq., sworn to on May 27, 2010, the Affidavit of Matthew Cohen, sworn to on May 26, 2010, the complaint by the Trustee against the Third Party Plaintiffs dated May 27, 2010 (the "Complaint"), the Order to Show Cause dated May \_\_, 2010, and all of the pleadings and prior proceedings in this and related actions; and a hearing on the Application having been held on \_\_\_\_\_, 2010 to consider the Application, and sufficient cause appearing, therefore:

IT IS on this \_\_\_\_ day of \_\_\_\_\_, 2010 HEREBY:

1. ORDERED that the Application is granted.
2. ORDERED that the Third Party Actions are void *ab initio* as violative of the automatic stay provisions of the Bankruptcy Code § 362(a), and SIPA § 78eee(b)(2)(B)(i).
3. ORDERED that, to the extent the Third Party Actions are not void *ab initio*, pursuant to §105(a) of the Bankruptcy Code, the Third Party Plaintiffs, their agents, servants, employees, attorneys, and all those acting in concert or participation with them, or acting on their behalf, all defendants, and all parties having notice of this Order, are hereby enjoined and restrained from any further prosecution of, or further action in connection with, the Third Party Actions, including any discovery of the Trustee, until such time as the Trustee has completed his actions against the Madoff Defendants and final, non-appealable orders have been entered in connection therewith.

Dated: New York, New York  
\_\_\_\_\_, 2010

---

HONORABLE BURTON R. LIFLAND  
UNITED STATES BANKRUPTCY JUDGE